

Judicial Deference to State Department Suggestions Recognition of Prerogative or Abdication to Usurper

Michael H. Cardozo

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Michael H. Cardozo, *Judicial Deference to State Department Suggestions Recognition of Prerogative or Abdication to Usurper*,
48 Cornell L. Rev. 461 (1963)
Available at: <http://scholarship.law.cornell.edu/clr/vol48/iss3/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

JUDICIAL DEFERENCE TO STATE DEPARTMENT SUGGESTIONS: RECOGNITION OF PREROGATIVE OR ABDICATION TO USURPER?

Michael H. Cardozo†

In no cases do the courts of this country defer to executive suggestions as often and as fully as in those having international ramifications. While occasionally accepted as a wise "accommodation by abdication,"¹ this deference periodically provokes charges that the courts are abdicating their responsibilities and that the Department of State is usurping the judiciary's role. These are serious charges in our domestic affairs, but internationally the consequences of a rejection of executive suggestions in such cases can be grave in a world where friendly relations often rest on very thin ice. The deference, the charges and the risks were the subject of the Third Summer Conference on International Law at Cornell in 1960. Among the learned conferees at that meeting was a member of the judiciary, experienced in law and in the conduct of international relations. "Certainly as a judge I have been educated,"² was his summation of the discussions, and he was speaking aptly for many others. This article is in large part a result of that educational experience.

It is tempting to believe that the same experience had some influence on the revision of the Restatement of the Foreign Relations Law of the United States; certainly the portion dealing with the Act of State Doctrine that appears in the "Proposed Official Draft" of May, 1962, bears only remote resemblance to the version that was defended and attacked at the 1960 Summer Conference.³ In any event, the Restatement's treatment of the subject of executive influence on court decisions, and the later commentaries, especially those based on the recent Cuban cases, show the continued uncertainty in the state of the law in this area. The range of situations in which the United States Department of State, usually through its Legal Adviser, addresses itself to domestic courts has been the subject of recent studies, and has been described with clarity and thoroughness in a recent article by a member of its own staff, Richard

† MICHAEL H. CARDOZO, Professor of Law, Cornell University, A.B. 1932, Dartmouth College; LL.B. 1935, Yale Law School. U.S. Department of Justice, 1940-42; Office of the Legal Adviser, Department of State, 1945-52; Visiting Professor of Law, Northwestern University, 1961-62.

¹ Franck, "The Courts, The State Department and National Policy: A Criterion for Judicial Abdication," 44 *Minn. L. Rev.* 1101, 1103 (1960).

² Charles Fahy, in *International Law in National Courts* 179 (Third Cornell Summer Conference on Int'l Law 1960).

³ Restatement, *Foreign Relations Law of the United States* (Tent. Draft No. 4, 1960).

Bilder.⁴ He delineates the problems, but, duly exercising the discretion that a government official, especially one in diplomatic activities, is so often advised to observe, he has insulated his own views with an ample coating of conditional verbs.

Untrammelled by official position I will propose in this article that the executive branch has a duty to make its voice heard in many international cases before the courts and that the judges usually must, without question, give heed to what is said. This doctrine applies to any case where it is important to the national interest that the United States government be heard to speak "with only one voice," and also where a particular rule of law depends for its vigor on action by the executive branch. Naturally such a doctrine must be sedulously circumscribed to maintain the proper relation between executive and judiciary in a government of separate powers. It will be the purpose of this article to propose methods of distinguishing between the circumstances where application of the doctrine is appropriate and where it has no place. I feel that it will be a service to the judicial function if devotion to that function can be reconciled with the extent of judicial deference that has always been and in my view, really must be shown to political determinations in cases arising in the field of foreign affairs.

The problem of judicial deference to the executive must be characterized as an issue of separation of powers, a sacred principle in the American system of government. Perhaps our treatment of the principle is unique, but every schoolboy learns that under the United States governmental system each of the three branches has an area of exclusive competence. One branch encroaches on another only at the risk of censure by partisans and patriots and restraint by the courts. Conversely, if one branch abdicates one of its functions, scholars and politicians will join in condemnation. To appreciate this, one need only read the editorial and scholarly comments on *Baker v. Carr*,⁵ where the Supreme Court held that the method of legislative apportionment may be, after all, a justiciable rather than a "political" matter. The Court was promptly charged with breaching the wall of separation between judiciary and politics. Both majority and minority opinions in that case contain sections discussing the point at which "foreign relations" aspects of a controversy become political questions beyond the reach of judicial concern. Thus we are warned that the scope of the principle of separa-

⁴ Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," 56 Am. J. Int'l L. 633, 667-78 (1962). See also Franck, *supra* note 1; Moore, "The Role of the State Department in Judicial Proceedings," 31 Fordham L. Rev. 277 (1962).

⁵ 369 U.S. 186 (1962).

tion of powers is authoritatively recognized as involved in the problem under review. On such ground only the temerarious⁶ would fail to tread most gingerly.

Some commentators have expressed concern lest the deference so often paid by courts to pronouncements by the executive branch cause injustice to private litigants who are not given a chance by the executive branch to be heard at the most crucial phase of their cases. Admittedly, unless the affected parties are given a hearing before an executive pronouncement is sent to the judge, they will never have a day in court on what may prove to be the key issue in the case.⁷ Some kind of a hearing consistent with the principles of due process is essential whenever the expression of executive views will affect the decision of a court. And this occurs in a very wide range of subjects related to international affairs. Most of them are listed, with relevant cases cited, in the Reporter's Note to section 155 of the Proposed Official Draft of the Restatement.⁸ They include recognition of nations and governments; sovereign and diplomatic immunity; acts of state, such as nationalization; the existence of a state of war or neutrality; the status and interpretation of treaties; the issuance of passports; immigration, nationality, and entry for business purposes.⁹ The courts' decisions in cases of these kinds show us that the judges almost always decide consistently with State Department "suggestions," interpretations, findings, certifications and so forth. Whether the courts treat these interventions as conclusive or only of "great weight," a litigant has a just complaint if they occur before he has had a chance to argue for the kind of intervention he thinks proper in his case. When he is arguing about the policy, the facts or the law, he deserves a day in court. As the State Department's responsibilities expand more and more into the daily affairs of the citizen, it must accept more of the duties of any agency involved in the administrative process. This duty was recognized early in the trade agreements program, when timely hearings on proposed tariff changes were instituted.¹⁰ Hearings on denials

⁶ The word is from *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 210, 227 (1960). On the separation of powers generally, see Nathanson, "The Supreme Court as a Unit of the National Government: Herein of Separation of Powers and Political Questions," 6 J. Pub. L. 331 (1957); Parker, "Judiciary and Executive Branch of Government," 9 *The Jurist* 205 (1949).

⁷ M. H. Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 *Harv. L. Rev.* 608 (1954); see text accompanying note 66 *infra*. Cf. Note, 50 *Calif. L. Rev.* 559 (1962).

⁸ Restatement, Foreign Relations Law of the United States § 155, at 561-62 (Proposed Official Draft 1962).

⁹ The practice is reviewed generally in Lyons, "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department," 24 *Brit. Yb. Int'l L.* 116 (1947); I Oppenheim, *International Law* 765-68 (8th ed. Lauterpacht 1955); Notes, 97 *U. Pa. L. Rev.* 79 (1948); 50 *Geo. L.J.* 284 (1961).

¹⁰ See Trade Agreements Act § 4, 48 Stat. 945 (1934), 19 U.S.C. § 1354 (1958).

of passports have more recently been provided.¹¹ To have to make provision for still more opportunities to be heard should not unduly burden the process of administering foreign relations. Indeed the officers of the Department should welcome an orderly procedure in place of the harassment of having to receive at irregular times the more knowledgeable lawyers who already know how vital it is to be heard when the policy decision is being formulated.

There are those who eloquently plead that the whole process of deciding on the immunity or not of a defendant is "essentially judicial," which the State Department cannot properly perform because it "does not have the facilities necessary to decide the often complex issues involved."¹² The Department, however, in its claims functions has, throughout its history, had to decide just such issues of ownership and classification as, for example, are involved in sovereign immunity cases. Before espousing a claim against another country, the Department must be satisfied as to the private claimant's citizenship, ownership, and injury.¹³ This has required the decision of issues of fact and law. If the assistant legal adviser in charge of suggestions and certifications to courts is worried about the procedures of hearing counsel for private parties presenting their arguments and the responsibility of deciding difficult questions, let him get some advice and instructions from the assistant legal adviser in charge of claims.

THE CASE OF THE BAHIA DE NIPE

To clarify the problem of executive intervention, let us consider the facts and issues of a recent case that arose out of the actions of the Castro government in Cuba, *Rich v. Naviera Vacuba, S.A.*¹⁴ On August 8, 1961, the S.S. Bahia de Nipe sailed from Cuba with a cargo of sugar destined for a port in the Soviet Union. This ship had been owned by a private Cuban firm, Naviera Vacuba, S.A., but had been seized by the Cuban government as part of its program of nationalization. About five years earlier, it had been the subject of news reports in this country when a group of Cubans in New York had tried in vain to obtain asylum for a prisoner in its brig who was being taken back to Cuba to be tried

¹¹ Dep't of State Reg. 108.475, 22 C.F.R. §§ 51.135-70 (Supp. 1963).

¹² Timberg, "Sovereign Immunity, State Trading, Socialism and Self-Deception," in *Essays on International Jurisdiction* 58 (Ohio State 1961). See also Jessup, *The Use of International Law* 83-84 (1959).

¹³ Bishop, *International Law: Cases and Materials* 738-43 (2d ed. 1962); I Whiteman, *Damages in International Law* 130 (1937); Christenson, "International Claims Procedure Before The Department of State," 13 *Syracuse L. Rev.* 527 (1962).

¹⁴ 295 F.2d 24 (4th Cir. 1961), 50 *Calif. L. Rev.* 559 (1962).

for revolutionary activities against the Batista regime.¹⁵ It is an interesting twist of history that on August 17th, 1961, while enroute to the Soviet Union, on the high seas, the master and ten of the crew turned the Bahia de Nipe toward the United States and advised the Coast Guard that they intended to enter the United States and seek asylum from Batista's successor. The remainder of the crew were being held in restraint. In due time the ship entered a harbor in Virginia under the escort of the United States Coast Guard. Almost immediately libels against the vessel and cargo were filed on behalf of three claimants: (1) two longshoremen who held unsatisfied judgments of United States courts against the Republic of Cuba and Naviera Vacuba, the former owner; (2) a judgment creditor holding a judgment for \$500,000 against the Republic of Cuba rendered in a Louisiana state court; and (3) the United Fruit Sugar Company, which before nationalization had been the owner of the sugar now aboard the Bahia de Nipe. There were other claims that need not be considered for the purposes of this discussion.

At the threshold of the proceedings there arose a controversy over the service on the ship of the court's processes by the United States marshal. The Coast Guard prevented the marshal from boarding and performing his duties, claiming authority under a statute giving the President power during emergencies to control the movement of foreign flag vessels. The district court¹⁶ and the court of appeals both held that this act did not authorize the Coast Guard, under the present circumstances, to prevent the marshal from serving his papers. In view of the further holding of the courts on the sovereign immunity issue, however, the question of service became irrelevant. It would have been interesting, nonetheless, to see how the courts would have dealt with a claim that a vessel taken into territorial waters as a result of an act of barratry should be treated as immune from service to the same extent as a vessel entering in distress.¹⁷

Acting through the medium of Swiss diplomatic channels, because of the absence of United States and Cuban diplomatic missions in Havana and Washington, respectively, the Cuban government on August 21, 1961, notified the United States Government that the Bahia de Nipe was the property of the government of Cuba, and requested that it be granted immunity from the jurisdiction of the courts in the United

¹⁵ N.Y. Times, Dec. 22, 1957, p. 8.

