NOTES AND COMMENTARY

IS THE CURRENT DISPOSITION OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN THE UNITED STATES APPROPRIATE IN LIGHT OF PREVAILING GOVERNMENTAL POLICY?

Present applications of the doctrine of sovereign immunity in American courts of law indicate that certain broad questions of a judicial policy nature are present. Initially, the doctrine juxtaposes the idea that sovereign powers are to be accorded international supremacy with the notion of individual justice—that one who is injured by the acts of another should be permitted to present his claim for redress in a public forum. Secondly, the immunity doctrine presents a conflict between the executive and judicial branches of the government since the granting or denying of immunity to a foreign sovereign has an impact upon the proper conduct of United States foreign relations. Sovereign immunity has been referred to as both a stumbling block in the path of good neighbor relations between nations\(^3\) and an impediment to the proper functioning of the judicial process. Just as the political and economic status of the United States has changed in the last two centuries, so has the judiciary's application of the immunity doctrine. Nevertheless, some writers and jurists insist that alterations in the doctrine have not been radical enough, and many would prefer to dispense with sovereign immunity altogether.\(^3\)

The concept of sovereign immunity arose from the ancient notion that the sovereign was infallible and that governmental authority ought to be exalted to the highest degree. Historically, the attempt to grant to a foreign ruler less than the fullest immunity from judicial process was deemed an affront to the sovereignty of both the person and the state he ruled. Despite contemporary recognition of the proposition that a government should be held responsible for its acts, the doctrine of sovereign immunity continues to survive. However, the exemption from judicial process has changed considerably with respect to what may be termed its procedural and substantive aspects. In this country these modifications may generally be traced to evolving policy ideas regarding the

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\(^1\)This Note will primarily be confined to an examination of jurisdictional immunity, as opposed to immunity from execution. For a discussion of immunity from execution, see note 141 infra.


\(^4\)It was not until the nineteenth century that the doctrine was given judicial application:

The scantiness of pre-nineteenth-century judicial decisions bearing upon the exemption of States from the jurisdiction of foreign courts serve as explanation of the absence of reference to the subject in the classics of international law. Thus, to give examples, Gentili, Grotius, Bynkershoek and Vattel did not refer to the doctrine of State immunity, although the problems of diplomatic immunities and the immunities of personal sovereigns were extensively discussed in their treatises.

S. SCHUARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 3 (1959).
United States and its role in international politics. Foreign policy necessarily embraces a regard for prevailing international economic structures, as well as the conduct of diplomatic relations between states. Thus, American foreign policy has been, and continues to be, affected by the burgeoning of foreign intercourse and the entry of the government into many areas once considered solely within the private sector.

Present treatment of the doctrine involves consideration of both the substantive and procedural aspects of the sovereign immunity claim. The substantive aspect concerns whether immunity should be applied absolutely in favor of all foreign sovereigns or whether the privilege should be accorded only in certain limited circumstances. The procedural aspect involves an examination of the manner in which the claim is presented to the court. Further, if the immunity request has proceeded through diplomatic channels, consideration must be given to the weight to be accorded such executive department suggestions. Currently a restrictive approach to sovereign immunity prevails and executive requests for immunity are generally treated by the courts as being conclusive.

The purpose of this note will be to examine whether the present application of the doctrine in the United States warrants the critical comment it has received. The approach will be to review the historical evolution of the doctrine in the American politico-economic arena in order to determine whether its contemporary substantive and procedural application is supported by existing foreign policy structures. Such examination is appropriate since the execution of foreign policy decisions are affected by application of the doctrine. Two eras may be distinguished: 1775-1900, during which the traditional concept of absolute immunity was formulated; and Twentieth Century practice, during which judicial decisions have reflected the need to modify the traditional approach to meet existing policy demands. Particular emphasis will be placed upon recent case law and other evidence of contemporary application of the doctrine.

*Setser, The Immunities of the State and Government Economic Activities, 24 LAW & CONTEMP. PROB. 291, 292 (1959).* Setser commented: "It seems that doubt about the means for settlement of disputes is one of the minor factors, for example, that militates against improvement in the commercial relations between the United States and the Soviet Union." *Id.*

*The traditional rule of absolute immunity was expressed in an 1880 British case:

[As a consequence of the absolute independence of every sovereign authority, and of the international comity which indures every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any-state which is destined to public use . . .

I. PRE-TWENTIETH CENTURY PRACTICE—THE TRADITIONAL RULE

At the time of the American Revolution, there existed a nearly universal principal which limited colonial trade to the mother country. The colonial struggle for independence resulted not only from conflicting political philosophies, but also from the conflict between England’s policy of mercantilism and the desire of northern colonial merchants to establish new markets for their products. Foreign trade continued throughout the war, but after 1776 it experienced an unfortunate decline since the former mother country was reluctant to establish trade relationships with the new nation. However, the ensuing conflict between England and France opened new foreign markets for anxious American merchants. This new source of income permitted merchants to increase their demand for trade related services such as financing, insurance and brokerage.

A further important consideration was the development of the corporation as a legal concept. The corporate form of business made it easier for businessmen to finance the foreign trade commitments that were so vital to an unstable domestic economy. In light of this domestic instability and the subsequent desire for substantial foreign trade, much of which would necessarily extend to foreign sovereigns and their agents, it is arguable that a judicial decision holding the foreign sovereign accountable at law would have done much harm by dissuading the sovereign from dealing with colonial merchants.

It has been said that the United States was born out of a European balance of power which prevented England from exerting her full might to crush the colonies. Because most major American governmental policies were formed at

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1E. Borchard, American Foreign Policy 16 (1946).

2The basic mercantilist notion was to send as many goods abroad as possible in exchange for as few imports as possible. Mercantilism in practice involved the regulation of trade more drastically than ever before; imports were reduced and European states even required that goods be transported in vessels exclusively owned and operated by nationals of the state. A component in England’s policy of mercantilism was the establishment of colonies abroad which could supply necessary raw materials to the mother country and accept her products in return. F. Hartmann, The Relations of Nations 135 (1966).

3R. Robertson, History of the American Economy 87 (1964). In his commentary Mr. Robertson stated:

The events that led to the American Revolution fall into better order if we keep in mind the central theme underlying them: Mercantilist policy, imposed on an essentially self-governing people for a hundred and fifty years, led finally to a constitutional conflict that could be solved only on the battlefield. The revolutionary crisis was a political crisis, but the stresses and strains that led to fear and hatred of the British had economic origins.

Id.

5Statistics reveal that the dollar value of imports and exports increased during this period as did the tonnage of the merchant marine. Id. at 225.

6Id. at 235.

7The United States’ desire for increased foreign trade was a result of its domestic instability. The classic model has been described: “In the traditional conception . . . [the domestic structure is taken as given; foreign policy begins where domestic policy ends.” Kissinger, Domestic Structure and Foreign Policy, in International Politics and Foreign Policy 261 (J. Rosenau ed. 1969).

8F. Hartmann, supra note 8, at 427-28.
a time when extraordinary conditions prevailed in international relations, it was
difficult to readjust American political bases at a later date. Both Washington
and Jefferson cautioned against permitting the new republic to enter into
European power politics. Thus, decisions which would ultimately have a great
impact upon foreign relations were often reached with some reluctance.

It was in this economic and political setting that the United States Supreme
Court grappled with the doctrine of sovereign immunity. The first American
case in which the issue was raised was United States v. Richard Peters (The
Cassius).

There the owner of an American ship brought a libel alleging that a
French corvette, The Cassius, had pirated his ship on the high seas. The
Supreme Court subsequently declared the libellee's ship immune from suit in an
American court of law. A later suit against The Cassius, Ketland v. The
Cassius, marked the first use of a "suggestion" issued to the judiciary
by the executive branch of the United States government in a manner similar to that
practiced today. After the suggestion of immunity was filed with the Court, the
suit was dismissed. It is important to note that at the time of this decision the
concept of sovereign immunity, while the subject of much discussion, was by no
means an established doctrine. It did not achieve the status of an accepted rule
of international law until well into the Nineteenth Century.4

4Id. at 428.
429 U.S. (3 Dall.) 120 (1795).
4In the later case of The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), the
United States attorney for the district of Pennsylvania appeared and filed a "suggestion" in which
he discussed The Cassius:

The Cassius . . . had violated a municipal law of the United States; yet, being a public
vessel of France, the government of the United States directed the attorney general to file
a suggestion, stating the character of the vessel, which it was supposed would have taken
the case out of the jurisdiction of the court. But the case went off upon another objection
to the jurisdiction.

Id. at 124, 125.
42 U.S. (2 Dall.) 365 (1796).
4In its broad sense, a "suggestion" refers to any statement which formally brings to the attention
of the court certain facts or circumstances necessary to the court's proper treatment of an issue. For
purpose of the doctrine of sovereign immunity, a "suggestion" refers to any such statement,
presented to the court by various means, which comments upon the disposition of the immunity
claim.

4In the subsequent suit against the The Cassius for violation of neutrality laws prohibiting the
 outfiting of foreign vessels in United States ports, the French government took the matter directly
to the executive branch; when the Attorney General filed a "suggestion" of immunity, the case was
dismissed. Ketland v. The Cassius, 2 U.S. (2 Dall.) 365, at 365 (1796). The practice soon de-
veloped of requesting the Attorney General to file a suggestion with the Court. See Feller,
Procedure in Cases Involving Immunity of Foreign States in Courts of the United States, 25 Am.
J. Int'l L. 83, 86 (1931). See also the discussion of Ex parte Muir in text following note 70 infra.
The Muir decision crystalized the procedure for presenting immunity suggestions to the court.

4English case law did not touch upon the question of sovereign immunity until 1820 in The Prins
Fredrik, 2 Dods. 451 (1820), and even then the issue was not decided. See Riesenfeld, Sovereign
Minn. L. Rev. 1, 8-9 (1940).
In 1812 the case of *The Schooner Exchange v. McFaddon* was decided by a unanimous Supreme Court. This was the first important American case to analyze and apply the rule of sovereign immunity, although the dispute involved a warship rather than a merchant vessel. A libel was filed against *The Exchange*, a French naval vessel, when it entered the port of Philadelphia to make repairs. The libellants, claiming the ship had been seized on the high seas by the French Navy and outfitted as a warship, sought to have possession of the ship restored to them. The United States Attorney General, on behalf of the State Department, filed a "suggestion" with the Court requesting that jurisdiction be denied and the suit dismissed. Mr. Chief Justice Marshall stated that the jurisdiction of a state, within its own territory, is necessarily exclusive and absolute, and that any limitation of the state's power in this regard must be traced to the express or implied consent of that state. Marshall recognized the necessity of political and economic intercourse between states when he referred to the early nineteenth century world as being composed of distinct sovereign-ties "whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require."

The Chief Justice further stated that there are three situations in which the sovereign will be deemed to have waived a part of its exclusive territorial jurisdiction. The third of such situations was asserted to exist when a local sovereign permits troops of a foreign sovereign to pass through its dominion. In so doing, the local sovereign was said to have given his implied consent to vest the visiting sovereign with immunity from jurisdiction. However, there would be no presumption of immunity if no general or specific consent to pass had been given, as by treaty or other agreement, or none could be implied from custom or practice. In applying this third exception to the facts of the case, the Court reasoned that if a port such as Philadelphia is open to ships of all nations, an armed public vessel may enter and claim immunity even though no express consent is given with regard to either that particular vessel or sovereign. The Court affirmed the decision of the circuit court, holding that the libellee was entitled to exemption from jurisdiction in American courts. Thus it seemed that the king could do wrong, but that he could not be held accountable in a

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

id. at 136. This "consent" notion was supported by the customs and practice of international law.

id.

The other two exempt situations were: (1) "the exemption of the person of the sovereign from arrest or detention within a foreign territory," and (2) "the immunity which all civilized nations allow to foreign ministers." Id. at 137-38.

id. at 142.

Although the case was an in rem proceeding against a public vessel, subsequent cases consider this decision as having also extended immunity to in personam actions against a foreign sovereign.
public forum. The Supreme Court noted, however, that in the case of private individuals or commercial vessels a different result would attend:

[W]hen merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. 27

There is no evidence in Marshall's opinion that he intended that immunity attach to any commercial vessel, even those operated by a foreign sovereign. 28 However, at the time of the Schooner Exchange decision, the real possibility of governmental operation of commercial enterprise had not been contemplated.

The United States foreign policy and the international trade relationships which existed at the time of the Schooner Exchange were to undergo a marked metamorphosis in the next one hundred years. 29 Individual states displayed an increasing concern for their sovereignty and sought to settle their own affairs without interference from other states. 30 When the War of 1812 ended, American foreign trade was still that of an essentially agricultural people. Foreign trade blossomed after 1815, only to be followed by a depression three years later; it did not return to the level attained in the early part of the century until 1835. Nevertheless, the period from 1815 to the Civil War was generally characterized by substantial economic growth. 31 In 1846, a lower tariff policy

27 Id. at 144. The United States Attorney for the District of Pennsylvania, was of the same opinion. In presenting his contentions to the Court he stated: “So if a sovereign descend from the throne and become a merchant, he submits to the laws of the country.” Id. at 123 n.16 & n.27.

28 This lack of evidence was likewise recognized, but accorded little significance, in many subsequent cases. See, e.g., Berizzi Bros. v. The Pesaro, 271 U.S. 562 (1926).

29 Samuel Bemis has commented upon circumstances which provoked the change.

The American Revolution, by destroying the British trade walls around thirteen colonies, made the first great breach in the system of colonial monopoly. The French Revolution by the exigencies of war itself made the second breach. The Revolution of the Spanish-American colonies made the third breach. Of these adventitious circumstances in international affairs the United States took the fullest advantage.


