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THE ROLE OF THE STATE DEPARTMENT IN JUDICIAL PROCEEDINGS

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I. INTRODUCTION

WITH the rapid expansion in the volume of cases involving so-called "political questions," the effect given by the courts to determinations or suggestions[1] of the Department of State is correspondingly assuming greater importance. State Department determinations are most commonly involved in cases dealing with sovereign[2] and diplomatic immunity,[3] recognition of foreign governments[4] and boundary and territory disputes.[5] A determination, however, could assume importance in any case involving a "political question." In the United States, the State Department determinations have had their greatest development and effect on judicial decisions in sovereign immunity cases.[6] In England, on the other hand, the Foreign Office certificate has had its greatest impact in diplomatic immunity situations.[7]

The proper effect which the courts should give a Department of State determination has remained somewhat in doubt, and decisions giving more or less conclusive effect to them have evoked a storm of controversy.[8] For example, it is often recited that when the Department of

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1. These executive determinations may be in the form of directions, suggestions, or merely opinions. The term determination or suggestion is loosely used in this article to refer to any State Department communication with the courts or used by the courts.

2. See, e.g., Ex parte Republic of Peru, 318 U.S. 578 (1943); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam).

3. See, e.g., Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1949); County of Westchester v. Ranollo, 187 Misc. 777, 67 N.Y.S.2d 31 (New Rochelle City Ct. 1946).

4. See, e.g., Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1st Dep't 1961).

5. See, e.g., Jones v. United States, 137 U.S. 202 (1890); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839).

6. Lyons, Conclusiveness of the Statements of the Executive—Continental and Latin-American Practice, 25 Brit. Yb. Int'l L. 180, 209 (1948); Lyons, The Conclusiveness of the 'Suggestion' and Certificate of the American State Department, 24 Brit. Yb. Int'l L. 116 (1947).

7. Lyons, The Conclusiveness of the Foreign Office Certificate, 23 Brit. Yb. Int'l L. 240 (1946).

8. See Jessup, The Use of International Law 77-85 (1959); M. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608 (1954); Dickinson, The Law of Nations as National Law: "Political Questions," 104 U. Pa. L. Rev. 451, 471-79 (1956); Dickinson & Andrews, A Decade of Admiralty in the Supreme Court of the United

State suggests to a court that it "recognizes and allows" a particular claim of sovereign immunity, such determination is conclusive.[9] Similar broad language is frequently used in the diplomatic immunity cases,[10] and to a lesser extent in the recognition and territory cases.[11] It is by no means certain, however, that every suggestion of the State Department in any of these areas must be given conclusive effect by the courts and, in fact, the critics of such pronouncements have grown more numerous.[12] As a practical matter, the courts have not been completely governed by executive policy in all cases involving determination or suggestions.[13]

States, 36 Calif. L. Rev. 169, 215 (1948); Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101 (1960); Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168 (1946); Lyons, The Conclusiveness of the 'Suggestions' and Certificate of the American State Department, 24 Brit. Yb. Int'l L. 116 (1947); Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79 (1948); Note, Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State, 20 U. Pitt. L. Rev. 126 (1958).

9. "The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request 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." Ex parte Republic of Peru, 318 U.S. 578, 589 (1943). Accord, Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam); F. W. Stone Eng'r Co. v. Petroleos Mexicanos of Mexico, D.F., 352 Pa. 12, 42 A.2d 57 (1945). Apparently, however, the State Department itself has had some doubts as to the conclusiveness of its suggestions of law. For in the famous Tate Letter the Department said: "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." Letter From Acting Legal Advisor of the State Department to the United States Attorney General Concerning Sovereign Immunity of Foreign Governments, May 19, 1952, in 26 Dep't State Bull. 984 (1952).

10. See, e.g., United States v. Coplon, 88 F. Supp. 915, 921 (S.D.N.Y. 1950).

11. See, e.g., Cheng Fu Sheng v. Rogers, 177 F. Supp. 281, 282 (D.D.C. 1959).

12. See, e.g., Jessup, The Use of International Law 77-85 (1959); M. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608 (1954); Dickinson, The Law of Nations as National Law: "Political Questions," 104 U. Pa. L. Rev. 451, 471-79 (1956); Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101 (1960); Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168 (1946).

13. See United States v. Bussoz, 218 F.2d 683 (9th Cir. 1955) (domestic issues); The Katingo Hadjipatera, 40 F. Supp. 546 (S.D.N.Y. 1941) (sovereign immunity case); United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945) (sovereign immunity case); Frazier v. Hanover Bank, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct.), aff'd mem., 281 App. Div. 861, 19 N.Y.S.2d 918 (1st Dep't 1953) (sovereign immunity case).