¹⁶ *Rich v. Naviera Vacuba, S. A.*, 197 F. Supp. 710 (E.D. Va. 1961).

¹⁷ See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 191 (1927); *United States in Behalf of Kate A. Hoff v. United Mexican States*, General Claims Comm'n Ops. 174 (1929) p. 509. Barratry was mentioned in the government's memorandum to the Supreme Court as supporting the suggestion of immunity made by the State Department in the *Rich* case, *supra* note 16.

States. This assertion and request were, in accordance with well known practice,¹⁸ duly forwarded by the Department of State on August 21st to the Attorney General, in a letter which also stated,

This is to inform you that the Department of State recognizes and allows the claim of the Government of Cuba for immunity of said vessel and its cargo from the jurisdiction of United States Courts. Accordingly, you are requested to instruct the appropriate United States Attorney to file with the United States District Court for the Eastern District of Virginia a suggestion of immunity in this case.¹⁹

The Secretary of State had, in the two previous days, sent letters to the Attorney General stating that "the release of this vessel [Bahia de Nipe] would avoid further disturbance to our international relations in the premises" and "that the prompt release of the vessel is necessary to secure the observance of the rights and obligations of the United States."²⁰ These were somewhat cryptic statements, differing as they do from the standard terminology of sovereign immunity correspondence. They provoked from the court of appeals the remark that they were "infelicitously expressed," but nonetheless "sufficiently set forth the requisites of a valid suggestion for the allowance of sovereign immunity"²¹ within the doctrine of *Ex Parte Republic of Peru*.²²

If the judges in the case had been reading the daily newspapers at the time of the arrival in the United States of the Bahia de Nipe, they would have recognized the circumstances that made "prompt release of the ship" so "necessary to secure the observance of the rights and obligations of the United States." We must probably aver that judges should be no more influenced directly by such circumstances than by the election returns. It is clear, however, that the Department of State was, and properly so, influenced by the fact that, two days before the Bahia de Nipe arrived in Virginia waters, the Cuban government had released an Eastern Air Lines Electra plane that had been hijacked and flown to Cuba in July. Simultaneously the United States had released from its custody a Cuban naval vessel taken to Florida by anti-Castro Cubans. In one of its diplomatic notes on the subject, the Cuban government had said that "if the Government of the United States guarantees the right of immunity and sovereignty of the boats and airplanes belonging to the Cuban people that are seized in our country and taken to United States territory, as proclaimed in the note submitted by the

¹⁸ Lyons, *supra* note 9; M. H. Cardozo, *supra* note 7.

¹⁹ Letter from the files of the Department of State.

²⁰ Rich v. Naviera Vacuba, S.A., *supra* note 16, at 714, 715.

²¹ Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 25 (4th Cir. 1961).

²² 318 U.S. 578 (1943).

Government of the United States to the Security Council . . . the Government of Cuba will accord reciprocal treatment to American boats and airplanes that are in a similar situation."²³ This, then, was part of the political background against which the suggestion of immunity was made in the United States district court in Norfolk, Virginia, on August 21, 1961.

Certainly the Department of State had political motives when it forwarded the suggestion. In the light of a history of such suggestions running from the case of the *Schooner Exchange*²⁴ through *Transandine*,²⁵ *Bernstein*,²⁶ *Peru*²⁷ and others right up to the present day, it is very late to say that the executive should not intervene in this way. The Legal Adviser of the State Department surely could not have been stating a contrary general policy when in October, 1961, he advised counsel in the celebrated *Sabbatino* case,²⁸ which involved a Cuban act of state, that since it and other similar cases "are at present before the courts, any comments on this question by the Department of State would be out of place."²⁹ Judge Waterman spoke truly when he characterized the Department's recent letters as "somewhat ambiguous."³⁰ In the light of the long accepted past practice, however, the only questions to be considered now are (1) whether the State Department does not have a duty to give guidance to the courts in unequivocal terms whenever an issue like sovereign immunity arises, and (2) the extent of the obligation of the courts to give effect to the executive's suggestions. In the *Bahia de Nipe* case the State Department obviously felt impelled to act quickly and decisively, and the courts felt that it was their "duty to give judicial support to that decision,"³¹ since the suggestion made "by the State Department in this matter affecting our foreign relations, withdraws it from the sphere of litigation."³² The ship was ordered released. If we wish to support this result, we must be prepared to accept a very far-

²³ 45 Dep't State Bull. 407-08 (1961).

²⁴ *The Schooner Exchange v. M'Faddon*, 24 U.S. (7 Cranch) 287 (1812).

²⁵ *Anderson v. N.V. Transandine Handelsmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942).

²⁶ *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954); see Comment, 40 Cornell L.Q. 547, 551 (1955).

²⁷ *Ex Parte Peru*, 318 U.S. 578 (1943).

²⁸ *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), aff'd, 307 F.2d 845 (2d Cir. 1962), cert. granted 31 U.S.L. Week 3255 (U.S. Feb. 18, 1963), 60 Mich. L. Rev. 231 (1961); 47 Cornell L.Q. 659 (1962); 62 Colum. L. Rev. 1278 (1962); Lillich, "Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino," 8 Vill. L. Rev. 155 (1963); Stevenson, "The Sabbatino Case—Three Steps Forward and Two Steps Back," 57 Am. J. Int'l L. 97 (1963). Cf. Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case," 41 Am. J. Int'l L. 555, 557 (1947).

²⁹ 307 F.2d 845, 858 (2d Cir. 1962).

³⁰ *Ibid.*

³¹ *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 726 (E.D. Va. 1961).

³² *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961).

reaching executive influence in many kinds of court proceedings having international ramifications.

Observe what occurred when the *Bahia de Nipe* and her cargo were declared to be immune from the jurisdiction of our courts. Before either ship or cargo could be accepted as owned by the Cuban government, the act of nationalization had to be recognized. This could be done only if, under the act of state doctrine, the failure to compensate adequately is not allowed to invalidate the seizure. The decision of the district court in the *Sabbatino* case,³³ despite its reliance on expressions of executive views, could not be followed. Further, the intention expressed in the Tate letter,³⁴ that the Department of State would thereafter refrain from suggesting immunity in cases involving transactions that are commercial in nature, would have to be overlooked or overruled, at least for the time being. It must be assumed that the State Department concluded as a matter of policy (a) not to relieve the courts from the restraints that are imposed, supposedly in the interest of comity, by the act of state doctrine and that would prevent the courts from questioning the validity of the act of the Cuban state in nationalizing the ship and the sugar,³⁵ and (b) to deviate from the doctrine of the Tate letter and make the suggestion of immunity. Our question, then, is whether the courts properly perform or abdicate their judicial function when they let their decisions be guided by such pronouncements of policy. Their duty, of course, is to apply the law to the facts.³⁶ Where does an executive suggestion fit into the syllogism that, in view of the facts as found and the law as it exists, the judgment necessarily follows? The answer differs slightly in each of the situations in which executive suggestions are made, but generally it may be stated that the nation's foreign policy qualifies the way the rule of law applies to the case. Let us examine how this proposition works in the various relevant situations, starting with those cases in which the concept of "comity" is said to be the motivating force.

THE INFLUENCE OF COMITY

"In the interest of international comity" in the relations among nations, a number of special practices have developed to such an extent that they are widely treated as customary rules of international law.

³³ Note 28 supra.

³⁴ The Tate Letter, 26 Dep't State Bull. 984 (1952).

³⁵ Compare *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947), with *Berstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), Comment, 40 Cornell L.Q. 547, 551 (1955).

³⁶ See Jaffe, "Judicial Review: Question of Law," 69 Harv. L. Rev. 239 (1955).

When a court is asked to apply one of these rules, it behooves the judge to bear this origin in mind. It will guide him in deciding how the rule applies to the case before him. Let us examine in some detail the major areas where comity is the wellspring of the rule of international law.

Sovereign Immunity

Sovereign immunity is perhaps the best example of a rule of international law derived from the demands of "comity" among supposedly friendly nations. As Justice Marshall made clear in *The Schooner Exchange v. McFaddon*, sovereign immunity is a derogation from "the perfect equality and absolute independence of sovereigns."³⁷ The host sovereign, in other words, agrees to waive his "full and absolute territorial jurisdiction" when another friendly sovereign, his delegate or his property, is in the host's territory. This waiver, a specific recognition of the guest sovereign's independence, results from a "common interest impelling them to mutual intercourse."³⁸

Certain assumptions reflected in these words must not be overlooked when a court is confronted with a case in which the defendant is alleged to be entitled to immunity as a sovereign. Not only does the rule assume that it is a "sovereign" or a sovereign's property that is to be released, but a "friendly" one.³⁹ It assumes that there is a "common interest" which will be served by the grant of immunity. In the absence of any of these elements, the rule of *The Exchange*, at least, does not apply.

Who is best able to determine whether these elements exist? Whether or not the claimant is a "sovereign" is similar to the question of recognition: is the defendant an independent member of the family of nations? This is one of those "political questions" on which courts always say they defer to the "political arm" of the government, because it is best able to decide them. Recognition is for the executive, and the courts, with the approval even of critics of deference to executive intervention, invariably accept the declaration of the Department of State on the status of a nation and the recognition of a regime.⁴⁰ In view of this practice it is a curiosity of history that the New York Court of Appeals saw fit in 1923 to declare the "Russian Socialist Federated Soviet Republic" immune to suit in the courts of New York by the former owner of a quantity of furs seized in Russia under a nationalization program.⁴¹ Of

³⁷ 24 U.S. (7 Cranch) 287 (1812).

³⁸ *Id.* at 294.

³⁹ International Law in National Courts 9-14 (Third Cornell Summer Conference on Int'l Law (1960)).

⁴⁰ See Jessup, "Has the Supreme Court Abdicated One of Its Functions"? 40 Am. J. Int'l L. 168, 169 (1946); *Jones v. United States*, 137 U.S. 202, 212 (1890).

⁴¹ *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (1923).

course there was a "State of Russia" in 1923 and it was currently allowed to institute suits in our courts.⁴² But as far as the United States Government was concerned the people who set up the RSFSR and seized all private property in Russia were "a band of robbers," not the government of the State of Russia. In the eyes of the State Department that government was the Kerensky regime, represented in the United States by Ambassador Bakhmetieff and his staff.⁴³ For the New York Court of Appeals to call the Bolshevik regime "an existing government, sovereign within its own territories,"⁴⁴ was as surprising as it would be for an American court in 1963 to refer in similar terms to the regime of Mao Tse Tung in Communist controlled Chinese territory. It would be understandable if the judges, as observers of history in the making, were simply unable to go along with the fiction that a long-exiled regime remains the government of a nation while another group has consolidated its active control. Ten years later, while the executive position had not changed, the same court said, in another case involving the acts of the Soviet Russian regime, "We all know that it is a government. The State Department knows it, the courts, the nations, the man on the street."⁴⁵ In these cases the court was speaking as though faced with a determination by an administrative agency unsupported by anything in the record.