30 Charles Fenwick has commented upon this new "sovereignty" concept:

New principles and new customs developed slowly during the nineteenth century. But side by side with the new rules of conduct was the growing conception of the sovereignty of the state, of its independence of any higher control, of its right to determine for itself the justice of its claims, and of its right to take the law into its own hands when what it believed to be its vital interests were at stake. . . . The result of the doctrine of sovereignty was that some jurispruders came to hold that no rule of international law was binding unless it had been accepted as such by the particular state. Even for those who did not go so far the doctrine of sovereignty had the effect of weakening the authority of the international community as Grotius and his followers conceived it.

C. FENWICK, FOREIGN POLICY AND INTERNATIONAL LAW 5 (1968).

31 An indication of such growth was the export-import relationship during this period: "At the beginning of the period the people of the country, except for certain abnormal years during the Napoleonic wars, imported more than they exported, and maintained their overseas commerce
was established in the United States. Contemporaneously, Great Britain was also moving in the direction of free trade. Even as the century drew to a close, state trading had not yet made an impact upon foreign trade policy. The concept of state trading and government control over a state's centrally planned economy directly contrasts with the concept of a market-type economy in which governmental policy influences the operation of the market but does not supplant it.\(^2\) With the rise of communism in the Soviet Union and her satellites, the state trading concept would significantly affect the foreign policy of the United States in the Twentieth Century.\(^3\)

Nineteenth Century decisions, both in the United States and throughout the world,\(^4\) continued to espouse the traditional rule of sovereign immunity advanced in *The Schooner Exchange*. Furthermore, early Twentieth Century decisions indicated that application of the doctrine was not to be limited to armed public vessels.

### II. Twentieth Century Practice

#### A. 1900-1930

The network of international trade which the United States had begun to be established during the last half of the Nineteenth Century had crystallized somewhat by 1920.\(^5\) Despite an essentially protectionist policy which carried over into the Twentieth Century, substantial growth continued in international trade. Tariffs were handled by the legislature, yet it was apparent that someone in the executive branch needed authority to effect tariff concessions in order to obtain reciprocal favors.\(^6\) By the end of World War I, American foreign policy changed considerably as the United States emerged as a world political and almost exclusively with western Europe. Toward the close, they had begun to export more than they imported—a signal of the impending industrialization of the nation, and their trade was webbed over the seven seas." S. Bemis, *supra* note 29, at 306.


\(^3\) Such a concept could hardly be compatible with a United States foreign policy which had been influenced by Nineteenth Century *laissez-faire* capitalism whose basic proposition was that man was economically motivated and that his behavior was governed by self-interest. J. Spanier, *American Foreign Policy Since World War II* 12 (1968). It was thought that an international policy of *laissez-faire* would benefit all states just as a domestic *laissez-faire* policy benefited each individual within the states. *Id.* at 14.

\(^4\) See, e.g., The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822) (by dictum extended immunity to recognized belligerents, but stated that immunity does not apply to prizes brought into American territory); L'Invincible, 14 U.S. (1 Wheat.) 238 (1816) (extended the privilege of immunity to private armed vessels of commissioned privateers); Wally v. Schooner Liberty, 12 La. 98 (1838) (granted immunity to the Republic of Texas before its independence had been recognized, considering it to be a foreign state at peace with the United States); Long v. The Tampico, 16 F. 491 (S.D.N.Y. 1883) (necessary to show public use and possession, government ownership not being enough); The Pizarro v. Matthias, 19 F. Cas. 786 (No. 11,199) (S.D.N.Y. 1852) (immunity was extended to controversies regarding all maritime claims, not merely those concerning title).

\(^5\) R. Robertson, *supra* note 9, at 372.

\(^6\) *Id.* at 376.
economic leader. Marshall's three instances in which immunity was proper had been modified and expanded in the early part of the new century. Subsequent cases and comments, mirroring further political and economic progress, suggested that perhaps the traditional rule of absolute immunity was no longer appropriate.

During and immediately after World War I, numerous admiralty cases discussed the requirements for recognizing a sovereign's immunity plea. It became the established procedure for a wronged party to file a libel against the ship of a foreign sovereign when it entered an American port, thus satisfying formal jurisdictional prerequisites to proceedings in rem and quasi in rem. Whether the suit would proceed to trial was dependant upon the court's acceptance or rejection of the defendant-sovereign's claim of immunity.

A case by case examination discloses that many courts differed as to which elements were vital to the recognition of an immunity claim. The pioneer case, The Schooner Exchange, was interpreted differently to suit the political demands of the times and to protect ships carrying war cargoes. Writing in 1922, C.C. Hyde indicated there was little doubt that immunity would attach to vessels both owned and possessed by a foreign sovereign or its departmental agent, whether such vessels be warships or public ships. On the other hand, he recognized the difficulty which American courts experienced in regard to requisitioned merchant vessels.

One such case which involved a requisitioned ship was The Attualita, a 1916 case which arose out of a libel in rem for damages allegedly caused by the negligent sinking of libellant's steamship. The district court ordered the release of the vessel on the ground that The Attualita, while a private commercial ship, had been requisitioned by the Italian government and directed to carry cargo to such ports as that government should require. In denying immunity the Fourth Circuit was reluctant to "take a step beyond that which had been taken in any decided case." The court stated that a grant of immunity in this case would be inexpedient because it would create a class of vessels for which no one would be either legally or morally responsible. Continuing its analysis, the Fourth Circuit reasoned that if an armed public ship should cause damage while in the possession and control of a sovereign, the sovereign would be morally responsible, even if not legally answerable without its consent. If a privately

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*See note 24 supra, and accompanying text.

**It should not be necessary to note that if sovereign immunity is granted, it does not mean that jurisdiction properly did not exist at the outset. It merely means that a court sitting with competent jurisdiction in the matter has decided to "relinquish jurisdiction" on the basis of other considerations. Jurisdiction is properly in existence prior to such a judicial determination.

E.g., The Roseric, 254 F. 154 (D.N.J. 1918); The Maipo, 252 F. 627 (S.D.N.Y. 1918).

C. HYDE, INTERNATIONAL LAW 442-43 (1922).

238 F. 909 (4th Cir. 1916).

Id. at 913n.

Id. at 911; accord. The Beaverton, 273 F. 539 (S.D.N.Y. 1919).

238 F. at 911.
owned and operated ship should cause damage, its owner would be legally answerable. However, where a requisitioned vessel caused damage, the sovereign would no longer have any moral responsibility since it was not directly in control; and if immunity were granted, there would be no means to attach legal responsibility. The Fourth Circuit saw this latter situation as one which would provide no guarantee for the conduct of thousands of individuals employed upon such ships which, at the time happened to be under order of a sovereign, either by contract or requisition.46

Cases of commercial vessels being requisitioned and thereafter devoted to public service were common during wartime;47 the case of The Roseric48 presents such a factual setting. There a privately owned steamship requisitioned by the British government was libelled for damages alleged to have occurred in a negligent collision with a barge in New York harbor. The district court said that in The Schooner Exchange jurisdictional power had been waived out of due regard for the dignity and independence of a sister sovereign with whom the United States was at peace. The court further noted that in The Schooner Exchange the subject, an armed ship of war, was accorded the privilege of immunity based on the idea that the sovereign property was devoted to a state purpose.49 The Roseric court then reasoned that such a privilege should be equally applicable to an unarmed vessel which was employed by a sovereign in the public service. After reviewing British case law48 the court stated:

These cases, in my judgment, must be accepted as declaring the judicial

46Id.

47With respect to the fear expressed in The Actualita, C.C. Hyde wrote six years later:

Should the nationalization of merchant vessels, by requisition or any other process, serve to create a large volume of tonnage engaged under governmental control in commercial enterprise, and notably in foreign trade, there would be reason to withhold exemptions not accorded private ships, unless there was definite understanding that the State of the flag should assure full responsibility for the conduct of its vessels, and also place within the reach of the individual claimant a simple and direct means of obtaining justice. Obviously the matter is one demanding general international agreement to establish a reasonable substitute for the broad yielding of jurisdiction by the territorial sovereign. It should be observed, however, that, in the meantime, any restriction of the existing right of exemption is hardly a matter within the discretion of the courts. [citing Hough, J., in The Maipo] While the individual State may not lawfully by legislative enactment modify the requirements of international law, it may without impropriety express its own view as to what they demand, and in so doing announce a rule for the guidance of its courts.

1 C. Hyde, supra note 40, at 445-46 (footnotes omitted).

48Id. at 154 (D.N.J. 1918).

49Id. at 158. To emphasize the purpose for which the vessel was used was not a novel approach. In The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822), Mr. Justice Story asserted that the principles announced in The Schooner Exchange are also applicable to foreign public ships; and in Briggs v. Lightboats, 93 Mass. (11 Allen) 157 (1865), Judge Gray stated that immunity for lifeboats arises not because they are instruments of war or sovereignty, nor because of the extent of their actual use, but rather because of the purpose to which they are devoted.

policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings in invitum, regardless of the form or character of the process.\textsuperscript{56}

Of persuasive force here was the fact that the United States and Great Britain were actively engaged in prosecuting a war against a common enemy. Although the court found the instant situation factually identical to that in \textit{The Attualita}, certain overriding considerations were deemed to be present. \textit{The Attualita} had been decided before the United States became a belligerent with the Italian government in the war against Germany. Furthermore, the \textit{Roseric} court disagreed with the assertion in \textit{Attualita} that the granting of immunity to a requisitioned ship would create a vessel for which no one would be responsible.

The \textit{Roseric} court declared that the owner of a requisitioned ship could be made personally liable for the negligence of his servants in committing a tort while operating the ship even though the ship itself would be exempt. Thus the court concluded that the prior decision in \textit{The Attualita} "unduly subordinates the rights of sovereignty to those of the individual."\textsuperscript{51} This was found to be contrary to the immunity provided the state for instrumentalities of the sovereign which are devoted to public service—an immunity based on notions of dignity, independence and the well-being of the nation. The \textit{Roseric} court then held that it is not ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to public service that exempts the sovereign from judicial process.\textsuperscript{52} A decree was appropriately entered to stay all proceedings to arrest or detain the ship as long as she continued to be in the service of the British government.

In a similar case decided just four months earlier, a New York district court granted immunity, but reached its decision by a slightly different route. In \textit{The Maipo},\textsuperscript{53} a libel was filed against a ship owned by the Chilean government for damages to a cargo of hides sold by the Chilean government to a United States merchant. The hides were being transported to the United States by a private party to which the sovereign had chartered\textsuperscript{54} the vessel. Libellant argued that, in entering into the charter agreement, the Chilean government was permitting its vessel to be used for private commercial purposes and thus immunity should not be granted. The court asserted that the view of the American judiciary had consistently been in the direction of holding immune property both owned and possessed by a sovereign.\textsuperscript{55} This court likewise noted that the exigencies of war

\textsuperscript{56}254 F. at 159.
\textsuperscript{51}Id. at 161.
\textsuperscript{52}Id. at 161-62.
\textsuperscript{53}252 F. 627 (S.D.N.Y. 1918).
\textsuperscript{54}The charter party, the contract by which the ship was let to the merchant, revealed that the Chilean government intended that all acts of the ship's captain were to be regarded as those of his government. \textit{Id.} at 629.
\textsuperscript{55}Id. at 630. "[W]hen ownership and possession are both present, the res is immune unless otherwise provided by some permissive or concessionary statute." \textit{Id.} The court further noted that recent cases arising in tort are not distinguishable from those growing out of a breach of contract.
may lead a government to man otherwise commercial ships, for instance, and that although such enterprise may be regarded as commercial in substance, they are of great benefit to its citizens at large. In the opinion of the court, any loss which might occur when local individuals deal with foreign sovereigns or when foreign individuals deal with the local sovereign is outweighed by the ultimate benefit to the individual's country. The public purpose idea, expressly recognized in The Roseric, was the underlying notion upon which immunity was grounded in The Maipo. To the argument that people who deal with a vessel thus immune may be put to great inconvenience and expense when seeking claims for relief in foreign jurisdictions, the court replied:

[W]hen one knows with whom he is dealing and the law applicable, he must arrange accordingly. This may be difficult, but in these days of rapid changes, accommodation to new conditions is accomplished effectively and expeditiously.\(^{54}\)

The Maipo opinion would seem to be overly broad since any foreign sovereign who engages in commercial activities will ultimately be able to justify his acts by finding the requisite "public purpose" in the benefits to be derived by the foreign citizens. At least the analysis would seem to be invalid during peacetime when applied to states whose economies are geared to free market pricing mechanisms.\(^{55}\)

In both The Roseric and The Maipo the courts were quick to emphasize the wartime need for cooperation among allies. Thus it may be said that these two cases, in sharp contrast to The Attualita where the court refused to take an "inexpedient step," were precipitated more by the need during World War I for stable international relations among political allies, than by a well-founded reliance upon either the express dictates of The Schooner Exchange or general guidelines established in other early decisions. World War I clearly altered the position of the United States regarding international relations. A necessary result of the war was an alignment of powers. While the courts recognized and stressed the need for cooperation among allies, it has been said that the United States did not enter into its "association" with Britain and France to begin a permanent alignment against its "enemies," but rather to promote world peace and to protect against war in general and its recurrence.\(^{58}\)

As well as revealing apparent differences in the substantive law, these three

\(^{54}\)Id.

\(^{55}\)Such an economic theory rests on the premise that the greater benefit accrues to both the private competitor and his trading partner when pricing mechanisms operate in free markets. The contentions asserted by Judge Mayer would appear to favor the development of state-controlled trade since, to a state employing such economic controls, there would be a benefit to the whole of the state. There is clear evidence, however, that Judge Mayer did not intend such rationale to be extended beyond a wartime situation. The use of such phrases as "requirements of this extraordinary war" and "to be detained by the process at this time" are clearly of a limiting nature. Id. at 631.

