SOVEREIGN IMMUNITY—THE STATE DEPARTMENT'S DECISION TO RECOGNIZE AND ALLOW THE CLAIM OF SOVEREIGN IMMUNITY IS BINDING UPON THE COURTS AND IS NOT SUBJECT TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

As a result of events surrounding the recent *coup d'etat* in Chile, plaintiffs[1] brought an action in the District Court for the Canal Zone for breach of contract[2] and conversion[3] against defendant Empresa Navegacion Mambisa,[4] a Cuban corporation. On October 2, 1973, the district court issued a writ attaching a Cuban vessel.[5] The Czechoslovak Ambassador, representing the interests of Cuba in the United States, requested the State Department to file a suggestion of immunity in the district court urging the immediate release of the vessel and dismissal of the action. Following established procedures[6] the State Department recognized and allowed the request for immunity,[7] and a suggestion of immunity was certified to the court.[8] In compliance with the

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[1]Plaintiffs were Industria Azucarera Nacional, S.A., and Compania de Refineria de Azucar de Vina del Mar, both Chilean Corporations.

[2]The breach of contract action arose from the failure of the M/V Playa Larga, owned by defendant, to completely unload its sugar cargo in Valparaiso, Chile on September 11. According to defendant, extreme danger caused the vessel to leave hurriedly. After leaving Chilean waters, the Playa Larga was strafed by Chilean Air Force planes and shelled by a Chilean destroyer. A second vessel, the M/V Marble Island, abandoned its voyage to Chile on September 12. Plaintiff Industria Azucarera Nacional, S.A. sued for breach of contract, claiming full payment for the sugar.

[3]The conversion action arose from the sudden departure of the Playa Larga from Valparaiso. It carried off four unloading cranes owned by plaintiff Compania de Refineria de Azucar de Vina del Mar. Plaintiffs' claims totaled more than $4 million.

[4]Empresa Navegacion Mambisa owned both vessels.

[5]The ship attached was the M/V Imias, also owned by the defendant.

[6]The hearing was before members of the Legal Advisor's Office. No presentation of testimony or evidence was permitted and no transcript was made at this hearing. *See* 64 AM. J. INT'L. L. 650 (1970).

[7]In a memorandum to the Attorney General of the United States, the Legal Advisor said in part:

> The Department recognizes and allows immunity of the M/V Imias from the jurisdiction of United States courts for the purpose of arrest, attachment, suit, or any other legal process in the above captioned action. The Department would be grateful to you if you would cause an appropriate suggestion of immunity to be filed with the United States District Court for the Canal Zone.

[8]The suggestion of immunity stated, in part:

> [The issue of immunity] arises in connection with a determination reached by the Executive Branch of the Government of the United States in the implementation of its foreign policy and in the conduct of its international relations, which determination should be given effect by this Court.

Plaintiffs' request for an appeal to the Secretary of State from this decision was denied. In stating why the appeal was denied, the Legal Advisor said:

> The Department's practice in sovereign immunity cases does not provide for an appeal, or any presentation by counsel, to the Secretary of State. The Department's decision has been taken, and, it is the Department's view that the public interest and United States foreign relations are best served by the prompt release of the vessel.

suggestion the district court granted defendant's motion to dismiss but stayed the order pending appeal.[9] Defendant petitioned the Fifth Circuit Court of Appeals for writ of mandamus and prohibition, seeking the dismissal of the action and the release of the vessel. *Held*, petition for writs of mandamus and prohibition granted. The State Department's decision to recognize and allow the claim of foreign sovereign immunity is binding on the courts, and no further review of that decision is dictated by the Administrative Procedure Act. *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

The doctrine that a foreign sovereign cannot be sued in the courts of the United States without its consent was firmly anchored in American jurisprudence by Chief Justice Marshall's landmark decision in *The Schooner Exchange v. M'Fadden*.[10] While this entrenched tenet has usually been justified on the basis of international comity or derived by implication "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign,"[11] the foundation, as Justice Frankfurter pointed out in *National City Bank v. Republic of China*,[12] is not an explicit constitutional provision; rather, it "rests on considerations of policy given legal sanction"[13] by the Supreme Court.