What was overlooked in the *Wulfsolm* case, however, was the element of international comity. Was the suit being brought against a sovereign friendly to the United States with which there was "a common interest impelling them to mutual intercourse"? That would have been hard to find in a day when the red Bolsheviki were being denounced by the President himself as flouting "the cherished rights of humanity."⁴⁶ Would it contribute to friendly international relations to accord the entity called the RSFSR that immunity from "complete exclusive territorial jurisdiction . . . which has been stated to be the attribute of every nation"?⁴⁷ If asked this question, the Secretary of State would surely have pointed to the complete absence of any friendship between the nations and asked how a suit in our courts over title to expropriated American property—one of the very causes of the unfriendliness—could possibly make relations any worse. One would expect the same reaction to a request for immunity for an enemy government.⁴⁸

⁴² E.g., *Lehigh Valley R.R. v. Russia*, 21 F.2d 396 (2d Cir. 1927). Cf. *P. & E. Shipping Corp. v. Banco Para El Comercio Ext. De Cuba*, 307 F.2d 415 (1st Cir. 1962); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923).

⁴³ See *Lehigh Valley R.R. v. Russia*, note 42 supra, at 400.

⁴⁴ *Wulfsolm v. Russian Socialist Federated Soviet Republic*, note 41 supra, at 376.

⁴⁵ *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 226, 186 N.E. 679, 682 (1933).

⁴⁶ *I Hackworth, Digest of International Law* 302 (1940).

⁴⁷ *The Schooner Exchange v. M'Faddon*, 24 U.S. (7 Cranch) 287, 294 (1812).

⁴⁸ Compare *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000 (D.C.

Contrast this situation involving Russia in 1923 with the *Bahia de Nipe* situation in 1961. The Secretary of State in the latter case was deeply involved in the problems presented by the evolution of a communist government in our own good neighborhood. He was certain that if the vessel were held to be subject to the jurisdiction of our courts, relations with Cuba, bad as they were, would be seriously worsened. There were good reasons for this belief, which the judges could readily gather from the news of the day. In view of this certainty, the Secretary of State used all available means of modern communication to be sure that the courts knew his views. What grains of comity still remained in our tenuous relations with Cuba would be likely to run out, he said in effect. Using that circumlocution known as diplomatic language, his message told the court that release of the vessel "would avoid further disturbance to our international relations in the premises."⁴⁹

In the light of that kind of representation, especially when supported by such obvious justification in the public press, what function does a court perform in a sovereign immunity case? Surely all the judge may do is to dismiss the proceedings. If, like the judges in the *Bahia de Nipe* example, he says that he does so simply because "it is the duty of this court to give judicial support to that decision" of the President and his Secretary of State, he has properly applied the rule of law that provides for sovereign immunity when required in the interest of comity and denies the immunity when it would not serve that interest. This seems to be precisely what Chief Justice Stone was saying when, speaking for the Court in *Mexico v. Hoffman*, he stated that "it is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."⁵⁰ Despite the Restatement's doubt as to the intended breadth of this statement,⁵¹ it is not, as feared by Philip Jessup,⁵² "abdication" of the judicial function because it is not for the courts to evaluate the demands of comity in foreign relations. This is a

Cir. 1951), with *Telkes v. Hungarian Nat'l Museum*, 265 App. Div. 192, 38 N.Y.S.2d 419 (1st Dep't 1942). See also [1922] *Foreign Rel.*, vol. II, 709-14 (1938), discussing *Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924).

⁴⁹ *Rich v. Naviera Vacuba, S.A.*, note 31 *supra*, at 714.

⁵⁰ *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). See Lillich, "The Geneva Conference on the Law of the Sea and the Immunity of Foreign State-Owned Commercial Vessels," 28 *Geo. Wash. L. Rev.* 408, 412-15 (1960). Cf. Mann, "Judiciary and Executive in Foreign Affairs," 29 *Transact. Grot. Soc'y* 143 (1943).

⁵¹ Restatement, *Foreign Relations Law of the United States* § 75, at 250 (Proposed Official Draft, 1962).

⁵² Jessup, *supra* note 40. Cf. Jaffe, *Judicial Aspects of Foreign Relations* 233-36 (1933). Dickinson, "The Law of Nations as National Law: 'Political Questions,'" 104 *U. Pa. L. Rev.* 451 (1956); McDougal, "The Impact of International Law Upon National Law: A Policy-Oriented Perspective," 4 *S.D.L. Rev.* 25 (1959).

function that belongs to "the department of our government charged with the conduct of our foreign relations."⁵³ That department is not then deciding "the basic legal principle governing the immunity,"⁵⁴ but only the presence or absence of a factual situation that invokes the immunity. The Restatement says that a suggestion by the State Department on sovereign immunity "is conclusive as to issues of fact or law which relate to matters within the exclusive competence of the executive branch of the government. . . ."⁵⁵ The existence or absence of relations between governments depending on comity in a particular situation is such a matter, and consequently it is proper for the courts to accept the executive determination as binding.

On these assumptions the Tate letter of 1952 can be viewed in its proper perspective. It reflected the conclusion of the Department of State that the conditions of world trade in 1952 were such that the granting of immunity to suit in our courts for governments engaging in commerce-like activities was not necessary in the interest of good relations, *i.e.*, of comity. This was not a wholly novel view, of course, because it had been the view also of the Department when Hughes was Secretary of State and had been applied in many foreign countries.⁵⁶ After the unfortunate decision of the Supreme Court in 1926 in *Berizzi Bros. Co. v. Pesaro*,⁵⁷ however, where the court had granted immunity despite the State Department's adverse suggestion, the Department had felt obliged to suggest immunity regardless of the nature of the foreign sovereign's activity. This attitude came to an end after "a long, long process" of research had shown that the Americans and the British "were pretty much in a corner by ourselves" in adhering to it.⁵⁸ The "Tate letter" was sent to the Attorney General, advising him that thereafter the State Department would follow "the restrictive theory of sovereign immunity" in the consideration of requests by foreign governments for suggestions of immunity.

It is unfortunate that this letter was not couched clearly in language showing, as the Government's memorandum to the Supreme Court in the *Rich* proceedings emphasized,⁵⁹ that it was stating a conclusion in the

⁵³ *Mexico v. Hoffman*, 324 U.S. 30, 42 (1945) (concurring opinion). Cf. *National Bank v. Republic of China*, 348 U.S. 356, 366 (1955) (dissent).

⁵⁴ Jessup, *supra* note 40, at 169. Cf. *International Law in National Courts* 4 (Third Cornell Summer Conference on Int'l Law 1960).

⁵⁵ Restatement, *Foreign Relations Law of the United States* § 75, at 246 (Proposed Official Draft 1962).

⁵⁶ See, *The Pesaro*, 277 Fed. 473, 479-80 (S.D.N.Y. 1921); concurring opinion of Frankfurter, J., in *Mexico v. Hoffman*, 324 U.S. 30, 39 (1945).

⁵⁷ *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

⁵⁸ Comment by Jack B. Tate, *Proceedings* 70 (First Cornell Summer Conference on Int'l Law 1958); Comment by Raymond T. Yingling, *International Law in National Courts* 13 (Third Cornell Summer Conference on Int'l Law 1960).

⁵⁹ That letter does set forth the considerations which the Department will take into

field of foreign policy, namely, that immunity was considered necessary as matter of comity only in the restricted area of "sovereign or public acts (*jure imperii*)."

Then the letter need not have deferentially stated that "it is realized that a shift in policy by the executive cannot control the courts." The fact is that statements of policy in this area have had almost absolute control over the outcome of the cases, for never has a court failed to grant immunity in the face of a positive suggestion of immunity by the Department of State.⁶⁰ The Department should gladly accept its responsibility in these cases, because the aims of foreign policy can thereby be furthered. Although courts have sometimes acted without executive guidance and the Restatement recognizes that foreign governments may suggest immunity directly to the courts,⁶¹ the Department of State should expect that it will always be consulted by attorneys and judges, as well as by diplomats, when the issue appears in court, because the court cannot decide the case in a policy vacuum. It must hear from the foreign relations area whether or not comity requires immunity in this particular case. In the absence of positive word from that source, a court has no reason to refrain from deciding the case on the merits.⁶²

It will be said that the courts can by themselves decide whether or not a case involves governmental or private activities, and whether or not the property before them belongs to the foreign government at all.⁶³ Of course they can, but these issues decide the sovereign immunity question only when the State Department says so. This is clearly demon-

account in determining whether or not to recognize a claim of immunity by a foreign sovereign. But it is wholly and solely a guide to the State Department's own policy, not the declaration of a rule of law or even of an unalterable policy position; and, in addition, it sets forth only some of the governing considerations and does not purport to be all-inclusive or exclusive. . . . Although the consistency or inconsistency of the Department's position is not relevant to this judicial proceeding, it does bear emphasis that the circumstances surrounding the coming of this ship into United States waters were most extraordinary. . . . These were all elements to be considered by the State Department. Whether or not one agrees, as a matter of policy, with its ultimate determination, the legally relevant fact is that that recognition . . . puts an end to the matter.

Memorandum on behalf of the United States, filed with the U.S. Supreme Court in connection with application for a stay pending action on petition for writ of certiorari in *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961) quoted in Rabinowitz, "Immunity of State-Owned Ships and Barratry," 1962 J. Bus. L. 89, 91, and in *I International Legal Materials—Current Documents*, Am. Soc'y Int'l L. 288-89 (1962). Cf. Jessup, *The Use of International Law* 78-79 (1959).

⁶⁰ M. H. Cardozo, *supra* note 7; Comment by Raymond T. Yingling, *supra* note 58, at 4. Quare as to *Stephen v. Zivnostenska Banka*, 12 N.Y.2d 781, — N.E.2d —, 235 N.Y.S.2d 1 (1962).

⁶¹ Restatement, *Foreign Relations Law of the United States* §§ 74, 75 (Proposed Official Draft 1962).

⁶² Cf. Comment by Raymond T. Yingling, *supra* note 58, at 13; "Summer Survey: International Law in the New York Courts—1956," 42 *Cornell L.Q.* 521, 533 (1957).

⁶³ Cf. Drachsler, "Some Observations on the Current Status of the Tate Letter," 54 *Am. J. Int'l L.* 790 (1960), discussing *Weilmann v. Chase Manhattan Bank*, 21 *Misc. 2d* 1086, 192 N.Y.S.2d 469 (Sup. Ct. Westch. County 1959).

strated by the case of the *Bahia de Nipe*. Surely carrying sugar across the seas in commerce is the kind of activity that the Tate letter was intended to cover. But the State Department nonetheless suggested immunity, obviously because the *general* principle that comity does not require immunity in such cases had to give way to the particular fact that in *this* case it was required. The courts rightly accepted the Department's determination as impelling them to grant the immunity as a matter of law, because the rule says that a recognized foreign sovereign is immune to jurisdiction in our courts when the comity of nations calls for it.

The Department of State will have to decide, in many cases, whether the activity of the defendant government is "governmental" or "private," since, under the Tate letter, this will be the issue that determines the outcome of the application for immunity. Is this question to be decided by a court or by the Department? Here we must bear in mind the purpose of sovereign immunity, that is, to avoid forcing a friendly foreign sovereign to undergo the indignity of responding in the court of another sovereign. He is not supposed to have to argue his immunity in court. He need only appear in diplomatic channels and then, if the host government recognizes that his claim is proper, the latter advises the court of the needs of international comity. The friendly foreign sovereign cannot be expected to go before a judge in a court of first instance and argue that his activity is governmental, not private. This issue must be thrashed out in the diplomatic exchange and the court advised of the decision by the executive branch. The United States Government certainly seeks this treatment when sued abroad.⁶⁴ The State Department will have to develop a set of principles on which to rely in making its determination for cases arising in this country.⁶⁵ Even then it may sometimes decide that for reasons of policy the Tate letter must be wholly disregarded, as it presumably did in the *Bahia de Nipe* case. It cannot escape its responsibility by abdicating it to the courts. As already stated, of course, this responsibility includes a duty to hear both sides of the case; although that learned commentator, Edwin D. Dickinson, considered it fortunate that the State Department "has not attempted to hold hearings or conduct trials,"⁶⁶ this is the only way the plaintiff will have his day in court.