The trend, though, is unmistakably toward a greater effect. In fact, today the State Department has virtually complete power of decision in some cases.[14]

The rationale for this judicial abdication has universally been that the exigencies of foreign relations require that the nation must speak with but one voice on questions of foreign policy, and that the courts must not embarrass the executive in the conduct of our foreign relations.[15] Such reasoning is, of course, highly persuasive. The State Department suggestion, however, performs not one but many different functions, and to apply this reasoning to every instance in which it is used may be to oversimplify the true analysis. Furthermore, there are compelling counter reasons suggesting that the effect of the suggestion should be limited as far as is consistent with minimum standards of orderly foreign policy. For example, it is not always clear that the litigants will receive their "day in court,"[16] or that the law will develop uniformly or with the necessary certainty[17] if the State Department is allowed to decide indiscriminately every case which might conceivably have an effect on foreign relations. Consequently, it is apparent that State Department suggestions need not necessarily be given the same effect in all circumstances.

II. Some Procedural Aspects of State Department Determinations

There are several procedural[18] aspects of utilizing State Department suggestions which to some extent remain undecided. One of these questions is how the State Department suggestion initially comes before

14. See Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam); Miller v. Ferrocarrill Del Pacifico De Nicaragua, 137 Me. 251, 18 A.2d 688 (1941). "At last the courts have come to a point which they had been approaching through the course of many years. The executive branch, through the medium of the State Department, is deciding, not the general policy or the single fact, but the specific case before the court." Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 85 (1948).

15. Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); United States v. Lee, 106 U.S. 196, 209 (1882); Bishop, New United States Policy Limiting Sovereign Immunity, 47 Am. J. Int'l L. 93, 101 (1953); Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101, 1103 (1960).

16. See M. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608 (1954); Kuhn, The Extension of Sovereign Immunity to Government—Owned Commercial Corporations, 39 Am. J. Int'l L. 772, 775 (1945).

17. Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168, 171-72 (1946); Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 80, 88 (1948).

18. While these factors may not be entirely "procedural" in a strict legal sense, they are at least questions concerning the mechanics of the suggestion.

the court. The usual practice and perhaps the most important one is that commonly used in the sovereign immunity cases.[19] In such cases, the State Department, either on its own initiative or at the request of a foreign government, will consider a particular claim to sovereign immunity. This consideration is generally made ex parte, without a hearing or notice to the parties.[20] If the Department "recognizes and allows" the claim, it then writes a letter to the Attorney General setting forth its position and requesting him to present its suggestion to the court in which the action is pending. A representative of the Attorney General, in turn, presents the suggestion to the court. Although firmly established, the necessity for this roundabout procedure seems doubtful. Moreover, on the occasions in which the courts have appealed directly to the State Department for such suggestions, the Department has felt free to reply directly to the courts without utilizing the Department of Justice as an intermediary.[21] There seems nothing inherently objectionable in such a practice, and it would certainly be less time-consuming.

Recently, instead of waiting for the State Department to act, the courts have increasingly taken the initiative in determining that certain questions should be decided by the executive.[22] In such cases, the courts

19. There has been a great deal of controversy as to how the plea of sovereign immunity can be raised. In the leading case of Ex parte Muir, 254 U.S. 522 (1921), the general rule was established that the claim of sovereign immunity can only be raised either by executive suggestion or by the foreign sovereign, or its authorized representative, appearing as a suitor on its own behalf. See generally Compania Espanola De Navegacion Maritima, S.A., v. The Navemar, 303 U.S. 68 (1938); The "Gul Djemal," 264 U.S. 90 (1924); The Sao Vicente, 260 U.S. 151 (1922); The Pesaro, 255 U.S. 216 (1921); Ex parte Muir, 254 U.S. 522 (1921); Puente v. Spanish Nat'l State, 116 F.2d 43 (2d Cir. 1940); Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687 (Dist. Ct. App. Fla. 1961); Republic of Cuba v. Arcade Bldg., Inc., 104 Ga. App. 848, 123 S.E.2d 453 (1961); Deák, The Plea of Sovereign Immunity and the New York Court of Appeals, 40 Colum. L. Rev. 453 (1940); Feller, Procedure in Cases Involving Immunity of Foreign States in Courts of the United States, 25 Am. J. Int'l L. 83 (1931); Note, Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State, 20 U. Pitt. L. Rev. 126 (1958). Recently there have been hints that the claim of sovereign immunity can only be raised by an executive suggestion. This trend is a corollary to the increasing effect of the suggestion. Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687, 689 (Dist. Ct. App. Fla. 1961); Republic of Cuba v. Arcade Bldg., Inc., 104 Ga. App. 848, 851, 123 S.E.2d 453, 457 (1961) (dissenting opinion).

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

21. Hungarian People's Republic v. Cecil Associates, 118 F. Supp. 954 (S.D.N.Y. 1953).

22. See Puente v. Spanish Nat'l State, 116 F.2d 43, 45 (2d Cir. 1940); Hungarian People's Republic v. Cecil Associates, 118 F. Supp. 954 (S.D.N.Y. 1953); Deák, The Plea of Sovereign Immunity and the New York Court of Appeals, 40 Colum. L. Rev. 453 (1940). "[O]nce the issue of sovereign immunity is raised, the court will endeavor to inform itself and, indeed, our courts have frequently addressed inquiries to the appropriate branch of the executive. . . ." Id. at 463.