The primary consideration of policy given legal sanction by the Court has been the avoidance of embarassment to the executive branch in its conduct of foreign affairs by a court's exercise of jurisdiction over a foreign vessel.[14] In *Ex parte Peru*[15] the Supreme Court held that the State Department's decision to recognize immunity was a "conclusive determination" of that question[16] and thus foreclosing any further judicial discussion of this issue.[17] While in

[9]The district judge stated orally in court that he would defer the entry of the order for three days, and if the Plaintiffs posted a $25,000 bond, the court would stay the effectiveness of the order pending appeal.

[10]11 U.S. (7 Cranch.) 116 (1812). Marshall concluded:

> [T]he *Exchange* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, . . . must be considered as having come into the American territory under an implied promise that, while necessarily within it, . . . she should be exempt from the jurisdiction of the country . . . . [T]here seems to be a necessity for admitting that the fact [of immunity] might be disclosed to the court by the suggestion of the Attorney for the United States.

Id. at 147.

[11]National City Bank v. Republic of China, 348 U.S. 356, 362 (1955).

[12]348 U.S. 356 (1955).

[13]*Id.* at 359.

[14]Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *accord*, Ex Parte Peru, 318 U.S. 578, 588 (1943). In United States v. Lee, 106 U.S. 196 (1882), the Court said, "In [cases involving jurisdiction over foreign ships] the judicial department of this government follows the action of the political branch, and will not embarass the latter by assuming an antagonistic jurisdiction." *Id.* at 209.

[15]318 U.S. 578 (1943).

[16]*Id.* at 589.

[17]Isbrandsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971); Flota Maritima Browning de Cuba, S.A. v. M/V Ciudad, 335 F.2d 619, 623 (4th Cir. 1964); Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961). *See* Ex Parte Peru, 318 U.S. 578 (1943).

Compania Espanola de Navegacion Maritima v. The Navemar,[18] the Court by way of dictum said that "[i]f the claim [of sovereign immunity] is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion . . . ."[19]

Justification for judicial acquiescence has been founded on the constitutional principle of separation of power, the executive's need for secrecy in handling foreign affairs, and the "sovereign immunity" of the executive branch itself. The Court in *Oetjen v. Central Leather Co.*[20] recognized as a settled principle of law that questions arising out of the conduct of foreign relations are political in nature and could not be resolved by the judicial branch of government.[21] Using a separation of power analysis in *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*,[22] the Court held that " . . . final orders [which] embody Presidential discretion as to political matters [are] beyond the competence of the courts to adjudicate.[23] Although the Court in *Baker v. Carr*[24] rejected the view that every question touching upon foreign relations is necessarily a political question,[25] the criteria[26] used by the Court to define "political

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[18]303 U.S. 68 (1938).

[19]*Id.* at 74. If the State Department is silent on the issue of sovereign immunity, a court can resolve that question "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." Mexico v. Hoffman, 324 U.S. 30, 35 (1945). The failure or refusal of the executive branch to suggest immunity has been viewed as significant in the Court's refusal to recognize any claim of immunity; *e.g.*, National City Bank v. Republic of China, 348 U.S. 356, 360 (1955); Mexico v. Hoffman, 324 U.S. 30, 38 (1945); Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) ("[C]ourts 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 obligation to avoid embarrassing the State Department if that agency indicates it will not be embarrassed." *Id.* at 358. *Contra*, Berrizi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926) (the Court recognized the immunity of a merchant vessel owned by the Italian government, despite the State Department's refusal to recognize such immunity.)

[20]246 U.S. 297 (1918).

[21]*Id.* at 302. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634-35 (1818); Foster v. Nelson, 27 U.S. (2 Pet.) 253, 307, 309 (1829); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

[22]333 U.S. 103 (1948) [hereinafter Chicago & Southern Air Lines].

[23]*Id.* at 114. The Court also said:

> But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial . . . . They are delicate, complex, and involve large elements of prophecy . . . . They are decisions of a kind for which the judiciary has neither aptitude, facilities, nor responsibility . . . .

33 U.S. at 111.

[24]369 U.S. 186 (1962).