\(^{58}\)F. Hartmann, supra note 8, at 430.
cases reveal distinctions in the handling of the procedural aspects relating to the question of sovereign immunity. Eleven days after the filing of the action in *The Attualita*, the United States attorney for the Eastern District of Virginia, acting as an agent of the Attorney General of the United States, brought certain matters to the attention of the court. After comparing this suggestion with that received in *The Schooner Exchange*, the court stated that while the latter suggestion demanded the ship’s release, here the State Department had carefully refrained from such a demand. The *Attualita* court then concluded that a suggestion which does not contain a “demand” by the State Department does not constitute a decision by the executive branch on a political question; the instant suggestion was thus accorded little or no weight.

A somewhat different procedure was followed in *The Maipo*. There, a suggestion, submitted to the court by the representative of the Chilean Ambassador, stated that *The Maipo* was owned and possessed by the Chilean government, operated by a Chilean crew, and carried a cargo belonging to that government. The foreign ambassador’s suggestion, which was accompanied by the certificate of the Secretary of State of the United States merely accrediting him as the proper representative, also included a specific request for immunity. The court, citing the British case *The Parlement Belge*, stated that the factual allegations contained in the suggestion were not open to question and must be accepted as made. The court further stated that it was not necessary that such suggestion be made by a department of the United States Government: “It is enough that the fact is presented to the court, as here, by the duly accredited official of the foreign government.” When the United States Department of State declared that it has “no intention of interfering with the legal proceedings,” the district court accepted such comment as merely leaving the matter to be disposed of by the court in due course.

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*The Attorney General had received a communication from the United States Secretary of State to the effect that the Italian Ambassador advised the State Department that *The Attualita* had been requisitioned by the Italian government at the time of the attachment.

The district attorney’s “suggestion” noted the case of *The Luigi*, 230 F. 493 (E.D. Pa. 1916), and concluded by stating that in bringing this matter to the attention of the court the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian government, but I present the suggestion . . . as a matter of comity between the United States government and the Italian government, for such consideration as the court may deem necessary and proper.

*The Attualita*, 238 F. 909, 910 (4th Cir. 1916).

Perhaps the court’s reliance upon a comparison between the instant suggestion and that in *The Schooner Exchange* was misplaced. In *The Schooner Exchange* the Court did not really base its decision upon the executive suggestion. Instead, the decision was more properly grounded in general legal concepts.

5 P.D. 197, 210, 211 (C.A. 1880).

252 F. at 628.

Id.

Upon an examination of the facts which revealed a finding of possession and ownership in the foreign sovereign, the court granted immunity. Relevant evidence, in addition to allegations in the
In *The Roseric*, counsel for the British Embassy, appearing as amicus curiae, filed a suggestion with the court which stated that the ship had been appropriated by the British government, was devoted to public service, and thus all proceedings should be stayed. The court said that since the allegations in the suggestion had not been put in issue, it was deemed conclusive as to all material statements of fact unless that suggestion was not properly presented to the court. Although there had been cases in which courts had declined to receive suggestions presented by representatives of a foreign government, the source from which a suggestion may be received was held to be a matter of judicial discretion, each case to be governed by its own circumstances. The court concluded that in the absence of an intimation from the executive branch in opposition, rejection of the suggestion would not be justified, especially in view of the joint war effort.

The Supreme Court of the United States acted to clarify the formal procedural means of presenting a suggestion to a court in the 1921 case of *Ex parte Muir*, a libel for damages to a privately owned ship resulting from a collision with a British steamship. Private counsel for the British Embassy, appearing as amicus curiae, presented a written request to the Court to the effect that jurisdiction should be relinquished in as much as the steamship had been requisitioned into the service of the British government and was carrying a cargo of wheat belonging to that government. This procedure, found sufficient in *The Roseric*, was disallowed by the Supreme Court. The Court commented upon the proper avenues of presentation:

As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. Or, with its sanction, its accredited and recognized representative might have

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suggestion, included the charter party signed by the officer of the Chilean Navy in charge of vessel. See note 54 supra and accompanying text.

4254 F. at 156.


4See, e.g., *The Luigi*, 230 F. 493 (E.D. Pa. 1916); *The Florence H.*, 248 F. 1012 (S.D.N.Y. 1918). In *The Luigi*, an oral suggestion made in open court was rejected; inasmuch as the suggestion raised a question of international immunity, the court held it should have come through official United States governmental channels. In *The Florence H.*, the court held that a suggestion would not be received unless it came through the diplomatic channels.

4254 F. at 163.

4In commenting upon the proper presentation of suggestions, the court stated:

It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but it is to be disregarded unless it does so come. [sic] No case has been cited that holds as a matter of law that such a suggestion will not be received from a foreign sovereign's official representative.

4Id.

4254 U.S. 522 (1921).


4254 U.S. at 533.
appeared and have taken the same steps in its interest. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction.\(^3\)

The reasons listed by the Court for recognizing only these means of presentation were that it makes for better international relations, it conforms to diplomatic usage in other matters, it accords the executive department proper respect, and it tends to promote harmony of action and uniformity of decisions.\(^4\) Since the claim of immunity was not directly presented by the domestic government, the foreign sovereign or the foreign sovereign's representative, the immunity plea was not accepted.

This procedure was to undergo modification as subsequent cases enabled the courts to be even more precise regarding who might represent a foreign sovereign and the manner in which such representation might be undertaken.\(^5\) Additionally, there seemed to be a requirement that a suggestion be timely presented.\(^6\) Even after the *Muir* decision clarified the manner in which suggestions were to be presented, other more subtle questions of procedure were presented. Confusion existed as to the general effect to be given an affirmative suggestion of immunity presented to the courts through the United States Department of State, as to the effect of a Department suggestion that immunity is not appropriate and as to a Department decision not to make a suggestion of either immunity or liability. It is questionable whether these questions have been answered satisfactorily today.\(^7\)

After World War I, increasing disfavor was expressed concerning the then-existing substantive rule of absolute immunity. This criticism probably resulted from the presence of governmental operations in fields previously left entirely to private action. Congress recognized the need to treat government in the private sector with the equal dignity and liability accorded the individual,\(^8\) and there was evidence that the Department of State disagreed with the courts in their general application of the traditional rule of immunity. In 1921 the Italian

\(^{3}\textit{Id.} at 532-33 \text{(citations omitted).}\)

\(^{4}\textit{Id.} at 533.\)

\(^{5}\text{See, e.g., The Gul Djemal, }264\text{ U.S. }90\text{(1924) (suggestion presented by the Captain of the Turkish Navy was inappropriate); The Sao Vicente, }260\text{ U.S. }151\text{(1922) (Consul General, without specific authorization is not the appropriate representative merely by virtue of his office).}\)

\(^{6}\text{See, e.g., }Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43\text{ F.2d }705\text{(2d Cir. }1930),\text{ cert. denied, }282\text{ U.S. }896\text{(1931).}\)

\(^{7}\text{See note }112\text{ infra, and accompanying text.}\)

\(^{8}\text{Acts passed in }1916,\text{ }1920,\text{ and }1925\text{ allow the United States government to be sued for wrongs done by its vessels. }Admiralty Jurisdiction Extension Act, 46\text{ U.S.C. }\S\S \text{740-52 (1964); Public Vessels Liability Act, 46\text{ U.S.C. }\S\S \text{781-99 (1964); The Shipping Act, 46\text{ U.S.C. }\S\S \text{801-42 (1964).}\)
Ambassador wrote to the Department in an effort to prevent arrest of the Italian steamship Pesaro. The State Department replied that any commercial vessel, notwithstanding ownership by a foreign sovereign, should be subject to legal process in the local jurisdiction. In The Pesaro a libel in rem was brought to enforce a claim for damage to the cargo. The Solicitor for the Department, in reply to an inquiry from the court, asserted in August of 1921 that:

It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character.

Judge Mack prefaced the opinion of the court for the Southern District of New York with these remarks:

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel is, when within the waters of the United States, immune from arrest in admiralty, as “important and also new,” and that the “proper solution is not plain but debatable.” In re Muir. For that reason a re-examination of this question would seem to be justified, if not required, notwithstanding the decision in this court in The Maipo and the views expressed by the Circuit Court of Appeals in The Carlo Poma, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals.

The court recognized that while the doctrine of absolute sovereign immunity had been defended by some jurists as vital and fundamental to sovereignty, the extent to which it was retained had been the subject of strong criticism. Furthermore, there was a tendency to restrict its application or to guard against its extension. The court determined that its decision should “conform to the practical ends of the law in a moving, working world.” That is, the court considered its function not to be that of merely looking into history and logic, but that of inquiring whether public interest justifies or requires an extension of non-exemption beyond the usual processes of judicial justice. Further, the opinion indicated that the effect of continued recognition of absolute immunity

792 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 429-37 (1941).
81Id. at 479-80 n.3.
82Id. at 474 (citations omitted).
83See sources cited id. at 475.
84Id.
85Id. The court stated that the responsibility of a ship in admiralty is derived not from common law or civil law, but from “the commercial usages and jurisprudence of the middle ages, and earlier.” Id. at 481.
might be to discourage those individuals who sought to do business with foreign governments, agencies of the government or government-controlled industries and companies. Perhaps it may be said that the risk of dealing with a sovereign who has the advantage of immunity, far outweighed in the early 1800's by the need for foreign trade, was appearing to be of no little consequence by the 1920's. As to the requirements for successful business enterprise, the court commented:

To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands.  

The court concluded that any government ship should not be per se immune from seizure, but rather the vessel should be immune only if it is engaged in the public service. Judge Mack's definition of public service did not, however, extend to commercial activities during peacetime. Since The Pesaro was employed as an ordinary merchant ship at a time in which no wartime emergencies existed and there had been no suggestion of immunity from the Department, the court determined that the vessel should not be immune from arrest in admiralty.  

In a supplemental opinion Judge Mack considered European case law and commented on the subject of sovereign immunity. Noting that there existed a conflict of opinion between the various continental states, he concluded that an examination of foreign law only served to strengthen his decision. This opinion also answered the argument, advanced by jurists favoring the absolute approach, that to hold the foreign sovereign amenable to suit in American courts would do harm to the fragile network of international relations:

[It} seems improbable that in these days the judicial seizure of a publicly owned merchantman like the Pesaro would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed, it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern.

\textsuperscript{44}Id.

\textsuperscript{45}Id. at 481. The court found, in the vital fact that The Pesaro itself was subject to the ordinary processes of the Italian court, what Mr. Justice Marshall writing in \textit{The Schooner Exchange} might have considered similar to an implied consent to be sued.

\textsuperscript{46}Id. at 483.

\textsuperscript{47}Id. at 485. Two years later Judge Mack commented further upon the validity of a sovereign being held absolutely immune:

There is no principle of public law exempting a foreign state from its obligations under
The restrictive approach to the issue of sovereign immunity, espoused by both the State Department and the district court, was repudiated by the Supreme Court in 1926. In Berizzi Bros. v. The S.S. Pesaro, a later suit arising out of the same facts, Mr. Justice Van Devanter demonstrated adherence to the traditional rule of sovereign immunity—the majority view taken in other courts prior to 1926. While acknowledging that The Schooner Exchange contained no reference to merchant ships owned and operated by a foreign sovereign, the Court deemed this to be insignificant in light of the relative absence in 1812 of government activity in areas of commercial enterprise. The immunity announced in The Schooner Exchange was therefore deemed applicable to all ships held and used by a foreign government for a public purpose. The Supreme Court, however, was willing to extend the definition of “public purpose” beyond the limited meaning proscribed by Judge Mack in the 1921 decision. That is, the Court saw no reason to regard the advancement of the economic welfare of a country in time of peace any less a public purpose than the maintenance of a naval force. Thus, the Supreme Court in Berizzi Bros. rejected Judge Mack’s view of a relative sovereign immunity based on the distinction between public service acts and private acts, in favor of absolute sovereign immunity. This decision became the guiding principle for both the executive and judicial branches in subsequent cases.

B. 1930-1950—The Restrictive Approach

Protectionist policy was still in vogue after World War I, presumably to insulate a glut of newly established goods and industries. In 1930 the Hawley-
Smoote tariff raised duties even higher, only to touch off similar tariff increases abroad. The Reciprocal Trade Agreements Act was passed by Congress in 1934 and successively renewed. The creditor status that had previously been attained did a turnabout after 1929, and by 1940 the United States was practically a debtor nation again. In spite of the Supreme Court's decision in *Berizzi Bros.*, application of the doctrine of sovereign immunity was still somewhat uncertain in 1930.

In a case decided prior to the outbreak of World War II, one of the procedural questions left unanswered in *Ex parte Muir* was discussed. In *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, a suit to recover possession of a Spanish merchant vessel allegedly seized by the Republic of Spain, the Department of State refused to recommend immunity to the court but advised the Spanish Ambassador that he was entitled to appear directly before the court. The district court conducted a hearing to determine the relevant issues of fact raised by the Ambassador's suggestion and other evidence introduced, and concluded that The Navemar was neither in the possession of the Spanish government nor in its public service. The Court of Appeals, however, declared that an inquiry into the facts was inappropriate since the suggestion must be given conclusive effect. Thus, the Second Circuit held the vessel immune from suit in the courts of the United States. On certiorari the Supreme Court disagreed with the Second Circuit. The Court proclaimed that there are two basic means by which a foreign sovereign can claim immunity—either through diplomatic channels, or as a claimant in the *Pesaro* should not be accorded the immunity given to vessels of war. See *The Pesaro* 277 F. 473, 479 n.3 (S.D.N.Y. 1921), and discussion at note 80 supra.

*R. Robertson, supra* note 9, at 598-99.