⁶⁴ Leonard, "The United States as a Litigant in Foreign Courts," Proceedings, Am. Soc'y Int'l L. 95 (1958).

⁶⁵ Cf. Bishop, "New United States Policy Limiting Sovereign Immunity," 47 Am. J. Int'l L. 93 (1953); Timberg, "Expropriation Measures and State Trading," Proceedings, Am. Soc'l Int'l L. 113 (1961).

⁶⁶ Dickinson, *supra* note 52, at 478. See also discussion at note 12 *supra*.

The problem of who decides questions of title to property involved in claims to immunity asserted by foreign governments is another very delicate matter of division of responsibility.⁶⁷ The State Department's "suggestions" have typically stated that it "accepts as true" the allegations as to ownership of property made by the ambassador of a foreign country that someone is trying to sue here. Although it may not have been the intentional policy of the Department to make such a statement when there was a dispute over ownership,⁶⁸ it has occasionally done so without a discussion of the issue.⁶⁹ Perhaps this has resulted from the absence of notice to the plaintiff prior to the issuance of the suggestion. The courts, however, have assumed that it is their function to decide the question of title, and perhaps it is. A State Department lawyer, influential in this field, has stated that "where the ownership of securities is in doubt, the State Department does not make a suggestion of immunity, because the very basis on which the suggestion would be made would be uncertain."⁷⁰

This position, however, does not solve the problem. In the first place, the result of refusing a suggestion in the face of a dispute of ownership is to force the foreign sovereign into a domestic court to protect its asserted right. This is the affront that is supposed to be avoided by the immunity doctrine. It is naturally to be hoped that foreign governments will often be willing to litigate this issue in our courts, recognizing that arguing the point before judicial officers is probably no more undignified than arguing before diplomats. But, they will sometimes be unwilling to do this, as would probably be the case if the United States were asked to do the same thing abroad.⁷¹ The question of title then must be determined by the State Department before it can decide whether or not to make a suggestion of immunity. If the State Department holds a hearing on this issue, with notice to all interested parties and other "basic procedural safeguards,"⁷² it could make a determination of ownership. Then, acting on this determination, it could make or refuse the suggestion to the court, as an exercise of its responsibility to advise the court of the

⁶⁷ International Law in National Courts 11, 12 (Third Cornell Summer Conference on Int'l Law 1960). Cf. *Ex Parte State of New York*, 256 U.S. 503 (1921); *U.S.S.R. v. National City Bank*, 41 F. Supp. 353 (S.D.N.Y. 1941); Note, 61 Mich. L. Rev. 396 (1962).

⁶⁸ Comment by Raymond T. Yingling, *supra* note 58, at 11.

⁶⁹ See *Frazier v. Hanover Bank*, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct. N.Y. County 1953), *aff'd*, 281 App. Div. 861, 119 N.Y.S.2d 918 (1st Dep't 1953); *Stephen v. Zivnostenska Banka*, 23 Misc. 2d 855, 199 N.Y.S.2d 797 (Sup. Ct. N.Y. County 1960).

⁷⁰ Comment by Raymond T. Yingling, *supra* note 58, at 11.

⁷¹ International Law in National Courts 19-24 (Third Cornell Summer Conference on Int'l Law 1960). Leonard, "The United States as a Litigant in Foreign Courts," Proceedings, Am. Soc'y Int'l L. 95 (1958).

⁷² Cf. Timberg, "Sovereign Immunity, State Trading, Socialism and Self-Deception," in *Essays on International Jurisdiction* 57 (Ohio State 1961).

demands of comity. The court would then have the necessary foundation on which to grant or deny the immunity. For the plaintiff to lose in this kind of situation would be no more of a hardship than to be relegated to diplomatic negotiations in any sovereign immunity case; one of the burdens of dealing with governments is subjection to special channels when pursuing claims against them.

Despite this view, however, it is also true that it would not be a particular hardship or indignity to a friendly foreign sovereign to be required to prove its ownership of particular property in one of our courts. For the Department of State to adhere to the view that this is the better policy would be no more startling or objectionable than deciding, as it did in the Tate letter, to require foreign governments to respond in our courts when they engage in commercial activities here. What is important, however, is that it make its position clear, which has not always been the case.⁷³ The court should be advised firmly whether or not immunity will be expected if the property is found to belong to the sovereign defendant.

Act of State

If we now return to the *Rich* case, involving the Bahia de Nipe and its cargo of sugar, we may be puzzled by the absence of any consideration in the opinions of the courts of the question of ownership of the vessel and the sugar. This was the whole issue in the *Sabbatino* case, where there was no problem of sovereign immunity. But if the ownership issue had been resolved in the *Rich* case as it was in *Sabbatino*, the cargo would have been found to belong to a private claimant and consequently not immune from attachment here. Evidently the former owner of the S.S. Bahia de Nipe did not appear to claim title, but perhaps the other plaintiffs could have raised the issue in order to defeat the claim of sovereign immunity. The owner of the sugar, however, did appear, and lost, presumably because of the act of state doctrine.

The issue of ownership here, of course, depends on the act of state doctrine,⁷⁴ not the usual principles of personal property law. That doc-

⁷³ Drachsler, *supra* note 63; Comment by Raymund T. Yingling, *supra* note 58, at 13.

⁷⁴ See Memorandum on Behalf of the United States, filed with the U.S. Supreme Court in connection with application for a stay pending action on petition for writ of certiorari in *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961), quoted in I International Legal Materials, *supra* note 59 and Rabinowitz, *supra* note 59.

There has been a spate of writing on the act of state doctrine in the past few years, much of it in response to a report of the international law committee of the Association of the Bar of the City of New York. 14 Record N.Y.C.B.A. 228 (1959). See Hyde, "The Act of State Doctrine and The Rule of Law," 53 Am. J. Int'l L. 635 (1959); Reeves, "Act of State Doctrine and The Rule of Law—A Reply," 54 Am. J. Int'l L. 141 (1960); Metzger, "The Act of State Doctrine and Foreign Relations," 23 U. Pitt. L. Rev. 881 (1962) and in Metzger, *International Law, Trade and Finance* 66-77 (1962); Zander, "The Act of State

trine, like sovereign immunity, has its basis in the demands of comity among friendly sovereigns.⁷⁵ This means that the views of the executive branch here, too, must be given special heed. The basis of the doctrine is the assumption that a nation would commit an unfriendly act—would “vex the peace of nations”⁷⁶—if its courts questioned the validity of the act of another nation with respect to property located in the latter’s territory, and possibly property belonging to the latter’s citizens, regardless of its location. The courts consider the rule as a restraint on the exercise of their jurisdiction, imposed in the interest of international relations. In our courts, it has been a natural development that, when the executive branch makes it clear that in a particular case this restraint is not necessary as a matter of comity, the courts are relieved of the restraint and free to look into the validity of the other government’s act.⁷⁷ Immediately this raises a familiar issue in the area of separation of powers: Are the courts going to agree that their jurisdiction to consider a matter may be determined by a statement emanating from the executive branch? What now is the “judicial function”?

The debate has continued heatedly.⁷⁸ Some have urged that the courts should consider themselves *prima facie* free, regardless of executive pronouncement or silence, to disregard any act of state that violates international law. The Restatement agrees that this is the rule when the act affects property outside the territory of the acting state, but it expresses no opinion on it for property located within such territory.⁷⁹ Others have argued that the courts must ignore expressions of executive policy if there is judicial precedent pointing to the proper result.⁸⁰ Surely there can be found a solution to the problem that will reconcile respect for the judicial function with the demands of international comity.

Doctrine,” 53 Am. J. Int’l L. 826 (1959); Comments, 11 De Paul L. Rev. 76 (1961); 58 Mich. L. Rev. 100 (1959).

⁷⁵ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918). See also Comment by Edward D. Re, *International Law in National Courts* 63 (Third Cornell Summer Conference on Int’l Law 1960) citing *Hatch v. Baez*, 7 Hun 596, 599 (2d Dep’t 1876), and *Underhill v. Hernandez*, 65 Fed. 577, 579 (2d Cir. 1895).

⁷⁶ *Underhill v. Hernandez*, 65 Fed. 577 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897). Cf. Comment by Hardy Dillard, *Institutional Law in National Courts* 102-03 (Third Cornell Summer Conference on Int’l Law 1960).

⁷⁷ *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954); see Comment, 40 Cornell L.Q. 547, 551 (1955).

⁷⁸ Reeves, *supra* note 74; Stevenson, “The Sabbatino Case—Three Steps Forward and Two Steps Back,” 57 Am. J. Int’l L. 97 (1963). See *International Law in National Courts* 79 (Third Cornell Summer Conference on Int’l Law 1960).

⁷⁹ Restatement, *Foreign Relations Law of the United States* §§ 43, 46 (Proposed Official Draft, 1962). Cf. *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930).

⁸⁰ Borchard, “Extraterritorial Confiscations,” 36 Am. J. Int’l L. 275 (1942). Jessup, *supra* note 40.

Let us lift a page from the practice in the sovereign immunity cases. First, if international comity does not demand judicial restraint—if the adjudication will not “vex the peace of nations”—then there is no possible reason for the exercise of restraint. The famous *Bernstein* case is a perfect example.⁸¹ When Mr. Bernstein was seeking to regain his ships by libelling them in New York waters, the government whose racist acts had deprived him of his property was gone with the winds that carried away the smoke from Hitler’s funeral pyre. A decision in 1947 by a court in New York that those confiscatory acts were invalid and unenforceable would merely confirm what had already been declared to be the policy and the law of the new government of Germany. No peaceful relations between the United States and the Federal Republic of Germany would by any stretch of imagination be vexed by such a decision. Consequently it was not surprising, but entirely proper, for the State Department to state publicly the executive policy that courts were relieved from the restraint of the act of state doctrine. As Judge Clark pointed out in his dissent, “the authentic voice of our Executive” had been heard during the “classic excoriation” of the Nazi leaders at Nuremberg.⁸² Without clear evidence of such policy, however, found either in general statements by the executive branch or in comments on particular acts, the courts should assume that the restraint applies when an act of a recognized, *i.e.*, friendly, foreign government is involved.⁸³ The act should then be given effect without an examination of its validity on any grounds—not international law; not foreign law; not domestic law; not public policy. This, like the sovereign immunity situation, is no abdication of judicial function, but the proper application of a rule of law that has its only justification in the exigencies of foreign relations.

It would be no departure from the United States precedents to accept this formulation of the rule when the property affected by the act of state was located in the territory of the acting country.⁸⁴ For property located elsewhere, the approach has really been the reverse: the courts have considered themselves generally free to question the validity of the act.⁸⁵ Once the executive has spoken unequivocally, however, and has

⁸¹ *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954); *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir. 1947), cert. denied, 322 U.S. 772 (1949). See Comment, 40 Cornell L.Q. 547, 551 (1955). See also Comment by Victor House, *International Law in National Courts* 76-78 (Third Cornell Summer Conference on Int'l Law 1960).

⁸² *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246, 255 (2d Cir. 1947). Comment by Edward D. Re, *supra* note 75, at 75; Comment by Hardy Dillard, *id.* at 101-02.