[25]*Id.* at 211.

[26]339 U.S. at 217. These criteria are:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
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> (2) a lack of judicially discoverable and manageable standards for resolving the question;

questions" recognized that courts should not second-guess the executive.[27]

The executive branch has always felt that a certain amount of secrecy was necessary in the conduct of foreign affairs.[28] Concerning the approval of an overseas air route by the President, the Supreme Court in *Chicago & Southern Air Lines*[29] declared: "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."[30] The expansive dicta[31] in *United States v. Curtiss-Wright Export Corp.*[32] is an indication of the Court's almost unquestioned acceptance of the need for secrecy in the conduct of foreign relations.

The third justification for judicial acquiescence often used by the courts is the "sovereign immunity" of the executive branch itself. Nineteenth century courts refused to review any executive action which involved an exercise of discretion.[33] The Court in *Decatur v. Paulding*[34] was of the belief that "[t]he interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but

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(3) the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion;

(4) the impossibility of the court acting without showing a lack of respect due coordinate branches of government;

(5) an unusual need for adherence to a political decision already made;

(6) the potentiality of embarassment from multifarious pronouncements by various departments on one question.

[27]The Court said, "The nonjusticiability of a political question is primarily a function of the separation of power." 369 U.S. at 210. Using the criteria listed *supra*, note 26, a suggestion of immunity by the State Department would clearly fall into the political question category.

[28]President Washington, in a statement often quoted by the courts, said in reply to a request by the House of Representatives to see the instructions, correspondence, and documents relating to the negotiation of the Jay Treaty:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

1 *Messages and Papers of the Presidents* 194 (1897).

[29]333 U.S. 103 (1948).

[30]*Id.* at 111. The Court has apparently assumed that information concerning the conduct of foreign affairs comes within the common law governmental privilege which has been found to exist with respect to state secrets. This privilege is beyond the scope of this note.

[31]United States v. Curtiss-Wright Export Co., 299 U.S. 304, 319-322 (1936).

[32]299 U.S. 304 (1936).

[33]Brashear v. Mason, 47 U.S. (6 How.) 92, 102 (1848); United States ex rel. Tucker v. Seamar, 58 U.S., (17 How.) 225, 230 (1855). The distinction between mere ministerial acts, for which a writ of mandamus would issue, and executive functions determined whether a court could review actions by the executive branch. United States ex rel. Goodrich v. Guthris, 58 U.S. (17 How.) 284, 304 (1855). Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838). *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 158 (1803).

[34]39 U.S. (14 Pet.) 497 (1840).

mischief."[35] But beginning with *American School of Magnetic Healing v. McAnnulty*[36] the nineteenth century presumption of unreviewability became a presumption of reviewability.[37] With the passage of the Administrative Procedure Act[38] in 1946, an agency action was made reviewable[39] "except to the extent that—(a) statutes preclude judicial review, or (b) agency action is committed to agency discretion by law."[40] In *Heikkila v. Barber*,[41] the Court said in dicta that "the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that [the APA] greatly expanded the availability of judicial review."[42] And in *Brownell v. We Shung*[43] it was said that "[u]nless made by clear language or supersedure the expanded mode of review granted by [the APA] cannot be modified."[44] However, the APA restricts this judicial review to questions of agency authority (constitutional and statutory), abuse of discretion, reasonable evaluation of the evidence, and proper procedure.[45] The Supreme Court in *Accardi v. Shaughnessy* stated that it was not reviewing and reversing the manner in which the Immigration Board's discretion was exercised, but rather the Court objected "to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations."[47]

The Fifth Circuit Court of Appeals in *Spacil v. Crowe*[48] was faced with the novel contention that under the APA the State Department's decision to recognize and allow immunity was subject to judicial review. The court stated the issue as "whether the presumption of review accorded most agency action obtains."[49] Their response was that separation of powers principles and the need for secrecy justified the continued adherence to the well-established doc-

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[35]*Id.* at 516.

[36]187 U.S. 94 (1902).