Disposition of the doctrine throughout the world was just as uncertain. In 1933, after surveying foreign decisions, G. G. Fitzmaurice wrote:

The foregoing analysis, which includes most of the states having specially advanced systems of jurisprudence, indicates a very considerable divergence in the practice of nations on this subject, not only on matters of broad principle, but also on a number of minor points. Applying the rule, therefore, that international law depends on the practice of states, it is clear that international law on this question must be regarded as uncertain.


See discussion in text accompanying note 70 supra. *Ex Parte Muir* clarified the acceptable methods of presenting a suggestion; however it did not speak to the weight to be given various types of suggestions, nor to the importance of their sources.

*303 U.S. 68 (1938).*


*The Navemar, 90 F.2d 673 (2d Cir. 1937), rev'd sub nom. Compania Espanole De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938).*

The Court did agree as to the substantive issue. It stated that the engagement of the vessel of a friendly government, if in its possession and service, is a public vessel and immune from legal process even though it may be transporting cargo for hire. 303 U.S. at 74.
After the Secretary of State's refusal to suggest immunity, the Ambassador had chosen the latter alternative.

However, the Supreme Court stated that the Second Circuit was not bound to treat as conclusive the allegations in a suggestion filed by a foreign ambassador as a claimant in court. In reply to the question whether it was the duty of the court, upon presentation of this type of suggestion, to dismiss the libel for want of admiralty jurisdiction, the Supreme Court answered:

[T]he filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government.

The alleged absence of jurisdiction due to the public status of the vessel was therefore an appropriate subject for judicial inquiry where the immunity request came directly from the foreign sovereign. Nevertheless, in dictum the Court made it clear that a suggestion emanating from the United States executive branch would be given conclusive effect.

In a subsequent opinion written by Mr. Justice Stone, the Supreme Court applied the analysis in *The Navemar* and further examined the effect of an executive suggestion. In *Ex parte Republic of Peru,* a Cuban corporation libelled the vessel Ucayali for the failure of its owner, a corporate agent of the Peruvian government, to transport a cargo of sugar from a Peruvian port to New York. Pursuant to the foreign sovereign's request for executive recognition of the immunity claim, the State Department issued a formal suggestion of immunity from jurisdiction. Viewing as necessary the judicial recognition of, and deference to, the foreign affairs powers possessed by the President and the Department of State, the Court asserted:

[I]t is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.

Relying upon *The Navemar* and *The Schooner Exchange,* the Court set forth the appropriate treatment to be accorded a formal executive suggestion of immunity:

The certification and the request [from the State Department] that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the
submission of this certification to the district court, it became the court’s duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.\textsuperscript{108}

If immunity had not been recognized by the Department, however, the Court indicated that it would have been proper for the lower court to determine for itself whether immunity existed.\textsuperscript{106} The Supreme Court also stated that a foreign sovereign does not waive its right to claim immunity merely because it has seen fit to preserve its right to interpose other defenses.\textsuperscript{110}

A comparison of the decision in \textit{Peru} with that in \textit{Berizzi Bros.} demonstrates that the Supreme Court had come full circle. The vessel in the 1926 case was owned and operated by the foreign sovereign. The Supreme Court held that ship to be immune, in opposition to an opinion issued by the State Department to the effect that immunity was not proper. \textit{Berizzi Bros.} was thus based more upon general international law than upon reliance on executive policy as announced. Thereafter the State Department attempted to issue suggestions in succeeding cases which conformed to that pronouncement of the highest court in the land. The vessel in \textit{Peru} was also owned and operated by the foreign sovereign. There, the holding of immunity was based upon the view that to decide otherwise, in light of the Department’s suggestion of immunity, would cause the executive branch undue embarrassment in carrying out its duties with respect to foreign affairs.\textsuperscript{111} So, while the Department made an effort to align its subsequent statements of policy toward sovereign immunity with the Supreme Court’s ruling in \textit{Berizzi Bros.}, the \textit{Peru} decision by the same Court in 1943 ironically stood for the proposition that the judiciary should conform itself to the views of the executive branch.

From the decisions in \textit{The Navemar} and \textit{Ex parte Peru}, the duty of a court when confronted with an affirmative recommendation of immunity would seem to be clear. If a suggestion has come through the United States Department of State, it is conclusive and the sovereign is entitled to immunity. If the suggestion has been filed directly with the court by a sovereign appearing as a claimant, the allegations are not binding and judicial inquiry is proper. The result would seem to be that the executive branch may effect immunity as a matter of law, if existing foreign policy should so require, thus depriving the judiciary of an opportunity to examine the facts. Immunity may therefore be granted in certain cases despite the absence of certain factual elements held vital in prior cases. The duty of the court is not well defined, however, when the executive branch decides not to recommend immunity after a request by a foreign sover-

\textsuperscript{108} \textit{Id.} at 589.

\textsuperscript{106} The Court specified that such determination should be based on “whether the vessel when seized was petitioner’s, and was of a character entitling it to the immunity.” \textit{Id.} at 588.

\textsuperscript{110} \textit{Id.} at 589. Further, the Court refused to rule that immunity had been waived even though such claim of immunity had been asserted before both the Department and the district court. Neither method of asserting the immunity was deemed to be incompatible with the other.

\textsuperscript{111} \textit{Id.} at 588.
SOVEREIGN IMMUNITY

Can the intent that immunity should not be granted by the courts be inferred from such executive silence? Further, can express inaction by the executive, where the Department merely asserts that it wishes to take no position on the issue, be presumed to grant the judicial branch free rein in the matter?112

Reliance upon executive discretion was carried one step further in Republic of Mexico v. Hoffman, a 1945 Supreme Court decision, once again written by Mr. Justice Stone. A libel in rem was filed against a Mexican vessel for damage caused in a collision. The Mexican Ambassador filed a suggestion in the district court, claiming that the ship was owned by the Republic of Mexico, possessed by it, and engaged in transporting cargo for it. A communication from the Secretary of State to the Attorney General was filed. It merely noted the existence of the claim of the foreign government. No position was taken with regard to the allegations contained therein other than to direct the court's attention to Ervin v. Quintanilla114 and Compania Espanola De Navegacion Maritima, S.A. v. The Navemar.115 In the Ervin case the Fifth Circuit had granted immunity since the vessel was in the possession and service of the foreign sovereign at the time of the seizure; in The Navemar, the executive branch had failed to recognize the claimed immunity and the Supreme Court had denied immunity to a ship neither possessed nor in the service of a foreign sovereign. The district court denied the claim, the Mexican government filed an answer to the libel in which it renewed its claim of immunity, and a trial was held on the merits. Another communication from the State Department to the Attorney General was filed, accepting only the allegations of ownership in the foreign sovereign. The district court found that the ship was in the possession, operation and control of the Mexican corporation, not the Mexican government, and denied immunity.116 The Ninth Circuit's decision to affirm was based on the absence of possession and public service.117

On certiorari the Supreme Court considered the question of whether title, without possession, is sufficient grounds for recognizing sovereign immunity.

112 The answers to these questions have been made difficult because the means by which courts are apprised of executive opinions have varied. In appropriate cases the State Department has: issued immunity suggestions to the court in response to a request from a foreign sovereign, recognized the factual allegations of the claim but declined to suggest immunity, replied that the Department will leave the matter to the courts, maintained executive silence on the matter and made an affirmative suggestion of liability. There has been no formalized uniformity with regard to the procedural aspects, so it is understandable that courts have been confused as to the weight which should be accorded these various expressions. What have been termed "suggestions" might more accurately have been called "demands," "refusals," "comments" and, occasionally, "double-talk."

113 324 U.S. 30 (1945). Despite the expansive decision in Republic of Mexico v. Hoffman, most courts have refused to go beyond the Peru holding.

114 99 F.2d 935 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939).

115 303 U.S. 68 (1938).


117 Republic of Mexico v. Hoffman, 143 F.2d 854 (9th Cir. 1944), aff'd, 324 U.S. 30 (1945).
Citing a number of supporting cases, the Court asserted that since The Schooner Exchange decision, the United States government had recognized immunity when a vessel is in the possession and service of a friendly sovereign. This surrender of jurisdiction was based on a policy, recognized by the State Department and the courts, that national interest is best served when such controversies are handled diplomatically rather than under the compulsion of judicial proceedings. In the absence of executive recognition of an immunity claim, it would thereafter be for the courts to determine whether the requisites of immunity exist. Moreover, when a judicial proceeding has an effect upon relations with the foreign sovereign, it was deemed a "guiding principle" in considering whether immunity is proper, to determine whether the executive department would be embarrassed in its conduct of foreign affairs by a refusal of immunity. The Supreme Court then formulated the following principle: "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." Thus, when a foreign sovereign follows an alternative course and presents its immunity claim by appearance, the court should consider whether the basis for the claim is one recognized by the established policy of the department.212

The executive suggestion in Hoffman made no demand for immunity. It merely recited that the foreign sovereign owned the vessel; yet from this express

118Cases cited by the Court were: Ex Parte Peru, 318 U.S. 578 (1943); Compania Esponola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938); Ex Parte New York, 256 U.S. 503 (1921); The Pesaro, 255 U.S. 216 (1921); Ex Parte Muir, 254 U.S. 522 (1921); United States v. Cornell Steamboat Co., 202 U.S. 184 (1905); The Divina Postora, 17 U.S. (4 Wheat.) 52 (1819); L'Invincible, 14 U.S. (1 Wheat.) 238 (1816).
119324 U.S. at 35.
120Id. In a footnote to this statement, it was declared that in Berizzi Brothers the Court had granted immunity to a merchant vessel owned, possessed and in the service of a foreign sovereign, even though the State Department had declined to recognize immunity; the propriety of this was not considered. Since the Hoffman vessel was not in possession and service of the foreign sovereign, the Hoffman court thus did not have the opportunity to rule on the question directly presented in Berizzi Brothers. Id. at 35 n.1.

It is to be noted that this principle was quoted in the later case of Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transporte, 336 F.2d 354, 358 (1964), cert. denied, 381 U.S. 934 (1965). Although the Second Circuit in that case admitted that it had received various interpretations, it stated:

[W]e think it means at least that the courts should deny immunity where the State Department has indicated, either directly or indirectly, that immunity need not be accorded. It makes no sense for the courts to deny a litigant his day in court and to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed.

Id. at 358.
121In expressing its understanding of the executive department's policy, the Hoffman Court stated: "[s]uch a policy, long and consistently recognized and often certified by the State Department and for that reason acted upon by the courts even when not so certified, is that of allowing the immunity from suit of a vessel in the possession and service of a foreign government." 324 U.S. at 36.
inaction the Court apparently implied a "suggestion of liability." The Court stated that there was no evidence that the Department had ever allowed immunity on the basis of "title" alone, and that a similar position had been consistently taken by the courts. Of controlling importance was the fact that despite numerous opportunities, the executive department had never recognized immunity for a vessel owned, but not possessed by, a foreign government. In affirming the denial of immunity below, the Supreme Court declared:

[I]t is the national policy not to extend the immunity in the manner now suggested, and . . . it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

The apparent effect of the Hoffman decision is that when the State Department makes no suggestion of immunity, the courts will look to established "national policy" in similar factual situations.

However, it may be argued that such treatment gives no weight to the refusal of the Department to act when specifically requested to do so by the foreign sovereign. That is, when the State Department reviews a case and decides not to file an immunity suggestion, is it not necessarily making a determination of present executive policy? The court, in the absence of a suggestion, will decide the case on the basis of past "national policy," which policy may consist of cases previously decided in which the Department did issue a suggestion. So while the court applies established policy to the facts, mere inaction will not enable the Department to create present policy and have it recognized by the courts. In a nation of changing political and economic spheres, the United States Department of State thus has only a limited power to effect parallel changes in the doctrine of sovereign immunity. The only means available would be an affirmative policy pronouncement—in some instances this would amount to a suggestion of liability—mere silence not being enough. Nevertheless, in Berizzi Bros. the Court refused to adhere to just such an affirmative statement against granting immunity. If the Department recommends liability in some cases, rather than leaving the determination to the courts, would such conduct be likely to impede the Department's foreign affairs activities? It is arguable that it would, since the conduct of international relations is a direct function of the executive department. On the other hand, whether a denial of immunity is directly traceable to the judicial or executive branches, the decision would ultimately be viewed as that of the United States government.

Mr. Justice Frankfurter, in a concurring opinion to Hoffman, offered an

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122 See id. at 38 and cases cited therein.
123 Lauterpacht has referred to the requirement of possession as an indirect approach to an overthrow of the concept of absolute liability. Lauterpacht, supra note 3, at 269.
124 24 U.S. at 38.
125 See G. Hackworth, supra note 79.
interpretation of the majority's holding. In *Berizzi Bros.*, said Frankfurter, the Supreme Court felt free to reject the Department's policy-oriented views, while in the instant case the Court declared that the issue was to be decided in conformity with principles adopted by the Department in conducting United States foreign relations. He further noted that "possession" is too tenuous a distinction upon which to differentiate between foreign government-owned merchant ships that are immune from suit and those that are not. Frankfurter reasoned that the presence of one junior naval officer on one of its merchantmen might be enough to establish possession by the Republic of Mexico, or that a similar finding could be effected merely by varying the terms of the financial arrangement of the enterprise.  

Frankfurter also observed the enormous growth in recent years of commercial activity by the government. He noted with approval the comments of Lord Maugham in the 1938 British case *The Cristina*:

"[T]here has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world?"