⁸³ See Metzger, *supra* note 74.

⁸⁴ *Salmoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); Cf. *A. M. Luther v. James Sagor & Co.*, [1921] 1 K.B. 456, [1921] 3 K.B. 532.

⁸⁵ *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758

declared that it is the policy of the government to give extraterritorial effect to such an extreme act, the Supreme Court has held, in the *Pink* case,⁸⁶ that the courts of the nation may not question its validity. In view of the general acceptance of the principle that the territorial boundaries of a nation also measure the extent of its legislative power as far as property is concerned, little vexing of the peace of nations is likely to result from this converse operation of the act of state doctrine as to property abroad. When the executive speaks, however, with respect to acts affecting such property, the spirit of the *Pink* and *Belmont*⁸⁷ cases should constrain the courts to give effect to the policy. If the judges should feel free to make their own determination of validity, as the members of the New York Court of Appeals seemed to do in the *Transandine* case,⁸⁸ some unwelcome vexing of peaceful relations may result. Fortunately, in that case New York policy was found to be consistent with federal policy, and the protective nationalization by the Netherlands government was given effect. If it had not, it "might involve very serious consequences," to quote Judge Lehman's opinion.

In the *Sabbatino* case Judge Dimock held that the "self-imposed restraint" on courts, having its origin in "our conflict of laws principles . . . clearly would not extend to an act of state which was in violation of international law."⁸⁹ The court of appeals upheld this view.⁹⁰ Even though Judge Dimock invoked public denunciations by the executive branch of the Cuban confiscations, his and the court of appeals' assumption that their independent findings of invalidity under international law warranted their refusal to enforce the Cuban actions was an unfortunate departure from the act of state rule as it must be applied if we are to avoid the risk that court decisions will "vex the peace of nations." Of course, we must recall the state of our relations with Cuba in the winter of 1961, when the executive branch was abetting a plot for the forceful overthrow of the Castro regime. In such an atmosphere, the State Department might well have then said to the court, as in the *Bernstein* case, "go ahead and decide the issue of validity. An adverse decision cannot hurt our relations with Cuba."

(1939), *aff'd per curiam*, 309 U.S. 624 (1939); *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934); *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930).

⁸⁶ *United States v. Pink*, 315 U.S. 203 (1942); see M. H. Cardozo, "The Authority in Internal Law of International Treaties: The Pink Case," 13 *Syracuse L. Rev.* 544 (1962).

⁸⁷ *United States v. Belmont*, 301 U.S. 324 (1937). Cf. *Gonzalez v. Industrial Bank*, 12 N.Y.2d 33, — N.E.2d —, 234 N.Y.S.2d 210 (1962).

⁸⁸ *Anderson v. N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942).

⁸⁹ 193 F. Supp. 375, 381 (S.D.N.Y. 1961).

⁹⁰ 307 F.2d 845 (2d Cir. 1962), cert. granted, 31 U.S.L. Week 3255 (U.S. Feb. 18, 1963). See Lillich, "A Pyrrhic Victory at Foley Square: The Second Circuit and *Sabbatino*," 8 *Vill. L. Rev.* 155 (1963).

A few months later, however, the picture had changed. The United States had recently been embarrassed by ill-conceived measures in the struggle over Castroism. In August the executive branch found it politic and presumably entirely proper to tell the court in which the *Bahia de Nipe* matter was pending that prompt release of the ship was "necessary to secure observance of the rights and obligations of the United States."⁹¹ We must conclude that the Department of State would have been most disturbed if the courts had proceeded to follow the *Sabbatino* precedent on the issue of title to that vessel and its cargo of sugar and had held that Cuba did not own the ship or the sugar because the nationalization was in violation of international law. Here there certainly would have been "embarrassment to the executive" if the act of state doctrine had not been applied in its full force, namely, that the validity of the acts of a recognized foreign government in its own territory will not be questioned *on any ground* unless the executive gives the word that releases the restraint.

In a decision delivered just three days before the hijacking of the Eastern Air Lines plane, the Court of Appeals for the District of Columbia had applied the doctrine in this way in the *Pons* case,⁹² where Pons' claim for damages was based on the alleged illegality of the Cuban nationalization of his property. That court, recognizing its obligation to be guided by the demands of comity, if there were any, had sought guidance from the State and Justice Departments, but no word had been received from either. The majority of the court, therefore, felt constrained to refuse review of the Cubans' act of state. In dissenting, Judge Burger thought that Cuba, coming in as plaintiff, had exposed itself to judicial review of its own acts.⁹³ Evidently the State Department, when it received the court's inquiry in April, amid the confusion of the intervention in the Bay of Pigs, could not get around to stating whether or not recognition by our courts of confiscatory acts by the Cubans was necessary to good relations between the two nations. In August it was clearly necessary. When October and November had rolled around, however, the climate had changed and the dust had settled. The United States was once more in a position to be firm with Castro. Consequently the Department of State was not concerned over the possibility that the court of appeals might affirm Judge Dimock's decision in *Sabbatino*. By its express refusal to comment, it said, in effect "Go ahead and make your decision. It cannot vex our relations with

⁹¹ 197 F. Supp. 710, 715 (E.D. Va. 1961).

⁹² *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961).

⁹³ Cf. *National City Bank v. Republic of China*, 348 U.S. 356 (1955).

Cuba however you may decide." When silence can be interpreted so clearly, perhaps there is no objection to refusing to speak up. But when silence is ambiguous, "courteous neutrality" can be an abdication of responsibility and can even lead to a result that is the opposite of what is really desired.⁹⁴ In a situation as delicate as our relations with Cuba in 1961, surely the Department of State should not leave the courts in the dark as to policy that so often shapes their decisions. Perhaps it may be excused because the very delicacy of those relations made it impossible for the various executive departments to formulate an agreed position to be communicated to the courts. Someone, however, evidently found authority to tell a Florida court during this period that it was free to go ahead and review the Cuban acts.⁹⁵

Once the executive branch has relieved the courts from restraint against reviewing the validity of a foreign act of state, then, of course, the courts have the authority and responsibility of making an independent study of its validity. Furthermore, their doing so furnishes no ground for complaint by the acting government, since, as the Restatement emphasizes,⁹⁶ judicial restraint is never a requirement of international law, but only of comity. Without the exigencies of comity, review becomes a judicial function. Freedom to review can develop from an express executive pronouncement for a particular case, a general statement for all cases emanating out of a particular government's course of action, or a fair implication from public declarations and positions of the executive branch. Perhaps it would further the rule of law in the international scene if the President should declare to the world that our courts are hereafter free to review the validity under international law of the acts of any nation.⁹⁷ The door would have to be left open, however, for reimposition of restraint when a case like the *Bahia de Nipe* comes up in a heated political atmosphere. When the relief from restraint is clear, however, the courts are free to review the act's validity under the law of the acting nation or under international law. How they determine validity under the law of the other country is a very intriguing question, beyond the scope of this article.⁹⁸ It is also beyond the scope of this

⁹⁴ Compare *Lamont v. Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81 (1939), with *Miller v. Ferrocarril del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688 (1941).

⁹⁵ *Kane v. National Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Cir. Ct. Dade County 1961). See Bayitch, "International Law," 16 U. Miami L. Rev. 240, 271-72 (1961); Note, N.Y.L.F. 148, 154 (1962).

⁹⁶ Restatement, Foreign Relations Law of the United States § 41, comment (g) (Proposed Official Draft 1962).

⁹⁷ Resolution of the Bar Association of the City of N.Y., Record N.Y.C.B.A. Vol. 14, No. 6, p. 228 (June, 1959); Hyde, *supra* note 74. Cf. Reeves, *supra* note 74; Metzger, *supra* note 74.

⁹⁸ Cf. Comments by Martin Domke and Karl H. Neumayer, *International Law in National Courts* 87-88, 99-100, 101 (Third Cornell Summer Conference on Int'l Law 1960).

article to suggest how the court is to determine whether the act is valid under international law,⁹⁹ except in one respect: how much weight should the courts give to statements on this point by the Department of State and its representatives? The answer must be, no more weight than is given to the statements and writings of any experts in a field of law involved in cases before a court. The political officers and the lawyers in the Department of State do not declare the law, though they may appear before the courts to argue it as specialists in the legal aspects of international affairs.¹⁰⁰ Then they are only speaking as attorneys, not as makers of policy, as they do when declaring the governmental position as to the demands of comity.

Public policy in this area is as unruly as it is anywhere. It goes without saying (but the Restatement correctly does say)¹⁰¹ that public policy cannot be the ground for refusal to give effect to an act of state when the restraints of the act of state doctrine apply. That doctrine then bears to the international case the same relation as the full faith and credit clause of the Constitution bears to an interstate case: public policy of the forum may not excuse enforcement.¹⁰² When the restraint of the doctrine has been lifted, however, by means of a statement by the executive branch, the court is free to deny effect to a foreign government's act on public policy grounds. The influence of foreign policy and the demands of comity then do not require the judge to avoid any ground he may select in reviewing the act. If he thinks he has the "unruly horse"¹⁰³ under control, and that recourse to public policy is not a facile "substitute for analysis" of a choice of law problem,¹⁰⁴ he may ride it as well as any other mount to reach his conclusion as to the validity of the act in question.

⁹⁹ Comment by Myres S. McDougal, Proceedings 68-80 (Second Cornell Summer Conference on Int'l Law 1958). Falk, "Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino," 16 Rutgers L. Rev. 1, 19-23 (1961); Baade, "Indonesian Nationalization Measures Before Foreign Courts—A Reply," 54 Am. J. Int'l L. 801 (1960); Baade, "The Validity of Foreign Confiscations: An Addendum," 56 Am. J. Int'l L. 504 (1962); Domke, "Foreign Nationalizations," 55 Am. J. Int'l L. 585 (1961); Seidl-Hohenveldern, "Title to Confiscated Foreign Property and Public International Law," 56 Am. J. Int'l L. 507 (1962).

¹⁰⁰ Cf. *International Bank v. All America Cables*, FCC Docket No. 9362, decided March 23, 1953, 8 Pike & Fischer, *Radio Regulation* 927 (1953); Falk, *supra* note 99; Moore, "The Role of the State Department in Judicial Proceedings," 31 Fordham L. Rev. 277, 301 (1962).

¹⁰¹ Restatement, *Foreign Relations Law of the United States* § 43 (Proposed Official Draft 1962).

¹⁰² *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

¹⁰³ Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 Yale L.J. 1087 (1956). Cf. *Waterman, J.*, in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962).

¹⁰⁴ Paulsen & Sovern, "'Public Policy' in the Conflict of Laws," 56 Colum. L. Rev. 969, 1016 (1956).

Diplomatic Immunity

One of the vital strands that support the comity of nations is diplomatic immunity, a sort of subsidiary of sovereign immunity. As in the latter cases courts have often accepted an obligation to grant or deny immunity to individual diplomats in accordance with certificates from the State Department. There has been no quarrel with their following State Department certification that a person is actually a diplomatic representative of another recognized government.¹⁰⁵ Only the President or his Secretary of State can decide whether an envoy of any rank will be or has been received by our Government to represent another country. Consequently, evidence of that executive reception is the only indication on which a court can rely when confronted with a claim of diplomatic immunity. The appearance of a name in a diplomatic list issued by the executive branch, is, of course, good evidence that the person named is a diplomat. Only a certificate from the State Department, however, can provide assurance that the list is accurate as of the crucial date.