[37]For pre-A.P.A. decisions in favor of reviewability, *see* Dismuke v. U.S., 297 U.S. 167 (1936) (in the absence of an explicit statutory command to deny review, courts will review); Stark v. Wickard, 321 U.S. 288 (1944) (infringement of individual rights by unauthorized administrative action).

[38]Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970) (originally enacted by act of June 11, 1946, ch. 423, 60 Stat. 237.) [hereinafter the A.P.A.].

[39]A.P.A., 5 U.S.C. § 704 (1970).

[40]A.P.A., 5 U.S.C. § 701(a). However, § 706 permits courts to set aside agency action if found to be "arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law."

[41]345 U.S. 229 (1953).

[42]*Id.* at 232.

[43]352 U.S. 180 (1956).

[44]*Id.* at 185. *See* Marcello v. Bonos, 349 U.S. 302, 310 (1955); Shaughnessy v. Penreire, 349 U.S. 48 (1955).

[45]A.P.A., § 10(e), 5 U.S.C. § 706. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Pre-Fabs Transit Co. v. U.S., 306 F. Supp. 1247 (S.D. Ill. 1970).

[46]347 U.S. 260 (1954).

[47]*Id.* at 268. *See* Service v. Dulles 354 U.S. 363 (1957), (regulations validly prescribed by a governmental administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is discretionary in nature).

[48]489 F.2d 614 (5th Cir. 1974).

[49]*Id.* at 618.

trine of judicial noninterference when the State Department has recognized and allowed immunity.[50] Although the court reached the correct decision in light of the facts of this case, its opinion was unfortunately restrictive and could have an adverse effect on attempts by other litigants to gain review of State Department actions under the APA.

The court admitted that the State Department was subject to provisions of the APA,[51] but it refused to reach the merits of plaintiffs' argument that the State Department had seemingly ignored its own standards as announced in the Tate Letter.[52] The court instead felt that the State Department's recognition of immunity was a conclusive determination of the issue, precluding any further judicial inquiry into immunity or argument on the issue of reviewability.[53] In effect, then, the court really never reached the question of whether a decision by the State Department to grant sovereign immunity is reviewable under the APA.

The plaintiffs relied upon the APA as a vehicle to circumvent the long line of precedents rubber-stamping the State Department's recognition of immunity. There is much merit in the contention that, whatever the original justification for the absolute theory of sovereign immunity,[54] there is now substantial authority for applying a restrictive concept of sovereign immunity.[55] The courts should not accept the State Department's suggestion of immunity without question; rather, they should at least preliminarily examine the facts themselves to see if there was some justification for granting immunity.

Through the Tate Letter the State Department itself has recognized a restrictive theory of immunity. Immunity is to be recognized with regard to sovereign

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[50]*Id.* at 620-21.

[51]*Id.* at 618.

[52]*Id.* at 621, n.8. The letter announced that it would "hereafter be the department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant as sovereign immunity." *Letter of Acting Legal Advisor, Jack B. Tate, to Department of Justice*, 26 DEPT. STATE BULL. 98986 (1952) [hereinafter the *Tate Letter*].

[53]4 F.2d at 620: "Only if we permit an executive suggestion of immunity to preempt completely judicial consideration of the question can we be certain that we are not encroaching upon the executive's prerogative in foreign affairs."

[54]The doctrine originated in an era when kings theoretically could do no wrong and when the exercise of authority by one sovereign over another indicated hostility or superiority. *See* Schooner Exchange v. M'Fadden, 11 U.S. (17 Cranch). 116 (1812).

[55]The *Tate Letter*, at 984-6. *See generally* Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953); Dubrouir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968); Anticipating this development, Fensternalo, *Sovereign Immunity and the Soviet State Trading*, 63 HARV. L. REV. 614 (1950). In Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), the Second Circuit stated: "Growing concern for individual rights and public morality coupled with the increasing entry of governments into what had previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory." *Id.* at 357. *See* SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L. L. 220, 268 (1957).