He declared that *Berizzi Bros.* had been based on considerations no longer valid twenty years later, and concluded that perhaps the case should be reconsidered in light of the recent developments to which Lord Maugham referred. Justice Frankfurter then stated that courts should not reject jurisdiction except when the executive branch or Congress explicitly asserts that the proper conduct of foreign relations requires judicial abstention. Under this interpretation, the court should assume jurisdiction whenever the Department has not suggested immunity. The majority's rule in *Hoffman* is that if a suggestion is issued it must be followed, and that if none is issued the judicial determination should be made based on evidence of past national policy. Frankfurter would stop just short of this proposition; he would urge that in the absence of a suggestion, the judiciary should not disclaim the jurisdiction which rightly belongs to them but ought to determine the issue without being bound to examine and apply past executive policy. But, would not Frankfurter's position ultimately confer upon the courts the power and, before long, the duty to assert something akin to a "judicial foreign policy?"

Though the courts have generally refused to adopt the total-executive approach of the *Hoffman* case, Frankfurter's concurring opinion also does not represent the majority view after 1945. Interpreting the *Hoffman* decision as evidencing judicial willingness to entrust the Department with the power of a

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124 U.S. at 40.
125 Id. at 41 (quoting from The Christina, [1938] A.C. 485, 521-22).
126 Id. at 41-42.
127 Id.
court of law, more than one commentator has criticized Justice Stone's treatment of the case.\textsuperscript{196} Although it was clear after Hoffman that Berizzi Bros. was no longer controlling, precise guidelines remained to be formulated.

The "important developments in the international scene that twenty years have brought," to which Mr. Justice Frankfurter referred, included movement toward greater state trading.\textsuperscript{197} This concept, which involves state control of foreign trade, was in evidence prior to World War I, but by 1945 it had become an established institution in certain countries. The importance of state trading did not cease with World War II, but continued to grow in the next three decades. In fact, probably no country in the world today can be said to rely entirely on free trade mechanisms. While the United States has realized that it must enter into state trading to some limited extent, it has preferred to foster free enterprise. Just as the foreign economic trend has been in the direction of greater state control, buttressed by conforming foreign policy decisions, the trend of decisions analyzing the substantive aspect of sovereign immunity has been most definitely of a restrictive nature. Likewise, the procedural aspect of sovereign immunity has been handled by the courts to reflect considerable respect for executive opinion.

C. The "Tate Letter" Doctrine

In 1952 the executive branch made an affirmative policy statement concerning sovereign immunity which was unconnected with a pending case. The Acting Legal Advisor to the Department, Mr. Jack B. Tate, sent a letter to the Acting Attorney General in May of that year.\textsuperscript{198} In announcing what has been termed the "Tate Letter" doctrine, the Department of State referred to the distinction between acts \textit{jure imperii} and acts \textit{jure gestionis}. On the basis of case studies and the opinions of writers and commentators, the Department asserted that the restrictive theory of sovereign immunity ought to be applied; thus, sovereign immunity would be appropriate only in cases involving public acts.


\textsuperscript{197}In distinguishing state trading from private trading, one commentator has stated:

State trading is by no means crystal-clear in conception and its ambiguity in operation is even more pronounced. The commonly used technical definition of state trading is trade which is conducted by a government or its agents. . . . In order unmistakably to distinguish state from private trading, a dividing line may be drawn by specifying that state trading exists when the government, in addition to determining the kind and quantity of goods traded and their geographic distribution, also negotiate with regard to prices and the terms of the transaction. . . .

Since state-trading is national in character, it is only natural that it is a basic instrument of economic warfare.


\textsuperscript{198}26 Dep't State Bull. 984 (1952).
(acts *jure imperii*) of a sovereign. The impetus to reject the traditional rule of absolute immunity came primarily from changing politico-economic systems and the need of private merchants engaging in trade with foreign sovereigns to have disputes determined in courts of law. Coming on the heels of a judicial determination that executive suggestions of immunity should be accorded conclusive effect,133 this letter can perhaps be interpreted as an attempt by the executive branch to permit the judiciary to make decisions on its own. Its ultimate effect, however, would seem to be that of thwarting such judicial freedom, especially in view of the manner in which the Department approached the question of sovereign immunity in subsequent cases.

One paragraph of the letter, relating to executive policy and its weight in a court of law, has engendered confusion:

> It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.134

This paragraph could be interpreted as a repudiation of the majority’s proposition in *Hoffman* that, in effect, the executive branch can control court decisions on the question of sovereign immunity. Such a construction, implying that courts are free to disregard Department suggestions, would suggest that *Berizzi Bros.* is not as dead as some had thought and would also challenge the holdings in *The Navemar* and *Peru*. On its face, this paragraph would seem at least to imply, if it does not clearly state, that courts are free to make their own determination and that an immunity suggestion cannot control their actions. The treatment of subsequent cases, however, has indicated that perhaps the executive branch did not intend to make such broad changes in the procedural aspect of the doctrine.

The letter stated that the results of a survey of international opinion and practice concerning sovereign immunity showed that only the Soviet Union and its satellites continued to support full acceptance of the absolute rule of sovereign immunity.135 With regard to the economic motives favoring absolute immunity, the “Tate Letter” declared that “[t]he reasons which obviously motivate state trading countries in adhering to the theory [of absolute immunity] with perhaps increasing rigidity are most persuasive that the United States should change its policy.”136 Of paramount concern to the Department,  

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13426 DEP’T STATE BULL. at 985 (1952).
135Id.
136Id. Other considerations which entered into the Department’s decision to adopt the restrictive approach included: (1) the realization that the granting of immunity to foreign governments in American courts is inconsistent with actions of the United States government in subjecting itself to suits in these same courts; (2) the further inconsistency with United States Government policy of not
therefore, was the international economic structure which prevailed after World War II. According to the Department's analysis, the Soviet bloc, in employing state-trading controls, would favor absolute immunity. On the other hand, the United States would prefer a restrictive approach to sovereign immunity in order to encourage as much free trade as could effectively compete in a world that was beginning to feel the effects of state-trading policies.137

Taking the opinions in *The Navemar, Ex parte Peru* and *Hoffman* together with the Department's 1952 pronouncement, it might be adduced that the latter statement would automatically bind the courts in subsequent cases, or until such time as the Department should choose to express a different policy. The "Tate Letter" doctrine was given recognition in *New York and Cuba Mail Steam Ship Company v. Republic of Korea.*138 There an in personam action growing out of a collision with plaintiff's ship was initiated by attachment of the defendant-government's funds in New York banks. The Secretary of State asked the Justice Department to file a suggestion which asserted: "The Department of State, however, has not requested that an appropriate suggestion of immunity be filed, inasmuch as the particular acts out of which the cause of action arose are not shown to be of purely governmental character."138 Judge Weinfeld, speaking for the district court, recognized that a request for immunity presents a political rather than a judicial question. The court declared:

> [I]t has long been established that the Court's proper function is to enforce the political decisions of our Department on such matters. This course entails no abrogation of judicial power; it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs.140

Thus the court found itself bound to disallow the jurisdictional immunity claim,141 even though the cargo of rice had been acquired by the Republic of

claiming immunity for its merchant vessels in foreign jurisdictions; and, (3) increasing practice, on the part of all governments, of engaging in commercial activities, thus making necessary rules which enable parties to have their rights determined in court. *Id.*

137 With regard to what has been referred to as the "new Soviet offensive," in 1957, Soviet Premier Khrushchev said:

> We declare war upon you—excuse me for using such an expression—in the peaceful field of trade. We declare a war we will win over the United States. The threat to the United States is not the ICBM, but is the field of peaceful production. We are relentless in this and it will prove the superiority of our system.


138 Id. at 684 (S.D.N.Y. 1955).

139 Id. at 685.

140 Id. at 686 (footnote omitted).

141 Id. at 687. However, jurisdiction here rested on the writ of attachment. In the same letter in which the Secretary of State requested that no suggestion of immunity be filed, due to the absence of acts "of purely governmental character," immunity from attachment and seizure was recognized: The letter from the Secretary of State to the United States to the Attorney General of the United States recognizes that under international law property of a foreign government is
Korea for free distribution to civilian and military forces in that country during the Korean conflict. Such factual allegations, if proved, would seem to have demanded immunity on the basis of past policy.

D. Recent Practice—Executive Primacy

That same year, 1955, the Supreme Court rendered a decision in National City Bank v. Republic of China.\textsuperscript{142} There the foreign sovereign brought suit

\footnotesize{immune from attachment and seizure, and that the principle is not affected by a letter dated May 19, 1952. . . . The Department of State accordingly has requested . . . that the Court be informed of the Department of State’s agreement with the contention of the Ambassador that property of the Republic of Korea is not subject to attachment in the United States.}

\textit{Id.} at 685. The court commented that “by its own interpretation of its liberal policy against unrestricted immunity, the Department of State declares in unmistakable language that it adheres to the doctrine that the property of a foreign government is immune from attachment.” \textit{Id.} at 686. In a footnote the court recognized the argument that the restrictive theory is illusory since in many cases jurisdiction can only be acquired by attachment. The footnote continued:

Whether in the light of the relaxation of the absolute theory of sovereign immunity a distinction should now be made between seizure of property . . . under execution to enforce collection of a judgment, where jurisdiction has been previously acquired without attachment or seizure, need not be decided at this time. A distinction might be urged on the ground that in the instance where attachment is necessary to vest jurisdiction, the basic issues are still unresolved, whereas in the instance of jurisdiction already acquired the Court has passed on all issues including whether or not the claim rests upon acts of a private rather than a public character.

\textit{Id.} at 687, n.7. The motion to vacate the attachment was therefore granted by the court. Cf. Loomis v. Rogers, 254 F.2d 941 (D.C. Cir. 1958), \textit{cert. denied}, 359 U.S. 928 (1959) (deemed to be an established rule of international law that a sovereign is immune from legal process).

The view expressed in the above letter of the Secretary of State was further modified in a letter submitted by the Attorney General for the Department in the 1959 case of Weilamann & McCloskey v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959) where the court stated that the Department has always recognized the distinction between “immunity from jurisdiction” and “immunity from execution.” The Department has maintained the view that under international law property of a foreign sovereign is immune from execution to ratify even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit. \textit{Id.} at 472-73. After noting Dexter and Carpenter Inc. v. Kunglig Jarnvagsstyrelson, 43 F.2d 705 (2d Cir. 1930), \textit{cert. denied}, 282 U.S. 896 (1931), where the court did not permit execution in a proceeding in which the foreign sovereign had consented to suit, the court stated further that the Department was of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy the suit’s judgment. The reason given was that in the Department’s view, under international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit.

It is argued that since the court has the power to establish policy to some extent, it should do so in the case of immunity from execution. Thus, if a court does not recognize sovereign immunity as a defense, why should there be any bar to execution? As to the argument based on the coextensive nature of jurisdiction and execution, see Comment, \textit{Judicial Adoption of Restrictive Immunity for Foreign Sovereigns}, 51 VA. L. REV. 316 (1965). To the effect that courts should broadly apply waiver of immunity and allow execution in all cases, see Note, \textit{Sovereign Immunity—Waiver and Execution: Arguments From Continental Jurisprudence}, 74 YALE L.J. 887 (1965).

\textsuperscript{142}348 U.S. 356 (1955).
against the National City Bank to recover money deposited with the bank in 1948 by an official agency of the Republic of China. The defendant-bank's counterclaim on treasury notes issued by the Republic had been dismissed by the district court since it was not based on the same subject matter. Writing for the majority, Mr. Justice Frankfurter commented initially: "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court." The Court referred to the pronouncement of the State Department against recognizing immunity for the commercial operations of a sovereign, and noted that in Berizzi Bros. "this Court thirty years earlier rejected the weighty opinion of Judge Mack in The Pesaro . . . for differentiating between commercial and war vessels of governments." In this case there was no attempt to bring a foreign defendant into an American court of law; rather it was the foreign sovereign which initially invoked the jurisdiction of the Court and which subsequently claimed immunity from jurisdiction with regard to a counterclaim. The Supreme Court declared that a counterclaim based on the same subject matter is a permitted encroachment upon the immunity doctrine, but that there is great diversity among the courts as to when a claim is "based on the subject matter of the suit." Admitting that fiscal management is one of those immune operations of a foreign sovereign, as defined in the "Tate Letter," the Court found that such distinction becomes irrelevant when the sovereign is a suitor in American judicial proceedings. Of importance to the Court was the fact that the State Department had not intimated even slightly that to allow the counterclaim would embarrass the United States in its relations with China. The Supreme Court thus reversed the lower court's dismissal of the defendant-bank's counterclaim against the Republic of China. However, both the nature of the case, and the fact that Mr. Justice Frankfurter made no positive statement

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144 348 U.S. at 358.
145 Id. at 361 (citations omitted).
146 Id. at 364.
147 Compare the Court's reasoning on this point with the analysis in Republic of Mexico v. Hoffman discussed in text accompanying note 113 supra.
148 348 U.S. at 366. The Supreme Court was quick to indicate, however, that the doctrine of sovereign immunity is not a constitutional mandate, but rests on considerations of policy to which the Court has given legal sanction. Id. at 358-59.

Mr. Justice Reed, joined by Justices Burton and Clark, dissented on the proposition that the foreign sovereign would have been exempt from any direct suit on the notes. In his opinion, Mr. Justice Reed said:

Deposits may be the lifeblood necessary for national existence. It is not wise for us to tell the nations of the world that any assets they may have in the United States, now or in the future, upon which suit must be brought, are subject to every counterclaim their debtors can acquire against them at par or at a discount. It is unfair to our foreign friends and detrimental to our own financial and mercantile interests.

Id. at 372.
expressing Supreme Court adoption of any particular definitional rule, militate against the proposition that this decision stands for any precise set of guidelines to be used by the lower courts.