No special problem in diplomatic immunity arises when a person is duly listed as an accredited representative of a recognized regime. When the listing has been certified, it is, in the words of the Restatement, "conclusive in the courts,"¹⁰⁶ and they accord the immunity.¹⁰⁷ When the defendant, however, is not so listed, but claims the immunity, how does the court decide the question? It should go without saying that such a person, and probably even a listed person, should never be declared immune without some indication from the State Department that it would be appropriate. Since immunity is a means of achieving comity and creating an atmosphere in which diplomatic relations can be made reciprocally effective, the court must know whether the demands of comity and diplomacy call for immunity in the case before it. If the Department says, "No, it is not necessary for foreign relations reasons," then what ground can support it? Failure to grant the immunity will not, in the opinion of that agency exclusively qualified to know, vex the peace of the United States with its friends.

The more difficult problem is the case of the unlisted person for whom the State Department feels that immunity is important to prevent, for foreign policy reasons, friction in our foreign relations. Whom should

¹⁰⁵ Jessup, "Has the Supreme Court Abdicated One of Its Functions"? 40 Am. J. Int'l L. 168 (1946).

¹⁰⁶ Restatement, Foreign Relations Law of the United States § 78 (Proposed Official Draft 1962).

¹⁰⁷ *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949); *Friedberg v. Santa Cruz*, 193 Misc. 599, 84 N.Y.S.2d 148 (Sup. Ct. Nassau County 1948); *DeMiglio v. Paez*, 18 Misc. 2d 914, 189 N.Y.S.2d 593 (2d Dep't 1959); *Tsiang v. Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556 (Sup. Ct. N.Y. County 1949).

the Department certify, and is it free to certify anyone it feels like? What amount of deference should the courts give to the certificate when it is issued?

Answering these questions in inverse order, the rule of law to be applied by the courts might well be similar to the rule in sovereign immunity cases: a person is entitled to diplomatic immunity when the foreign relations branch of the government certifies him as eligible for it. By drawing on the field of administrative law for guidance, it could be added that a rule of reason modifies this principle, so that the executive branch must be able to show some factual ground for its certification before it will be considered binding. This would mean that, for example, anyone bearing a foreign diplomatic passport, or employed by and representing a foreign government, or accredited to or employed by an international organization, could properly be certified if the State Department determined it to be necessary.¹⁰⁸ Given some such attribute of diplomatic status, the courts, under the view advocated here, should hold that the person so certified is to be granted the traditional immunities of the diplomat.¹⁰⁹

No effort will be made here to list the categories of persons to whom the State Department should accord the privilege. There are, however, some interesting examples that demonstrate the importance of latitude in making the decisions and of deference by the courts to those decisions. In 1960 Igor Melekh had been arrested in the United States and charged with violation of espionage laws. The Soviet government insisted that Melekh was entitled to diplomatic immunity by virtue of his position in the Soviet foreign service and his employment in the Russian language section of the United Nations. The State Department certified to the federal district court in New York City that its records showed no evidence that Melekh held a position that entitled him to diplomatic immunity from prosecution. The issue was duly argued in court and then Judge Herlands prepared a long, carefully reasoned analysis of the opposing positions, concluding that there was no immunity.¹¹⁰ If the approach advocated here had been followed, of course, the judge would have been spared all his research into the history and statutes relating to diplomatic immunity. He could have said that, since the executive branch was taking the position that the prosecution would not embarrassingly impair comity in diplomatic relations between the United States and the Soviet Union, the basis for immunity did not exist.

¹⁰⁸ *In re Baiz*, 135 U.S. 403 (1890).

¹⁰⁹ Barnes, "Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice," 43 Dep't State Bull. 173 (1960).

¹¹⁰ *United States v. Melekh*, 190 F. Supp. 67 (S.D.N.Y. 1960).

The trouble with the way the case was handled, however, stemmed from the fact that the threat of prosecution definitely did threaten to embarrass relations between the two countries in a very vital respect. Melekh had been arrested in October 1960. During his detention here, the Russians were holding in the Soviet Union two American flyers from an RB-47 plane shot down in or near Soviet territory. They were also holding in prison Francis Gary Powers, the pilot of the ill-fated U-2 plane that had crashed in the Soviet Union the year before.¹¹¹ Early in 1961 the new administration in Washington was very anxious to obtain the release of these Americans, and, of course to avoid any new arrests in Red territory on espionage and similar charges. It was clear that one way to make such arrests more likely and the desired releases more remote was to hold a Russian here in the face of claims of diplomatic immunity that, while perhaps not strictly warranted, had some color of justification.

On March 25, 1961, the day set for Melekh's arraignment in a federal district court in Chicago, the United States attorney appeared before the judge and requested dismissal of the charges, so that Melekh could leave the country.¹¹² It was explained that this was being done because the Departments of State and Justice had concluded that the departure of Melekh from the United States without trial "would best serve the national and foreign policy interests of the United States." The judge "reluctantly" followed the recommendation, "observing that he had little choice but to approve such a request." There was no mention of diplomatic immunity in this phase of the proceedings, and we must assume that the State Department would have been loath to give any hint that persons in Melekh's position could expect to be considered as clothed in immunity thereafter. But the effect in the particular case was the same: he was treated as immune, and freed. He had to leave the country, however, because he had become *persona non grata*.

Once more the foreign policy branch, acting pursuant to its duty to tell the courts what were the demands of the comity of nations, had called for immunity, and, as always, the court responded favorably, if unhappily. This case seems to make the rule particularly clear, because the defendant was outside the category of listed diplomats. Still, the court recognized that, once the demands of policy were made clear by the proper authorities, its duty to grant the immunity was fixed.

Of course, when a learned court undertakes to consider the issue of

¹¹¹ See Lissitzyn, "Some Legal Implications of the U-2 and RB-47 Incidents," 56 Am. J. Int'l L. 135 (1962).

¹¹² N.Y. Times, March 25, 1961, p. 6.

immunity *in vacuo*, without relying on the views of the State Department, a most valuable and interesting essay on the law and practice may be the result. Such a case is *Bergman v. De Sieyes*,¹¹³ where the French minister to Bolivia was served in New York with a summons in a civil suit brought in that state while he was en route to his post in South America. His attorneys pleaded diplomatic immunity in a motion to dismiss addressed to the court. The motion was granted, and this decision was upheld on appeal. Both Judge Caffey in the district court¹¹⁴ and Judge Learned Hand in the court of appeals reviewed the historical practice and various proposed conventions on the subject and concluded that, applying international law, "the courts of New York would today hold that a diplomat in transitu would be entitled to the same immunity as a diplomat in situ."¹¹⁵

The difficulty with this approach is its failure to distinguish between the decisions of nations to accord certain immunities for policy reasons and the rule of law involved, whether a rule of New York law, federal law, or international law. As in all court proceedings involving foreign governments where action stems from the desire to foster comity and avoid vexing the peace of nations, the rule of law is activated only when the political ground has been laid. Once the political arm declares that, for example, diplomatic immunity is needed for reasons of policy, the plaintiff encounters the legal principle that he cannot obtain redress in the municipal courts. In addition to pure political considerations, history, as reflected in the practice of nations and the writings of scholars, may, of course, guide the foreign offices in deciding when they should suggest immunity. Be there present some reason in history or current policy for the immunity, and the suggestion having been made, then the courts have no cause to delve further.

SPEAKING WITH ONE VOICE

In his concurring opinion in the *Pink* case, Justice Frankfurter restated an old adage: "In our dealings with the outside world, the United States speaks with one voice."¹¹⁶ In several categories of cases, involving "executive decisions as to foreign policy" this principle leads courts to declare the matters to be "political, not judicial."¹¹⁷ The executive decisions are then allowed to determine the outcome of court proceedings.

¹¹³ 170 F.2d 360 (2d Cir. 1948).

¹¹⁴ 71 F. Supp. 334 (S.D.N.Y. 1946).

¹¹⁵ 170 F.2d 360, 363.

¹¹⁶ *United States v. Pink*, 315 U.S. 203, 242 (1942). See also Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 Am. J. Int'l L. 231, 244 (1934).

¹¹⁷ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

When the executive branch has spoken, for example, on the question of recognition of foreign governments or the existence and meaning of treaties, that is the voice of the United States. If the courts do not follow its lead, our country will be heard abroad in confused tones. The problem, then, is once more to reconcile obeisance to the judicial function with the need for harmony when our words are to be heard around the world.

Recognition

Every judge and every commentator avers that no judge is free to deny the legitimacy of a regime the executive branch has recognized.¹¹⁸ Congress has supported this opinion by the passage of section 25(b) of the Federal Reserve Act, giving conclusive effect to the Secretary of State's certification to banks as to who represents a foreign government,¹¹⁹ legislation which, as the Restatement points out, was "strictly speaking . . . not necessary"¹²⁰ because the law already required courts to respect executive pronouncements on recognition. This, by very nearly unanimous agreement, is a political question. Judge Goodman, a United States district judge of considerable experience in international legal issues, once rocked the boat of this unanimity by boldly refusing to order release of bank accounts of the Bank of China. Despite recognition of the status of the "emigre directors" by the executive branch, the judge believed that leaving the funds intact was "the only solution which gives promise of affording protection to the Bank of China, its stockholders and depositors, and at the same time supporting the foreign policy of the United States."¹²¹ This was in 1950, and he stated that "only time will tell whether this (communist) government will become a stable government." Two years later he concluded that time had "clarified" the picture. "Our national policy toward these governments is now definite"; we recognize only the Nationalist government, so its representatives may have the funds.¹²²

If the courts had ordered the banks to turn the Chinese government's deposits over to representatives of the "unrecognized" communist regime, what a shambles would have been made of our immutable policy of supporting Chiang Kai-shek! It was in recognition of the inconsistency

¹¹⁸ E.g., Borchard, "The Unrecognized Government in American Courts," 26 Am. J. Int'l L. 261 (1932). See also *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955).

¹¹⁹ 55 Stat. 131 (1941), 12 U.S.C. § 632 (1958).

¹²⁰ Restatement, Foreign Relations Law of the United States § 114, at 406-07 (Proposed Official Draft 1962).

¹²¹ *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950), 104 F. Supp. 59 (N.D. Cal. 1952), *aff'd*, 209 F.2d 467 (9th Cir. 1953).

¹²² 104 F. Supp. at 59.

of having unrecognized regimes drawing out funds from banks in the United States that Congress enacted section 25(b) of the Federal Reserve Act, mentioned above. This is legislative sanction for the dominance of the executive branch in designating the accepted government and determining for banking purposes who is received as its representatives. The courts would find their paths to decision simplified if they consistently followed the same principle in other fields.

There is a difference between denying the status of a regime as the government of a nation whose existence is acknowledged by the United States, and denying that the nation is in the family of nations. Even when no regime is accepted, the "state" may exist,¹²³ and may even be allowed access to our courts. This was done during an interregnum resulting from a Mexican revolution in 1923.¹²⁴ The court acted on an approving signal from the State Department. In the same year, on the other hand, in New York the "Russian Socialist Federated Soviet Republic" was once denied access to a court because not "recognized,"¹²⁵ and once accorded sovereign immunity because, said the court, it "is the existing *de facto* government of Russia."¹²⁶ Also in the same year the "State of Russia," represented by Ambassador Bakhmetieff, the "recognized" envoy, was allowed to pursue an action for damages resulting from the Black Tom explosion.¹²⁷ Perhaps no political harm resulted from these inconsistencies, but they certainly leave the law in a bewildering state. More sedulous application of the acknowledged rule that the status of a nation and a regime is a political question, in which the courts follow executive pronouncements, should produce a more symmetrical pattern.