or public acts (*jure gestionis*).[56] Having limited its own discretion, the State Department's actions can be reviewed using its own standards. As previously noted,[57] the courts will determine questions of immunity using the State Department's standards when the executive branch has not spoken on the issue. Applying the distinction between acts *jure imperii* and acts *jure gestionis* to each case, the judiciary could thus determine whether the dispute involves a sovereign or individuals. Even if a sovereign is involved, there is some basis for arguing that when a state enters into a transaction with a private party, it ceases to act as a sovereign, and this impliedly waives its immunity.[58] Such waivers should be considered by the courts, despite a suggestion of immunity by the State Department. In applying the public-private acts distinction, the courts will no longer be faced with the situation which confronted the Second Circuit in *Isbrandtsen Tankers v. President of India*,[59] where the cause of action was held properly dismissed even though the conduct in question involved purely private commercial activities.[60] The court sympathized with the plaintiff but concluded "we have no alternative but to accept the recommendation of the State Department."[61] There is, however, no apparent reason why the courts could not review the state department's recognition of immunity, under the APA, when an issue of abuse of discretion is involved.

The reasoning of the court appears to be clearly erroneous; the presence of the several caveats[62] in the court's opinion would seem to indicate that the court itself was unsure of its reasoning. Nonetheless, the result reached by the court is undoubtedly correct. There could be valid reasons for the State Department not adhering to its own standards announced in the Tate Letter. This raises the possibility of political exceptions to the Tate Letter.[63] For instance, the Chi-

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[56]The *Tate Letter* announced: "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*), *Tate Letter* at 184.

[57]*See* note 19 *supra*.

[58]BRIERLY, THE LAW OF NATIONS 249 (6th ed. 1963). The distinction between public and private acts of a sovereign was early noted in Bank of The United States v. Planter's Bank, 22 U.S. (9 Wheat) 904 (1824): "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Id.* at 906. This distinction was applied to foreign sovereigns in The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 145 (1812). A suit against a corporation is not a suit against a foreign sovereign. United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Societe Co-operative Suisse Des Charbons, 21 F.2d 180 (S.D.N.Y. 1921). A corporate defendant claiming sovereign immunity must prove that it is a creature of the sovereign. Pan American Tankers Corp. v. Republic of Vietnam, 291 F. Supp. 49. (S.D.N.Y. 1968).

[59]446 F.2d 1198 (2d Cir. 1971).

[60]The commercial activity here involved was the sale of grain by the government of India.

[61]*Id.* at 1201.

[62]Spacil v. Crowe, 489 F.2d at 618, 621 & n.8.

[63]*See* Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864

lean government unquestionably involved itself in the controversy—its planes and navy were in hot pursuit of the Cuban vessel when it hastily left Valpariso harbor with the unloading derricks still on board. The State Department may have felt that the Chilean government by this political act so prejudiced the claim of the plaintiffs that the United States should not get involved for political reasons. Consider also the site of the attachment of the Cuban vessel. Political questions directly affecting the United States and its relationship with Panama possibly were involved. The treaty between the United States and Panama concerning the control of the Panama Canal has been a source of much controversy in recent years. The Panamanians claim a residuary sovereignty over the canal zone and have refused heretofore to recognize the right of the United States to exercise admiralty jurisdiction over third countries' ships in the Canal Zone. Perhaps the State Department did not wish to stir up another controversy with the Panamanians and therefore granted immunity in a situation where it would not ordinarily have done so under the Tate Letter guidelines.

Finally, there may not have existed any inconsistency with the Tate Letter guidelines at all. These allegedly private acts of the original parties involved could have been done at the direction of their respective governments. In effect they may have become public acts. However if this were so, it would have been better for the court to have said so, rather than denying any power to review State Department actions at all. This case involves important factual questions, and it would have been much more preferable for the court to have dealt with this case as a factual determination rather than speaking in broad terms about sovereign immunity. A similar situation may never again arise, for the State Department would assuredly refuse immunity if only private individuals were involved. But if the State Department inadvertantly grants immunity where the Tate Letter guidelines would apparently have denied it, a court faced with the question of abuse of discretion will hopefully ignore this case and review the State Department's action under the Administrative Procedure Act.

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(1966), where the Supreme Court of Pennsylvania recognized that the state department could privately change or abandon its announced policy in the *Tate Letter* in its sole discretion in each particular case. 215 A.2d at 874-77.