For the most part, the political and economic trends which began in the late forties and early fifties continued during the sixties. The postwar discord between the United States and the Soviet Union had gradually expanded into a cold war existence which involved complex governmental structures. The Common Market proved to be so successful in lowering trade barriers between the signatories that Congress enacted the Trade Expansion Act of 1962. The purpose of the Act was to enable the United States to establish the same sort of economic alliance and was to be effected by allowing the President to lower tariffs on certain goods. The period after World War II has been referred to as the first era of truly global foreign policy. This is so because each major state can apply its power to produce consequences in every part of the globe; further, the number of participants in the international scene has nearly doubled since 1945. Postwar foreign policy has provided for the encouragement of American investment abroad by instituting risk-guaranty programs. United States foreign policy has been necessarily dynamic, and international relations have been necessarily expansive. In fact it has been suggested that foreign policy has become "intercontinental policy."

In a 1961 district court decision, Rich v. Naviera Vacuba, the court accepted without further inquiry the certificate and grant of immunity issued by the State Department. Affirming on appeal, the Fourth Circuit commented upon the executive suggestion: "We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion." In the absence of Department action in the

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154 Kissinger, Domestic Structure and Foreign Policy, in Conditions of World Order 164, 167 (Hoffman ed. 1968).
151 id.
152 An example of such governmental effort includes the Investment Guaranty Program initiated by the Economic Cooperation Act of 1948, 62 Stat. 144 (1948).
154 197 F. Supp. 710 (E.D. Va.), aff'd per curiam, 295 F.2d 24 (4th Cir. 1961). In this case the vessel Bahia de Nipe had sailed from Cuba carrying a cargo of sugar to a Russian port. Three hundred miles east of Bermuda, the master and ten crewmen assumed control and turned toward Virginia, notifying the United States Coast Guard that they intended to seek asylum in the United States. Three successive libels were filed; by longshoremen who had previously recovered judgments against the foreign sovereign and the vessel, by Mayan Lines, S.A. which had recovered a consent judgment in a state court and by a company that claimed the cargo had been expropriated by the revolutionary government in Cuba.
155 295 F.2d at 26; cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In Marbury Mr. Chief Justice Marshall declared that the power over foreign affairs power vested in the executive branch was beyond judicial inquiry. He stated that "[t]he subjects are political. They respect the nation, not individual rights, and being intrusted to the executive the decision of the executive is conclusive." Id. at 166.
matter, the court stated that it could properly have considered the contention raised by the libellant as to the effect of a waiver of immunity; but in suggesting immunity the Department was deemed to have contemplated and rejected this argument.\footnote{One of the libellants showed that in a prior state court action, in which judgment against the Republic of Cuba had been entered, the defendant had waived its immunity with respect to both jurisdiction and execution. Thus it was argued that it was unconscionable for Cuba to later repudiate that waiver and to request the State Department to submit a suggestion of immunity. Another libellant asserted that, since the sugar cargo had belonged to it before being expropriated from the company's plants in Cuba, release of the cargo under the Department's suggestion would deprive it of property without due process in violation of the Fifth Amendment. To these contentions the court answered: "Refusal of the State Department in these circumstances to enforce Cuba's earlier waiver over its present assertion of immunity is within the Department's authority and constitutes no violation of the libellant's rights under the Fifth Amendment." 295 F.2d at 26.} This approach may be considered an acceptance of that construction of the "Tate Letter," one paragraph notwithstanding, which declares that the judiciary is bound by the Department's determination since it proceeds directly from the preeminence of the executive branch in matters of foreign affairs. Two of the claimants argued that the Department's suggestion of immunity had been issued in violation of the "Tate Letter" doctrine. In response the Solicitor General filed a Memorandum for the United States in which he proscribed the role of the State Department in light of that 1952 pronouncement:

That letter does set forth the considerations which the Department will take into 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. Here, the State Department has, in fact, recognized Cuba's claim to immunity, after taking into account all pertinent factors.\footnote{Memorandum for the United States in Opposition [to Application for Stay Filed by James Rich and Walter Precha] in 1 INT'L LEGAL MAT'LS 276, 288 (1962) (emphasis added).}

It should be noted that the vessel in this case was performing a totally commercial act; and yet the State Department, possibly influenced by then-existing strained international relations, accorded at least substantial dignity in 1961 to the immunity request of Castro's Cuba.\footnote{That such dignity was accorded may be explained by a consideration of prevailing foreign policy notions. Cuba had just agreed to release a hijacked United States airplane after the American government agreed to grant similar treatment to Cuban property. 48 DEP'T STATE BULL. 407 (1961). In a 1964 case the Supreme Court held that Cuban confiscation of property owned by American citizens had created valid title by virtue of the Act of State Doctrine. Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964). It has been said, however, that denial by the government of Cuba of fundamental rights to the Cuban people might well have raised the question whether the act of the Cuban government should be taken as the act of the Cuban people. C. FENWICK, supra note 30, at 25. Fenwick discusses the effect which a breaking off of relations with a foreign government can have upon judicial decisions. Fenwick further notes that the Sabbatino case has been widely criticized by jurists. Id. at 26 n.7.}
It was not until 1964 that the restrictive theory enunciated in the "Tate Letter" acquired concrete guidelines. In the case of *Victory Transport Inc. v. Comisaria General de Abasterimientos y Transportes*, decided by the Second Circuit Court of Appeals, the appellee instituted proceedings under the United States Arbitration Act. A branch of the Spanish Ministry of Commerce had chartered the S.S. Hudson from its owner, the appellee, to transport a cargo of wheat from Alabama to a Spanish port. The action was initiated when appellant failed to pay for damages, allegedly due to an unsafe port, and refused to submit the dispute to arbitration. After a brief review of the development of the sovereign immunity doctrine, from its origin in an era in which kings could do no wrong to the growing concern of some modern writers who question the validity of absolute immunity, the court reiterated the policy statement in the "Tate Letter." As to the oft-proclaimed rationale behind the substantive approach of absolute immunity, the court said that "[i]t makes no sense for the courts to deny a litigant his day in court and to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicated it will not be embarrassed." Recognizing that an immunity claim could be presented properly in two ways, the court stated that in this case no suggestion had been received from the State Department. It thus became the task of the court to decide for itself "whether it is the established policy of the State Department to recognize claims of immunity of this type."

The Second Circuit lamented that the "Tate Letter" offered no precise guidelines for differentiating between public and private acts. The court recognized that in making the distinction some courts had looked to the nature of the transaction, while others had looked to its purpose, and that both criteria had been found to be unsatisfactory by the commentators. The Second Circuit considered as significant the Department's failure or refusal to suggest immunity, and thus felt disposed to deny an immunity claim not "recognized and allowed" by the Department unless the activity plainly fell within one of the categories of strictly political or public acts. According to the *Victory Transport* court, such acts should generally be limited to the following categories: (1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity and (5) public loans. The court further

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111 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
113 336 F.2d at 358.
114 Id. The following phraseology was employed to explain the acceptable procedure:

The foreign sovereign may request its claim of immunity be recognized by the State Department, which will normally present its suggestion to the court through the Attorney General or some law officer acting under his directions. Alternatively, the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity directly to the court.

Id.

115 Id. at 359.
116 Id.
advised that if the executive branch thinks these guidelines too limited in certain cases, it could act affirmatively and file a suggestion of immunity. This advice would seem to be in keeping with Mr. Justice Frankfurter's concurring opinion in *Hoffman*, in which he noted that responsibility for the conduct of foreign relations should be placed where the power lies—the executive branch—and that the courts should be permitted to enforce the regular judicial processes.\[^{16}\]

Looking to the facts in *Victory Transport*, the Second Circuit found the activity to be more private or commercial than public. The inclusion of an arbitration clause in the contract was of particular significance in this decision.\[^{16}\] The court also noted that maritime transport action had been included among those commercial activities specifically mentioned in recent American treaties restricting sovereign immunity.\[^{17}\] Since the appellant did not claim that the cargo of wheat was destined for the public services of Spain, the court presumed that the wheat would be resold to Spanish nationals; whether the Spanish Ministry lost money or made a profit was deemed irrelevant in making the determination. The Second Circuit found support for its decision in the *Republic of Korea* case where the free distribution of a cargo of rice during the Korean War was found to be an act *jure gestionis*: "If the wartime transportation of rice to civilian and military personnel is not an act *jure imperii*, a fortiorari the peacetime transportation of wheat for presumptive resale is not an act *jure imperii*."\[^{18}\] Thus, the court retained in personam jurisdiction to enter the order below compelling arbitration.\[^{18}\]

In a case decided shortly thereafter, *Petrol Shipping Corp. v. The Kingdom of Greece*,\[^{19}\] the Second Circuit held its *Victory Transport* decision to be

\[^{16}\]Republic of Mexico *v.* Hoffman, 324 U.S. 30, 42 (1945) (concurring opinion).

\[^{17}\]The court quoted from a 1957 decision by a French court:

A contract relating to maritime transport is a private contract where the owner merely puts his ship and the ship's crew at the disposal of the State and does not take a direct part in the performance of the public service undertaken by the State in the latter's capacity as a charterer. ... The insertion of the arbitration clause underlies the intention of the parties to make their agreement subject to private law.


\[^{18}\]A typical provision in a United States treaty with Israel was cited as an example. 336 F.2d at 361 n.15. The court noted that the 1926 Brussels Convention was the first major international attempt to restrict sovereign immunity; that agreement, signed but never ratified by Spain, denied immunity to all maritime governmental activity, except vessels exclusively in noncommercial services. Id. at 361.

\[^{19}\]Id. at 362 (footnote omitted).

\[^{18}\]The Second Circuit stated that by agreeing to arbitrate in New York, where the United States Arbitration Act made such agreements specifically enforceable, the Comisaria General was deemed to have consented to the jurisdiction of that court which could compel the arbitration proceeding. Cf. Hamilton Life Ins. Co. *v.* Republic Nat'l Life Ins. Co., 291 F. Supp. 225, 234 (S.D.N.Y. 1968), *aff'd* 408 F.2d 606 (1969) (agreement to arbitrate was likewise held to constitute submission to jurisdiction under the Federal Arbitration Act).

\[^{19}\]360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966). The ultimate disposition of this case climaxed a very interesting series of appeals, rehearings, and remands. After Petrol petitioned for an
controlling. Petrol, owner of the tanker Atlantis, sought to compel the foreign sovereign to proceed to arbitration pursuant to the terms of a commercial agreement. Petrol had agreed in the charter party to transport grain acquired under an agreement between the United States and Greek governments to a port in Greece. The Kingdom of Greece disclaimed responsibility for damage to the vessel which allegedly occurred due to an unsafe berth in the Greek port, and thereafter would not agree to arbitrate the dispute. In the final disposition of the case, the Second Circuit quoted in part from an amicus curiae brief submitted by the Justice Department in the rehearing en banc:

Only after . . . jurisdiction is acquired does the sovereign immunity defense property [sic] come into consideration. Instead of being a "jurisdictional" matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction properly acquired. 171

After satisfying itself that the requirements for jurisdiction were satisfied by virtue of the arbitration clause and service of process, the court disposed of the sovereign immunity claim very simply. On the question of immunity there was only one point of distinction between the instant situation and that in Victory Transport. In that prior case no executive advice had been given to the court whereas in the instant case the United States Department of State, in a letter to the Greek Ambassador, had declined to recognize and allow the claim of immunity on the ground that the matter was jure gestionis. 172 Thus, relying on

order to compel arbitration, Greece submitted a claim of immunity directly to the district court. The immunity claim was upheld and the petition to compel arbitration was denied. On appeal, the denial of the petition was affirmed by a panel of the Second Circuit. Petrol Shipping Corp. v. The Kingdom of Greece, 326 F.2d 117 (2d Cir.), vacated, 332 F.2d 370 (1964). Judge Clark, dissenting from that decision, suggested that the matter should be remanded and the position of the State Department ascertained. Id. at 118 (dissenting opinion). On a rehearing en banc, the Department of Justice submitted an amicus curiae brief which asserted that sovereign immunity does not present a jurisdictional defect in the same sense that other inadequacies might, but rather that it is a ground upon which jurisdiction may be properly relinquished. Petrol Shipping Corp. v. The Kingdom of Greece, 332 F.2d 370 (2d Cir. 1964). The matter was then remanded to the district court for further development of the facts. Before the court heard the case on remand, a panel of the Second Circuit handed down the Victory Transport decision. On remand the district court then refused to accept the plea of immunity, relying on Victory Transport, and ordered the parties to proceed to arbitration. On reappeal, this time by the sovereign, the dismissal of the sovereign's immunity claim was affirmed. Petrol Shipping Corp. v. The Kingdom of Greece, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966).

171360 F.2d at 106.

172In Petrol Shipping the parties entered into a stipulation in lieu of a hearing, and introduced the charter party and documents of correspondence with the State Department. These documents included the Greek Ambassador's request to the Department for recognition of the immunity claim, petitioner's request for the Department to decline that ambassador's request, the reply to the foreign ambassador in which the Department declined to recognize the sovereign immunity claim on the ground that the matter was jure gestionis, and the reply to petitioner to the effect that the Department had declined to intervene.
its decision in *Victory Transport*, the Second Circuit affirmed the district court's order to arbitrate.\(^{173}\)

In both the *Petrol Shipping* and *Victory Transport* cases the plaintiffs were able to satisfy the jurisdictional requisites by including in the commercial agreements a clause which provided for arbitration in New York and by thereafter instituting actions under the United States Arbitration Act. This technique, employed in later cases, was an effort to avoid a problem which had not presented itself in many prior factual situations. Jurisdiction was easily acquired in most Nineteenth Century cases by simply attaching the property of the foreign sovereign-defendant, as in the case of a vessel which enters an American port. However, in cases like *Petrol Shipping*, for example, the plaintiff was unable to effect attachment of the sovereign's property, and in personam jurisdiction was acquired by means of the arbitration clause and an order to compel arbitration. Thus, due to the impossibility of effecting in rem jurisdiction, businessmen sought to protect themselves from the jurisdictional inability to settle disputes in courts of law by bargaining for arbitration clauses in commercial contracts.