Territory

The determination of sovereignty over territory is a function closely related to the act of recognition of nations and regimes. When the outcome of a court proceeding is of material interest to a foreign government, and the issue depends on who has sovereignty over territory, the court must look to the executive branch for an authoritative pronouncement on the political issue. Suppose, for example, that a treaty between the United States and France provided for reciprocal inheritance rights for persons

¹²³ Cf. Restatement, Foreign Relations Law of the United States § 102, at 361-62 (Proposed Official Draft 1962).

¹²⁴ *Mexico v. Fernandez*, [1923] Foreign Relations vol. II, 511.

¹²⁵ *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923).

¹²⁶ *Wulfsolin v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 374, 138 N.E. 24, 25 (1923), discussed in text accompanying note 41 *supra*.

¹²⁷ *Lehigh Valley R.R. v. Russia*, 21 F.2d 396 (2d Cir. 1927).

residing in the two countries. A claimant appears in the United States, basing his claim on residence in Morocco in 1945. The issue before the local probate court is whether a resident of Morocco is a resident of France. Who is to decide this?

If the expression "French residents" in the treaty was intended by the two governments to embrace residents of Morocco, then a failure to allow the claimant to receive the estate would cause a breach of the treaty provisions. The French Government would have a justifiable complaint, and the Department of State, if it agreed with that interpretation, would have to admit the failure to keep our word. Consequently, if the United States is to speak with one voice on what constitutes "France" for this purpose, the court must accept the word of the State Department as governing. This is precisely what the Court of Claims did in the *Etlimar* case, stating that, in view of "the official interpretation by the French Government and the United States Department of State . . . we must reject plaintiff's contention . . . and we conclude, therefore, that the plaintiff was a French resident within the terms of the Agreement."¹²⁸

Comparable situations can be envisaged where the decision of a municipal court on the boundaries of the territory of a nation can have an effect on international relations. The national origin of imported goods can affect the rate of customs duty. The identity of the government rightfully exercising sovereignty over an individual's place of birth can resolve the question of his right to file a claim before a national claims commission. In all such cases the word of the State Department on the territorial issue should be sought and its voice should be heeded.

Occasionally a territorial question arises in a domestic court in a manner that does not affect international relations. In such circumstances the view of the executive department on the political situation may be given respect, but there is no need to treat it as controlling the court's decision. Indeed, in such cases the executive should hesitate to speak at all, but if it does make a statement, it must be very careful to avoid giving the impression that it would consider the court's opinion binding in international relations. It was failure to recognize the difference in the cases that made executive intervention in the *Vermilya-Brown*¹²⁹ case such a fiasco.

The issue there was whether the United States Fair Labor Standards Act¹³⁰ covered employment on a military base on Bermuda leased by the British to the United States under an executive agreement signed in

¹²⁸ *Etlimar S.A. v. United States*, 106 F. Supp. 191 (Ct. Cl. 1952).

¹²⁹ *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948).

¹³⁰ 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1958).

1941. The act stated that it covered employment of persons engaged in commerce between the states, including "any territory or possession of the United States."¹³¹ The agreement gave the United States all necessary "rights, power and authority," but nowhere stated that the base became "territory of the United States." When the British heard that a lower court had agreed with the theory of the American plaintiffs that the act covered employment on the base, a note was sent to the State Department expressing concern lest the United States Government accept the argument that, as between the two governments, the base had become United States territory. The State Department agreed with the British view, and told them so. If only it had stopped there, merely letting the Court see the exchange of notes for guidance, all would have been well. But the Department went further, and told the Court that the conclusion of the court below that the act covered the Bermuda base was "unfortunate," and that any affirmance of the holding that the bases "are 'possessions' of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government."¹³²

The State Department could have prevented damage to our relations with the British by firmly pointing out that no decision in this suit by American workmen for additional pay from a contractor doing government work could possibly affect the status of the bases as between the two governments. The issue concerned the interpretation of a statute of the United States. The Court was merely asked to hold that Congress had intended the statute to cover employment for United States Government work in such places as the Bermuda bases. Perhaps the British could object to the payment of such high wages in their territory, but the remedy for that problem was not to be found in worrying about the words used to define the scope of the act. The Supreme Court made all this clear in its opinion, sustaining the plaintiffs' claim that the act covered their employment. The Court emphasized that "it is a matter of statutory interpretation,"¹³³ having no effect on the agreed postulate that "the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense."¹³⁴ Unlike the court decisions that were influential in the case of the islands of Minquiers and Ecrehos,¹³⁵ no one could possibly say later that this decision

¹³¹ 52 Stat 1060 (1938), 29 U.S.C. 203(c) (1958).

¹³² 335 U.S. at 401, n.12.

¹³³ 335 U.S. at 389-90. Cf. *McCulloch v. Sociedad Naciones de Marineros de Honduras*, 83 S. Ct. 671 (1963).

¹³⁴ 335 U.S. at 380-81.

¹³⁵ *Minquiers and Ecrehos Case (France and United Kingdom)*, [1953] I.J.C. Rep. 47.

supported a claim of United States sovereignty. By not recognizing the real nature of the issue before the Court and explaining it to the British, the State Department weakened its claim to deference in cases in which foreign relations' interests are really at stake.

State of War

Most of the cases in domestic courts involving the question whether a state of war exists have concerned matters unlikely to have any significant effect on international relations. There is often a clause in insurance policies, for example, excepting claims during a war. Whether or not this clause applies to a particular instance is not a question on which the nation must speak with one voice. No other government is likely to be concerned either way. Consequently there is no cause for a court to give more than respectful heed to executive pronouncements as to the existence of a state of war. The same is true if the court is interpreting an act of Congress, such as one depriving a court martial of jurisdiction over prosecution for certain crimes committed "in time of peace."¹³⁶ If the defendant has no standing to claim the protection of another nation, the issue is wholly domestic. The court, of course, may conclude that the question is really political, and defer to executive views as to the state of peace or war.¹³⁷ The deference here, however, has its justification in judicial absence in political issues generally, not in the needs of the nation's foreign relations.

Nationality

Sometimes the answer to a question of nationality falls within the special competence of the Department of State. The amount of deference due to the views of that Department on such a question should depend, as in other areas, on whether its words will be heard and have significance abroad as well as within this country.

In 1943 the Second Circuit Court of Appeals had to decide whether or not Paul Schwartzkopf should be interned as an enemy alien in the interest of public safety as determined by the Attorney General. Schwartzkopf claimed that he was a citizen of Austria, never an enemy country. The court perceived the issue as turning on the question whether Germany could force its citizenship on an absent person when it annexed Austria in 1938, after Schwartzkopf had arrived in the United States. In the record before the court there was a letter from the Secretary of State expressing the view that "Mr. Schwartzkopf should be regarded as a

¹³⁶ See *Lee v. Madigan*, 358 U.S. 228 (1959).

¹³⁷ See *Rex v. Bottrill*, ex parte Kuechenmeister, [1946] All E. R. 635 (KB).

German citizen or subject."¹³⁸ The court refused to accept this view.¹³⁹

It must be borne in mind that the only issue here was whether or not the United States Government, acting under its own due process of law—its duly enacted statutes¹⁴⁰ and its constitution—could intern this man for the duration of the war. Who, in other words, may be so interned? Since even American citizens are subject to extreme restraint in wartime the real issue is, what class of persons did Congress intend to embrace in the words "natives, citizens, denizens or subjects of the hostile nation or government"? There is no question of "speaking with one voice" on matters of foreign relations in defining the scope of those words. To decide whether or not citizens of Austria were "subjects" of Germany in 1938 for purposes of our wartime security legislation could no more be interpreted by beleaguered Austrians as repudiation or recognition of *Anschluss* than could the application of the Fair Labor Standards Act to the Bermuda base be interpreted as a claim of sovereignty by the United States. Consequently the court should deem itself free to give no more than polite attention to the State Department's opinion as to nationality and proceed to exercise its judicial function of deciding the case as a matter of law. This is more like the "state of war" cases, discussed above, than the situation arising in the *Etilmar* case, discussed under the heading of "Territory." Disagreement by the court with the State Department's conclusion here did not subject the Department to the embarrassment of having to confess to any violation of our word. The court was speaking only to our own people; its voice would not be heard abroad and there was no need for harmony with the voice of the executive.

This same conclusion is applicable to cases of contested nationality of passport applicants. No matter how much special competence the State Department may have on the underlying issues of territorial sovereignty and acts of foreign governments, a person's eligibility for a United States passport on nationality grounds is a matter of United States law whose interpretation is clearly within judicial jurisdiction and competence.¹⁴¹

What has been said heretofore leads to the conclusion that there will be situations where judgments on issues of nationality rendered by a body like the Foreign Claims Settlement Commission of the United States may seriously affect foreign relations. The Commission will then find it the part of wisdom to obtain views from the State Department in

¹³⁸ United States ex rel. Schwartzkopf v. Uhl, 137 F.2d 898, 900 (2d Cir. 1943).

¹³⁹ Ibid.

¹⁴⁰ 40 Stat. 531 (1918), 50 U.S.C. § 21 (1958).

¹⁴¹ International Law in National Courts 15-16, 58 (Third Cornell Summer Conference on Int'l Law 1960).

order to avoid a clash of United States voices heard abroad. The work of the Commission involves the adjudication of claims of Americans against various foreign governments with which lump sum settlement agreements have been executed. Although there is no appeal from its decisions,¹⁴² it is "a judicial tribunal which performs essentially, if not solely, judicial functions."¹⁴³ This distinguishes it from ordinary executive agencies, all of which are subject to presidential directive. There never is any excuse for disharmony in the voices of two such agencies as the Departments of State and Justice. They may speak only the words authorized by the President. This principle is especially compelling in the field of foreign affairs, where lack of coordination between the State Department and other agencies can cause acute embarrassment.

Under an agreement with Yugoslavia,¹⁴⁴ the Foreign Claims Settlement Commission deals with a fund paid to the United States for the payment of claims of Americans against Yugoslavia. After all the claims authorized by the terms of the agreement have been paid, any funds left over will be returned to Yugoslavia. This means, for example, that any payments to persons whose nationality was not American at the crucial date would violate the agreement and presumably provide the Yugoslavs with a ground for complaint and demand for a larger return of surplus funds.¹⁴⁵ Since the State Department would have to deal with any such protest, it would be well if its views as to the meaning of nationality under the agreement had been sought and given due heed before the Commission made public its decision. This would no more involve abdication of the judicial function than is deference by any court to a political determination by the executive.¹⁴⁶ It is the only way to make it likely that the State Department and the Commission, like any court, would be heard "speaking with one voice" to the affected foreign governments.

Treaties

The executive may at two stages be involved in problems in courts arising out of treaties, which includes all types of international agree-

¹⁴² *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994 (1956); Coerper, "The Foreign Claims Settlement Commission and Judicial Review," 50 Am. J. Int'l L. 868 (1956).

¹⁴³ Re, "The Foreign Claims Settlement Commission and International Claims," 13 *Syracuse L. Rev.* 516 (1962).

¹⁴⁴ 62 Stat. 2662 (1948).

¹⁴⁵ Cf. Lillich, *International Claims, Their Adjudication by National Commissions* 38-39 (1962); Coerper, *supra* note 142, at 876.