The majority and dissenting opinions in the 1966 case of *Chemical Natural Resources, Inc. v. Republic of Venezuela*\(^{174}\) together provide an interesting judicial examination of the present status of the doctrine of sovereign immunity. Plaintiffs, a Delaware corporation and its subsidiary, entered into contracts with a department of the Venezuelan government under which they agreed to construct facilities for converting steam into electrical power which would then be resold to the defendant-sovereign. The Republic of Venezuela subsequently cancelled the contract and confiscated plaintiff's property, including the mineral rights in a Venezuelan municipality. The plaintiffs commenced an action of assumpsit by filing a writ of foreign attachment against a vessel in the port of Philadelphia alleged to be the property of the Republic of Venezuela. At the request of the defendant-sovereign the United States Department of State, acting through the United States Attorney for the Eastern District of Pennsylvania, filed a suggestion of immunity which included a prayer to the court to dismiss the action.\(^{175}\) When the lower court entered an order overruling its motion to dismiss, the foreign sovereign appealed to the Supreme Court of Pennsylvania to challenge the jurisdiction of the lower court and to petition for mandamus and for a writ of prohibition. At the outset the court declared that the challenge to the lower court's jurisdiction could not be sustained since, irrespective of whether sovereign immunity is a defense, that court had jurisdiction of the cause of action by virtue of its jurisdiction over and power to inquire into actions of trespass. The court stated that “Sovereign Immunity is

\(^{173}\)360 F.2d at 111.


\(^{175}\)The State Department has been criticized in this case for recommending immunity without stating its reasons and without indicating whether the determination proceeded upon a “legal” or more subtle political basis. See Note, *Sovereign Immunity*, 8 *Harv. Int'l L.J.* 388 (1967).
in the nature of an affirmative defense; (a) it does not go to jurisdiction and (b) it can be waived. Referring to the sovereign immunity doctrine as a "widely accepted national and international diplomatic policy," the court set forth its opinion of the present status of that rule as follows:

In order to preserve this policy of Sovereign Immunity from conflict, confusion, and erosion, and to prevent a breach of friendly relations or a severance of diplomatic relations or a possible war with a foreign nation, the Supreme Court of the United States has held that in the realm of Foreign Relations or Foreign Affairs, a determination of Sovereign Immunity by the Executive Branch of our Government, namely, the State Department, when conveyed to a court through proper channels or officials, is—in the absence of waiver or consent—binding and conclusive upon all our Courts... no matter how unwise or, in a particular case how unfair or unjust the Department's determination appears to be (a) to injured American citizens and (b) to vast numbers of the American people and (c) to our Courts...

In dismissing the complaint the court noted the "cannot control the courts" language in the "Tate Letter," but then declared that irrespective of its clear meaning the Department had silently abandoned that revised policy and had apparently instituted instead a case by case immunity policy. The majority opinion therefore concluded that: (1) the question of whether sovereign immunity should be granted is a matter for determination in the first instance by the executive branch, namely, the State Department; (2) such determination would depend in each case upon (a) the foreign and diplomatic relations existing at the time between the United States and the particular foreign sovereign, and (b) the best interests of the United States at the particular time; and (3) if and when the Department's determination is made and properly presented to the court, that decision is binding upon the court.

In his dissenting opinion, after commenting upon the nature of the acts which gave rise to the cause of action, Judge Musmanno characterized Venezuela's subsequent request for sovereign immunity as an "effrontery as bold as its order of confiscation," amounting to a flagrant violation of the property rights of American citizens who had been urged to invest in Latin America in the interest of the Good Neighbor Policy. Musmanno said that although the majority had declared itself helpless in light of the executive opinion, the Department, which they seemed to consider infallible, had specifically denied infallibility in the

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420 Pa. at 143, 215 A.2d at 867.
Id. at 147, 215 A.2d at 869.
Id. at 159, 215 A.2d at 875-76.
Id. The court indicated that in reaching its conclusion it had relied heavily upon the interpretation given the "Tate Letter" doctrine by the decisions in Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945), Republic of Mexico v. Hoffman, 324, U.S. 30 (1945), Ex parte Peru, 318 U.S. 578 (1943), and the opinion submitted by the Solicitor General in Rich v. Naviera Vacuba, 295 F.2d 24 (4th Cir. 1961).
420 Pa. at 173, 215 A.2d at 883.
"Tate Letter." Judge Musmanno stated rather emphatically that "to the extent that sovereign immunity exists, it is a creature of the Courts, not the Executive Department of our government. And what the Courts have created they can take away." Thus, he considered the opinion of the court to be based on an erroneous concept of law: that once the Department suggests immunity the courts are conclusively bound to adhere to such determination. Nor did he consider Peru, Stone Engineering, or Rich to be controlling.

Judge Musmanno then rendered an interesting summary of the historical preface to the doctrine of sovereign immunity in which he stressed movement toward greater governmental responsibility. He concluded by asserting his attitude with respect to the realities of the immunity doctrine:

The sovereign immunity doctrine, with the exception clearly spelled out in this opinion, is no longer a healthy manifestation of society. It is, in fact, an excrescenta of the body of the law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

In a more recent case considered twice by the courts, Pan American Tankers Corporation v. Republic of Vietnam, the guidelines enunciated in Victory
Transport were treated with approval. In the first Pan Am case, which dealt primarily with the proper procedural means of presenting an immunity suggestion, the defendant-foreign sovereign appeared specially to oppose the arbitration motion on grounds of sovereign immunity. Stating that it intended to petition the State Department for an immunity suggestion, the Republic of Vietnam requested that the motion be held in abeyance pending receipt of such suggestion. On the other hand, the plaintiffs, owners and operators of three American flag vessels, urged the court itself to request instruction from the State Department. The district court declined to accept either of these approaches. In refusing to hold the motion in abeyance, the court stated that "there is no guarantee that the Department of State will make any suggestion in this case, but may leave the matter completely to the Court—with the result of nothing accomplished but harmful delay." Since the issue had been presented to the court in a proper manner—asserted by a claimant directly to the court—the court felt it to be irrelevant that the foreign sovereign had expressed an intention to proceed diplomacy as well. As to whether it should petition the Department for a suggestion, the court said:

It would not be appropriate for the Court to take the initiative in such matters, except when it invites the Government to act as amicus curiae and express its position. The suggestion of the Department of State in these matters is far more than an amicus brief; and (at least when representations have gone through diplomatic channels) such a suggestion would apparently be conclusive upon the courts. The Court, therefore, should not adopt a procedure that may prejudice one side or the other in the presentation of its views.

Relying on the Petrol Shipping and Victory Transport cases, the court concluded that it would be imprudent to decide the issue presented directly to the court on the basis of the meager record. For example, there was no evidence that the immunity plea had been entered by one who had the authority to act for the Republic of Vietnam, or that the two corporate defendants were creatures of that sovereign. The court was thus compelled to reserve decision on the motion to compel arbitration pending determination of the immunity issue.

In 1969 the arbitration motion was again before the court. The defendant-sovereign contended it was entitled to immunity since its role in the transaction

\[168\text{Id. at 49.}\]

\[169\text{Id. at 51.}\]

\[167\text{Id. (citations omitted). The court said that when the sovereign makes the suggestion directly to the court it is in the nature of a defense, and the claimant has the burden of proving its privilege of immunity. Perhaps this is one of the "different results flowing from the procedure employed by the sovereign," to which the Government referred in its amicus brief in Petrol Shipping. Id. at 52. See the discussion of Petrol Shipping, id. at 51-52.}\]

\[166\text{The Pan Am court expressed its agreement with the Petrol Shipping statement that "sovereign immunity is not a jurisdictional defect but rather a substantive defense like incapacity or incompetency." Id. at 52.}\]

Sovereign immunity was primarily that of governmental supervisor over the expenditure of foreign exchange, a role which involved acts allegedly political in nature. Plaintiff contended the involvement went beyond mere political acts into the realm of commercial activity. After reciting the guidelines set out in Victory Transport, the court determined that the instant act was not one of foreign exchange control, as urged by defendant, and therefore was not one of the exempt transactions labelled by the court in Victory Transport as "an internal administrative activity." The critical inquiry went to the character of the conduct which generated the lawsuit. That is, plaintiffs did not complain of any activity involving foreign exchange control; rather they sought to remedy an alleged breach of a commercial contract which would be decided by the arbitrator, should the motion issue. The district court therefore declined to accept the plea of sovereign immunity.

"Plaintiffs also contended "that the central focus of the [court's] inquiry must be the essential nature of the transaction out of which the controversy arose, and that if it should turn out to be commercial no immunity should be granted regardless of the extent of governmental involvement." Id. at 363 (emphasis added).

"Even in the absence of such a determination, the court asserted that the foreign sovereign would fail to sustain the burden of proof. According to the court, the documentary evidence submitted tended only to show an active participation in all aspects of the cement transaction. However, the affidavit of Bui Diem, Vietnam Ambassador to the United States, denied that the Republic of Vietnam was a contracting party and asserted the contentions later raised in court: that the sovereign acted only to control the expenditure of foreign exchange.

The court's disposition of the issue presented seems to be in accord with section 72 of the Restatement (Second) of the Foreign Relations Law. This section states the general rule in two parts, basing the distinction on the manner in which the suggestion was made:

(1) Under the law of the United States, an objection based on the rule of immunity stated in § 65, if made on behalf of a foreign state by means of a suggestion from the executive branch of the government of the United States as indicated in § 71(1)(a), is conclusive as to issues determined by executive action within the exclusive constitutional competence of the executive branch of the government and as to other issues directly affecting the conduct of foreign relations. As to all other issues, such a suggestion will be given great weight.

(2) Under the law of the United States, an objection made by the government of a foreign state through its accredited diplomatic representative as indicated in § 71(1)(b) raises an issue for disposition by the court or other enforcing agency upon the basis of proof.

Restatement (Second) of Foreign Relations Law § 72 (1961). The court, in the absence of a suggestion of the kind referred to in section 71(a)(1), treated the suggestion filed directly in court as raising an issue for disposition in due course. This required the foreign sovereign to carry the burden of proof in order to effectively plead sovereign immunity as a defense. That burden had not, as yet, been carried by the Republic of Vietnam.

Likewise, an illustration to section 72(2) cites The Navemar, where the court required the foreign sovereign to prove the allegations in a suggestion submitted by its foreign Ambassador as a claimant in court.

Section 72(1) would also seem to be in general accord with other recent decisions. See, e.g., Rich v. Naviera Vacuba, 295 F.2d 24 (4th Cir. 1961).
The restrictive approach to the substantive law of sovereign immunity was again reaffirmed in *Amkor Corporation v. Bank of Korea.* The fiscal arm of the Korean government, the Bank of Korea, had solicited and accepted plaintiff's bid for construction of a caustic soda plant to be built for a private Korean corporation. The defendant was acting as an agent of the foreign sovereign pursuant to a program of economic cooperation between the Korean and United States governments. In its communication to the court the State Department had asserted:

The essence of the transaction, as alleged, is a simple contract for purchase of commercial articles on behalf of a commercial enterprise. The fact that the Bank of Korea was acting pursuant to an agreement between the Government of the United States and the Government of the Republic of Korea, or that it is an official arm of the Republic of Korea, does not alter the commercial nature of the transaction. The policy expressed in the Tate Letter focusses upon the nature of the transaction and not upon the character of the government agency involved or upon its reasons for engaging in a transaction.

The Department's refusal to suggest immunity was held to be binding and therefore defendant's motion to dismiss on the grounds of sovereign immunity was denied.

After these recent cases it appears that the restrictive approach to the question of sovereign immunity is entrenched. And yet one notable point of confusion persists: when the immunity claim is asserted directly in court, or when the executive branch is silent (as it was in the *Pan Am* case), what shall the courts look to in determining the question? Should the courts base their opinions upon prior decisions in cases arising out of the same facts, or upon past political pronouncements in similar situations? It cannot be said that the result would be the same regardless of the approach chosen. Political developments, such as wars or other military conflicts, or economic fluctuations, such as depressions, would necessarily cause past executive pronouncements to be varied even when factual situations seem identical.

Vietnam had in fact accepted the "Arbitration Clause" as part of the contract. Therefore, the court held its order in abeyance while directing the defendant to state all grounds for objection.


191Id. at 144.

191However, the court may have indicated that, in the absence of a statement by the Department, it would have applied the restrictive theory and found a similar lack of immunity, when it said:

In any event, it is plain that the activities allegedly engaged in by defendant and giving rise to this dispute are private and commercial in nature rather than public or political acts and, therefore, applying the restrictive theory of sovereign immunity, defendant is not entitled to immunity here.

*Id.* Does this therefore mean that when the Department is silent the court will look to a purely judicial interpretation of the question, devoid of past executive policy? Since the judicial approach would seem to have been merged with the executive approach in the restrictive theory, perhaps the question cannot, and need not, be answered.
III. Conclusion

During the past two centuries the United States has changed from an underdeveloped but emerging colonial state to a world leader. This dramatic change has caused fluctuations and occasional reversals of government policy. The American legal system has experienced similar fluctuations. The ancient doctrine of sovereign immunity, one facet of that system, has undergone a metamorphosis which necessarily parallels that of evolving United States foreign policy.

In general, foreign policy embodies and reflects those principles which have arisen from a nation’s history, ideologies, power potential and cultural predilections. International economics is a vital element of United States foreign policy, however, and this must not be overlooked. Also, international law has an impact upon foreign policy, for it is the general recognition of reasonable rules of conduct that gives a desirable degree of certainty in foreign affairs. International law is workable today only because governments are willing to subordinate their sovereign rights to the rules and customs which comprise international law. The application of the doctrine of sovereign immunity, one of the rules of international law, clearly influences the character of relations among states as it involves the very essence of international affairs—the extent to which a state will relinquish its sovereign rights in order to permit the judicial process to operate.