¹⁴⁶ *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941).

ments: first, whether any treaty is in force, and second, what it means. If ever it is essential for the nation to speak with one voice, it is in the cases under the first heading. For a court to deny the force of a treaty, or any kind of international agreement, while the executive is relying on it to enforce our own rights is palpably intolerable. This is especially true when the executives of both governments assume that the treaty is in force. Given any evidence to support the executive assertion, surely there is no substantial ground on which a court can stand to hold the contrary. This is the clear meaning of the words of the Supreme Court when it overruled the argument on behalf of Porter Charlton that the extradition treaty with Italy was no longer in force: "The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this Court to recognize the obligation to surrender the appellant. . . ."¹⁴⁷ Similar words were used by the Court of Appeals for the Ninth Circuit when it rejected the argument of Andrija Artukovic that there was no extradition treaty with Yugoslavia:

From every practical and logical standpoint every nation must speak to every other nation through its Chief of State. Here, the President, as the Chief of State, in recognizing the continuing validity of Treaties between the United States and Serbia has acted upon a reasonable basis of fact peculiarly within his sphere of authority . . . and there can be no better equipped vehicle for decision than the Chiefs of State of the countries concerned. If their agreed decisions, when based upon supporting facts, are not conclusive they should at least weigh very heavily.¹⁴⁸

History seems to show that the weight of combined executive decisions on this issue has always been sufficient to give them conclusive effect. When a court is confronted with a case in which the views of the other government are not known, but our executive has asserted the continuing force of a treaty, the conclusiveness of the assertion may depend on the extent to which the other government is concerned with the litigated issue. If there could be no international repercussions from a decision either way, the question would lose its political coloration. Such a case is hard to envisage.

Most cases in domestic courts involving treaty rights present questions of fairly direct interest to the other party, either as a government or as protector of its nationals. May a foreign national inherit property? May a state prohibit aliens from engaging in particular trades? How

¹⁴⁷ Charlton v. Kelly, 229 U.S. 447 (1913). See also Argento v. North, 131 F. Supp. 538 (N.D. Ohio 1955), aff'd, 241 F.2d 258 (6th Cir. 1957), 106 U. Pa. L. Rev. 617 (1958).

¹⁴⁸ Ivancevic v. Artukovic, 211 F.2d 565, 573-74 (9th Cir. 1954). See Cardozo, "When Extradition Fails, Is Abduction The Solution"? 55 Am. J. Int'l L. 127 (1961).

much duty applies to the products of a friendly nation? Will we extradite an accused criminal? In all these instances the "speak with one voice" doctrine is peculiarly relevant. For a court to be able to negate national policy by exercising its own judgment on the existence of an obligation of the country could do much to vex the peace of nations.

Some State Department officials have emphasized the importance of this position.¹⁴⁹ The State Department's communication to the Court in *Clark v. Allen*,¹⁵⁰ however, was so phrased as to cast doubt on the consistency with which that Department has accepted these views. The courts were confronted with the question whether the treaty of 1923 with Germany, granting reciprocal inheritance rights, was still in force in 1942, despite the existence of a state of war. The State Department's letter to the Attorney General treated the question as purely legal, and cited *Techt v. Hughes*¹⁵¹ to support its conclusion that, as a matter of law, the treaty had survived the outbreak of war. There was, of course, a large volume of scholarly writing on the question of the survival under international law of treaties after a war between the parties.¹⁵² In deciding whether to declare a particular treaty still in force, the Department of State naturally must consider this history, since the matter ultimately is likely to become a matter of negotiation with the other party. The Secretary of State would then have to support his position with legal arguments. When he has concluded, however, that it is open to him to contend, under the law, that the treaty remains in force, he has a further function, *i.e.*, to make the political determination whether this government desires the continuation of the treaty obligations. Throughout the opinion in *Techt v. Hughes* this political function is recognized:

This, I think, is the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty shall be observed *in the absence of some declaration by the political departments of the government* that it has been suspended or annulled. But until some one of these things is done, until some of these events occur, while war is still flagrant, *and the will of the political departments of the government unrevealed*, the courts, as I view their function, play a humbler and more cautious part.¹⁵³ (Emphasis added.)

When the *Vermilya-Brown* case came up in 1948, the State Department was in a position to reveal "the will of the political departments" regard-

¹⁴⁹ Cf. Comment by Raymond T. Yingling, *International Law in National Courts* 55 (Third Cornell Summer Conference on Int'l Law 1960).

¹⁵⁰ Brief for Petitioner, pp. 85-92, *Clark v. Allen*, 331 U.S. 503 (1947).

¹⁵¹ *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185, cert. denied, 254 U.S. 643 (1920).

¹⁵² See citations in Bishop, *International Law: Cases and Materials* 179 (2d ed. 1962). See also Layton, "The Effect of Measures Short of War on Treaties," 30 U. Chi. L. Rev. 96, 99 (1962).

¹⁵³ 229 N.Y. at 242, 243.

ing the 1923 treaty with Germany. They wanted the treaty to continue, and their wish was justified by legal precedents.¹⁵⁴ The letter, therefore, after citing the legal basis of the determination, should have contained a clear declaration that it was the policy of the government to deal with the treaty as a continuing obligation. The Department's determination, upon a reasonable basis in fact and law, would then be the revealed "will of the political departments of the government," whose voice in matters of foreign relations is the one voice of the United States. Whether or not a treaty is in force is surely in the area of foreign relations.

When we turn to problems of treaty interpretation we touch delicate nerves. To proclaim the meaning of the written word is so hallowed a judicial function that we have fashioned a parol evidence rule to prevent even the views of the writers themselves from intruding into the sanctuary. Will the international lawyers be able to sustain an argument that once the executive branch has spoken on the meaning of a written treaty, the courts must adjudge accordingly? They must at least try.

As a matter of fact, the courts have helped to establish such a rule, but they have stopped just short of making the executive determination conclusive. They say over and over that it is entitled to "great weight." In the *Kolovrat* case in 1961 the Supreme Court said it again: "While courts interpret treaties for themselves, the meaning given them by the departments of the government particularly charged with their negotiation and enforcement is given great weight."¹⁵⁵ The Restatement also states that "the judicial branch . . . has exclusive authority to interpret an international agreement" but gives "great weight" to executive views.¹⁵⁶ How close this comes to making the executive determination "conclusive" may be illustrated by a discussion of the weight to be given to executive interpretation at the Cornell Summer Conference on International Law in 1960:

Mr. Metzger: . . . With the leeway that the language gave, shouldn't that be a situation where a court should give considerable weight—not conclusive—to this carefully argued exchange of notes . . . ?

This points up the difference between what you are doing when you are interpreting a treaty; you have something more than when you are interpreting a statute. In my judgment, unless this is borne in mind, there will be too wooden an application of a statutory technique to this field where new elements are added.

¹⁵⁴ See Rank, "Modern War and the Validity of Treaties: A Comparative Study," 38 Cornell L.Q. 321, 511 (1953).

¹⁵⁵ *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Robertson v. United States*, 294 F.2d 920 (D.C. Cir. 1961).

¹⁵⁶ Restatement, Foreign Relations Law of the United States § 153, at 553; § 155, at 558-59 (Proposed Official Draft 1962).

Mr. Cardozo: I wish Stan had defined "considerable" a little bit more . . .

Mr. Re: And he said it loudly.¹⁵⁷

When all the parties to a treaty agree on an interpretation, it should not be necessary for them to declare their view loudly in order to bind a domestic court.¹⁵⁸ How can an agreement mean anything other than what the parties say it means? This applies even in domestic contract law, where the interpretation agreed upon by the parties even binds third party beneficiaries.¹⁵⁹ Private parties whose interests are affected by treaties can hardly complain, therefore, if they must abide by the interpretation adopted by the governments concerned. The courts, therefore, can be expected to accede.

The "great weight" apothegm was used by the Federal Communications Commission in 1953 in an adjudication on the cable rates to be charged to the International Bank for Reconstruction and Development and the International Monetary Fund for messages sent abroad from the United States.¹⁶⁰ The question was whether the Bank and the Fund were entitled to the same reduced rates as foreign governments received in this country. The State Department had advised the Commission that, under the Bretton Woods Agreements, the "United States Government is committed to support" the interpretation adopted unanimously by the executive directors of the two organizations, who in turn had formulated their decision pursuant to the weighted voting procedure established in the two agreements.¹⁶¹ Under these procedures, "interpretation" in some situations will look more like revision.¹⁶² Nonetheless, the FCC opinion accepted the obligation to give "great weight" to the Department of State's communication, and declared it to be "an additional basis" for its conclusion that the agreements themselves called for the reduced rates. This was a case where the views of the executive should be expressed loud and clear, and given more weight than any private litigant could withstand. Failure to follow the executive views could have put the nation in default on an obligation to many other nations. Is not the interpretation then properly categorized with political matters that fall outside the judicial function?

The "great weight" test in treaty interpretation has been hallowed

¹⁵⁷ International Law in National Courts 53 (Third Cornell Summer Conference on Int'l Law 1960).

¹⁵⁸ See Dickinson, *supra* note 116.

¹⁵⁹ 3 Corbin, Contracts § 558 (1960).

¹⁶⁰ International Bank v. All America Cables, FCC Docket No. 9362, decided March 23, 1953, 8 Pike & Fischer, Radio Regulation 927 (1953).

¹⁶¹ See Metzger, "Settlement of International Disputes by Non-Judicial Methods," 48 Am. J. Int'l L. 408 (1954).

¹⁶² Cf. Jaffe, Judicial Aspects of Foreign Relations 74 (1933).

by such long usage that it would surely be futile to try to change it. The Supreme Court recently has unequivocally reconfirmed it.¹⁶³ The words, however, are not crucial. As long as the courts do not lightly allow litigants to get out from under the weight of an executive interpretation, the government will not have to worry that a decision of a judge will cause international embarrassment. State Department suggestions respecting the meaning of treaties can be expected to continue to enjoy the uniform observance that has characterized their reception in the sovereign immunity field.

CONCLUSION

The State Department, whenever international comity or national policy is involved in a case before the courts, must recognize its duty to give the courts clear statements of the views of the political departments, even—or, rather, especially—“on matters pending before the courts.”¹⁶⁴ Unfortunately, past official reticence justified the remark in the draft Restatement that “The attorney may have difficulty in getting evidence of an executive interpretation material to his case.”¹⁶⁵ This is abdication, not wise discretion. Further, no longer should it be “unlikely that the court will request it officially for him.”¹⁶⁶ A court trying to decide an international law case without advice on the political ramifications is as much in the dark as a judge sitting on a libel case without the innuendo required to explain the defamatory connotation of an equivocal published writing. An element essential to decision is missing. When the executive supplies that element, the judges cannot justly accuse it of going “outside the scope of its proper functions” and usurping the judicial prerogative. The executive pronouncement will reveal the political facts of foreign relations on which the legal conclusions have to be based in the courts of the nation.¹⁶⁷ Those courts are also part of the government. The voices of the judges, when they pass over the water’s edge, must harmonize with the executive’s. The exercise of judicial deference is then recognition of the executive’s prerogative, not abdication of the judiciary’s responsibility.

¹⁶³ *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

¹⁶⁴ *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1961), *cert. granted* 31 U.S.L. Week 3255 (U.S. Feb. 18, 1963).

¹⁶⁵ Restatement, Foreign Relations Law of the United States § 154, at 558 (Proposed Official Draft 1962). Cf. Zander, “The Act of State Doctrine,” 53 *Am. J. Int’l L.* 826, 851 (1959).

¹⁶⁶ Restatement, *supra* note 165.

¹⁶⁷ Cf. McDougal, “International Law, Power and Policy: A Contemporary Conception,” 1953-I, *Recueil des Cours, Académie de Droit International*, 132-259, esp. 157.