A. The Substantive Aspect of Sovereign Immunity

It is clear that the restrictive rule of sovereign immunity currently prevails in the United States. The executive branch has recommended and the judiciary

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197 In discussing the character and scope of United States foreign policy, Charles Fenwick has defined that concept as necessarily involving reorientation and change:

In a broad sense foreign policy may be defined tentatively as the attitude the United States takes in its relations to and with other countries which it is believed will best assure our national safety and promote our national welfare. How to keep our country secure; how to protect our political, economic and social interests, and how to do so within the traditions of moral idealism that have come down to us from the beginning of our history,—a vast program, involving major and minor interests of the widest variety. A policy suggests a certain consistency between what we are doing today and what we have been doing in the past. But conditions change, and obviously the changes must be taken into account when they are fundamental.

C. Fenwick, supra note 30, at 1.


199 The difficulty in isolating economic policy has been recognized:

In diplomatic and legal questions the actors involved are obviously the states themselves, but in international economic problems (unless these are a state monopoly as in Russia) there are also individuals, and their interests and trade with one another across state frontiers, who must be considered.

F. Hartmann, supra note 8, at 131. It is apparent that the formulation of foreign policy notions, for example mercantilism, is the product of both political and economic pressures.


201 1970 Dep’t State Bull. 984 (1952).
approved in applications this more limited substantive approach. The standard generally applied to determine if immunity should be granted under the restrictive rule is whether the foreign sovereign has undertaken a governmental, as opposed to a commercial, activity. The distinction has been expressed in terms of public acts (acts *jure imperii*) and private acts (acts *jure gestionis*). In order to differentiate between the two, some writers and courts have looked to the "nature of the transactions," while others have scrutinized the "purpose of the transaction." Whatever the criteria, the restrictive rule holds a foreign sovereign accountable for his actions, unless overriding foreign policy considerations exist. When compared with the older practice of absolute immunity, the present rule appears to advance the concept of "justice," for the private activities of all persons, sovereigns notwithstanding, are subject to review in a public forum.

The most popular rationale for the immunity doctrine is that the notion of comity between states requires that every nation accord due respect to all other sovereigns. Since effective foreign policy depends upon harmonious international relations, it may be argued that foreign affairs are less strained if immunity is granted absolutely. The traditional rule of absolute immunity provides that once a defendant establishes its sovereignty, regardless of the circumstances, immunity is proper. On the other hand, a more limited rule is entirely appropriate today. Contemporary rules of law recognize that if a government acts in a non-governmental fashion, it should compensate damaged individuals.

At the very root of the doctrine of sovereign immunity is an apparent conflict between this proposition that one should be responsible for any damages one causes, and the notion that all sovereigns are supreme. The traditional approach generally decides the conflict in favor of the latter notion, whereas an approach that would never allow immunity would not recognize such supremacy. The contemporary restrictive approach seems to present a compromise between

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23*26 DEP'T STATE BULL. 984 (1952).

24Under this approach, a public or governmental activity is defined as one which is not performed by a private individual. At times use of this criterion has produced results criticized as inequitable. See J. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933).

25Under the "purpose of the transaction" approach immunity is proper only if the object of the enterprise is public in nature; however, theoretically all sovereigns act only for a valid purpose. The use of this approach has resulted in inconsistent decisions. In *Victory Transport* the Second Circuit commented that "[f]unctionally the criterion is purely arbitrary and necessarily involves the court in projecting personal notions about the proper realm of state functioning." 336 F.2d at 359.

26In the case of Dexter & Carpenter, Inc. v. Kungleg Jarnvagsstyrelsen, 43 F.2d 705 (1930), *cert. denied*, 282 U.S. 896 (1931), the court did not permit execution of the judgment. Yet, even after such refusal by the court, it is noted that in 1933 the Swedish government made settlement in the amount of $150,000. 2 G. HACKWORTH, supra note 79, at 480. In light of this settlement can it be doubted that the presentation of a dispute in a public forum, even where the resulting judgment cannot be enforced, does not at least have some value?
these two opposing ideas. Thus, just as the right to contract freely is limited by certain countervailing rules, such as those against usury and unconscientability, likewise the right to summon another into a public forum must be limited in extreme situations. Further, the supremacy which all sovereigns enjoy must be flexible if sovereigns are to deal with each other in a regulated manner. Foreign relations are not harmed by the current rule of sovereign immunity if all nations are willing to relinquish their sovereign rights under certain circumstances. The present disposition of the substantive aspect of the doctrine clearly meets the demands of an effective United States foreign policy which ultimately must yield to the merits of compromise in certain situations.

Since international economics is an integral part of United States foreign policy, the application of the sovereign immunity doctrine also has an effect upon prevailing economic policy considerations. Contemporary American governmental structures have granted due respect to international trade. The Twentieth Century has witnessed a proliferation of state-trading practices with the economic policy of the Soviet bloc being the most obvious example. Conversely, the United States has continually sought to encourage free enterprise in the international marketplace. Theoretically, limiting devices such as tariffs, import duties, and quota systems are utilized only when necessary to benefit the whole of the American economy.

The restrictive approach is practicable today because its effect is consonant with both the conduct of foreign affairs and American trade policy. Neither a grant nor denial of immunity under the restrictive approach should disrupt prevailing American foreign relations or trade structures. It is not submitted that the present substantive rule of sovereign immunity should be enshrined as a steadfast rule. It is enough that it is workable today. If future United States foreign policy should necessitate a change in the doctrine, even a return to absolute immunity might be needed. Likewise, a movement toward absolute non-immunity eventually might become appropriate.

B. The Procedural Aspect of Sovereign Immunity

An equally important facet of the doctrine of immunity is the procedural aspect—the formal means of presenting the defense of immunity to the courts.

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Of practical concern to one seeking to engage in foreign trade is the ability to operate efficiently and effectively within the framework of the American financial system. This framework includes the Treasury, the Federal Reserve System and private commercial banks. In general, this is said to be a free system in that it imposes few barriers to the international movement of funds. See D. Watson, Economic Policy—Business and Government 702-13 (1960). It is also necessary to understand the workings of a number of international organizations such as the International Monetary Fund, the International Bank for Reconstruction and Development, and the International Finance Corporation. Id.

The present administration's response to Japanese textile makers, who glutted the domestic textile market in early 1970, provides recent evidence that the United States government will engage in protectionist practices when the inflow of foreign-produced goods tends to cause substantial injury to domestic merchants. See Business Week, Mar. 4, 1970, at 117-18.
It should be understood that a court which grants an immunity claim has initial jurisdiction over the controversy; when the defense is recognized the court is said to have relinquished that jurisdiction. The litigant may present a claim of immunity in either of two ways: the foreign sovereign may appear as a claimant and present the issue directly to the court, or the sovereign may request that the United States Department of State file a suggestion of immunity with the court, or it may do both. The courts accord the latter suggestion a conclusive effect, under the rationale that the judiciary should not render a decision which could prevent this executive branch from carrying out its foreign affairs duties. When a sovereign presents a claim directly in court, a determination is rendered taking into account past decisions with similar factual situations.

As previously indicated, this responsibility for creating and effecting foreign policy is not within the realm of the judiciary. Instead, the United States Constitution has specifically delegated such responsibility to the executive and legislative branches, with the greatest power residing in the former. From the specific grants of power to the President, other executive powers have been derived. Thus, since the Executive may appoint ambassadors, he possesses the power to pursue diplomatic relations with foreign states. By virtue of the President’s position as the head of a sovereign state, neither the principle of “reserved rights,” nor the separation of powers may limit the executive branch in its conduct of international relations.

Although the doctrine of sovereign immunity is given judicial application and is jurisprudential in theory, it is impossible to characterize as totally “legal” any rule which has an impact upon diplomatic relations between states. To disregard that the doctrine of sovereign immunity has an impact upon diplomatic relations and therefore permit the responsibility for applying the doctrine to rest in the hands of the judiciary is not wise. Such an approach would leave the application of a vital instrument of foreign affairs to those who have had little experience with sophisticated contemporary foreign policies.

200 U.S. Const. arts. I, II.
201 Id. amend. X.
212 However, it has been argued that the approach should be a totally legal one, rather than wholly or even partially political. See, e.g., Comment, Restrictive Sovereign Immunity, the State Department, and The Courts, 62 Nw. U.L. Rev. 397 (1967). There the writer states that the disposition of the doctrine has been political for too long, and that the American development in this area has been slow when compared with that of other international states. The writer would, however, recognize situations in which it is imperative that even commercial activities of a foreign sovereign be held immune; the circumstances of the Rich case were cited. Contrariwise, some commentators have taken the totally political view, arguing that properly such decisions should be made solely by the executive branch.

213 Some commentators argue that in refusing to countermand an executive determination the judiciary has abdicated its traditional and constitutional responsibility. See, e.g., Cardozo, Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper, 48 Cornell L.Q. 461 (1963); Jessup, supra note 130. Conversely, they accuse the executive branch
recent years the courts themselves have recognized the special expertise possessed by the Department of State. 14

During the 1940's the American judiciary expressed the need to clarify the doctrine of sovereign immunity. In 1952 the executive branch responded with the "Tate Letter" 15 and more recently the courts have reciprocated by proposing specific guidelines. 216 The present procedural disposition of the doctrine is more uniform and less uncertain than at any time since its introduction in The Schooner Exchange. 217

If the sovereign appears directly to present its claim, or is pressed into this alternative because the Department has declined to act, the burden of proving immunity rests upon the claimant. Since sovereign immunity is a defense to be pleaded and argued just as any other, the onus is upon the sovereign both to allege and to prove such elements as are sufficient to take the situation within the restrictive rule of substantive law.

Once the interrelationship between the executive and judicial branches is recognized with respect to application of the doctrine, it follows that the Department must be accorded wide discretion. The current disposition of the procedural aspect of the doctrine of sovereign immunity is workable today. The execution of foreign policy is not hampered but rather is facilitated if the Department is permitted to act when compelling circumstances so dictate. It may be argued that it is manifestly unconstitutional and artless to place a rule of law in the hands of the executive branch. It is argued that whenever a court of law is not permitted to decide an otherwise justiciable controversy, a manifest injustice is done both to the instant claimant and to society in general. 218 Perhaps this "injustice" is a danger built into any rule of international law, a danger which must persist until such time as there are no more "sovereigns,"

of usurping the judicial power. These critics contend that international relations will be strengthened if courts refuse to grant immunity to foreign sovereigns and decide all controversies properly presented. The proposition underlying their contentions is that the "rule of law" demands enforcement if the concept of justice is to be effectuated.

26 It is significant to note the important role which foreign affairs diplomacy has played in the last two decades. International tensions have been high since the early fifties; a cold war existence has been aggravated by subversive activities in developing states, military confrontations, the space race, the missile crisis and international trade competition. See A. Saye & M. Pound, Principles of American Government 239 (1966). In dealing with these tensions there has been increased movement in the direction of diplomatic initiative at the conference table. The diplomatic burden falls upon the State Department since it is that executive department's duty to formulate and execute foreign policy in its day to day operations. Id. at 306.

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26 DEP'T STATE BULL. 984 (1952).

26 See Victory Transport v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (1964), cert. denied, 381 U.S. 934 (1965), which prescribed five types of activities which should be considered governmental.

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

26 However, it is not at all apparent that the doctrine of sovereign immunity causes this to occur. It can just as easily be asserted that the principle of separation of powers demands that the judiciary refuse to indirectly regulate foreign affairs, an activity constitutionally reserved to other branches.
and conflicting rules of international law are replaced by one system of laws for all mankind.218

If the utility of executive opinion is to be maximized, immunity suggestions must reflect even the slightest policy changes.219 The executive branch must not couch its opinions in language which is susceptible to more than one construction. If policy reasons should demand that the Department suggest absolute liability, as envisioned by at least one noted commentator,220 such a determination probably would be binding and proper.

The interrelationship between the two branches when sovereign immunity questions arise will be effective only if the Department makes such policy changes known to the court. Likewise, if confusion should surround a particular aspect of sovereign immunity, so that departmental policy aims are affected, it is the duty of the State Department to issue an affirmative statement, as it did in the “Tate Letter.” If further definitional guidelines are required, the Department should not hesitate to make positive recommendations.221

The substantive and procedural aspects of the doctrine of sovereign immunity influence the execution of United States foreign policy. If the restrictive doctrine is compatible with contemporary policy dictates in the foreign policy arena, one may conclude that it is practicable and that in general, broad criticism of the doctrine is unwarranted. Critical comment will become both appropriate and necessary if some future application of the restrictive doctrine has a disruptive effect upon United States foreign policy.

J.W.R.

218See Note, supra note 141, where the writer suggests that the present solution is a relaxation of the rules governing immunity.

219Flexibility and the capacity to reverse directions is imperative when dealing with an instrument as delicate as American foreign policy. The executive branch must be cognizant of pressure applied by democratic citizens as well as by foreign states. Three percent of the United States population is Jewish, but politicians are aware of their pressure vis-à-vis the state of Israel. Every American President has supported the sovereignty of Israel, despite adverse pressure such as lobbying by the oil industry to encourage good relations with the Arab states. It is the pressure of this three percent of the population which has caused some to wonder, “Is there a Jewish Foreign Policy?” See TIME, Mar. 16, 1970, at 15.

220See note 79 supra.

221Recommendations were in fact solicited by the Second Circuit in Victory Transport. After prescribing the five types of activities which it considered governmental or public, the court stated:

Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement.

336 F.2d at 360.