have inquired directly of the State Department as to its position on the matter. Such a practice is per se clearly within the competence of the judiciary.[23] In fact, if used as a method of determining the status of "political facts" such as recognition or nonrecognition of a foreign government, or of securing expert opinions on matters of international law and foreign policy, such a practice would seem highly desirable. There are many cases in which the expert advice of the State Department would be most helpful to the courts, and yet in which the State Department would not intervene on its own initiative either because it did not know of the case or because it would be reluctant to interfere with the judiciary.[24] In such cases, the judiciary should feel free to request information from the Department of State. This technique, however, should not be used merely as a method of evading hard decisions. Such a judicial abdication would neither promote better foreign relations nor aid the administration of justice, for in many cases it may prove much more embarrassing to our foreign relations for the State Department to decide the issue instead of the courts.[25]

Another method by which the State Department suggestion has occasionally come before the courts is for the parties on their own initiative to request directly an indication of policy from the Department. The resulting replies, given directly to the parties concerned, could then be introduced in evidence and considered by the court.[26] Such a procedure has usually been limited to those cases in which the issue of foreign policy is collateral to a domestic issue.[27] Similarly, in such cases the

23. "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. . . . As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State." Jones v. United States, 137 U.S. 202, 216 (1890). See also The Pesaro, 277 Fed. 473 (S.D.N.Y. 1921).

24. Although in recent years the State Department has shown greater willingness to make suggestions to the courts, by and large it has been somewhat reluctant to intervene in judicial proceedings, and "the basic responsibility for the realignment of control rests upon the courts." Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 91 (1948).

25. See Jessup, The Use of International Law 77-85 (1959). "If it were only realized, their [the courts'] present attitude contributes the greatest possible embarrassment to the executive in its conduct of foreign policy." Id. at 85. Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168 (1946); Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 91-92 (1948).

26. Connell v. Vermilya-Brown Co., 164 F.2d 924, 928 n.5 (2d Cir. 1947) (State Department Letter to the defendant's attorney).

27. Ibid. The issue in this case was whether the Fair Labor Standards Act applied to the United States Bermuda base.

parties or the courts have occasionally resorted to past or extraneous indications of State Department policy.[28] Since such extraneous manifestations of Department policy are often directed toward other issues, such evidence should not necessarily be controlling on domestic issues. For example, in *United States v. Bussoz*,[29] the United States Court of Appeals for the Ninth Circuit considered several State Department letters written considerably before the trial simply as some evidence that France was a neutral country in 1942. The ultimate issue for decision, however, was whether a domestic petition for naturalization should be granted. Clearly this is not the sort of case in which considerations of foreign policy as to the neutrality of France in 1942 are controlling. Although such indications of policy may be some evidence in the case, they need not be conclusive. Accordingly, the court held that the State Department had no "power or authority whatever to determine"[30] the case. Obviously, the State Department did not really attempt to determine the case, for it had little, if any, interest in the outcome of this essentially domestic issue.

Although the State Department has not extensively acted on its own initiative in making suggestions, there are indications that in view of its expanding decisional power and the exigencies of our present foreign policy, the Department will present a greater number of suggestions to the courts in the future.[31] If the courts are careful to evaluate these suggestions, and if they are not too hasty in abdicating their traditional decisional powers, then this increase in the number of suggestions could be highly desirable. Such a practice would increasingly make available to the courts the expertise of the State Department in international affairs.[32]

Another procedural question of current interest concerning the State Department suggestion is whether the suggestion can be raised for the first time on appeal. In a recent case, *Republic of Cuba v. Arcade Bldg.*,

28. See Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (executive correspondence with a foreign nation); United States v. Bussoz, 218 F.2d 683 (9th Cir. 1955).

29. 218 F.2d 683 (9th Cir. 1955).

30. Id. at 686.

31. See the strongly worded suggestion in Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959). See also the use of the suggestion in Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam).

32. Such expertise is most welcome. Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101 (1960). "[I]t must be reported that the courts, where they have decided issues of international territorial status 'on the merits' without consulting the policy and expertise of the State Department, have not shown substantially greater skill at weighing the facts and evolving a consistent legal theory than has the executive branch." Id. at 1106. (Emphasis omitted.)

Inc.,[33] the Georgia Court of Appeals held that a State Department suggestion presented for the first time on appeal could not be considered by the court. The court said:

> After the case was filed and docketed in this court, the U. S. Attorney for the Northern District of Georgia sought to file in this court a suggestion of interest of the United States in the matter in litigation, in which it is sought, for the first time, to suggest on behalf of the Secretary of State that the funds levied on by the process of garnishment in this case are immune from attachment. This court permitted the filing of these papers in the clerk's office, but for the purposes of the decision of the issues made by the bill of exceptions, the matter contained in them cannot be considered.[34]

The court, however, held that the Republic of Cuba was entitled to immunity in this situation without the necessity of considering the State Department suggestion. Thus, the case is questionable authority for a proposition that the State Department suggestion cannot be considered for the first time on appeal. Moreover, in a concurring opinion, Chief Judge Felton strongly disapproved of this rule.

> In my opinion [Chief Judge Felton] this court is not controlled by the laws of practice in Georgia on the question whether the State Department may file in this court for the first time a suggestion of sovereign immunity as to the funds involved. I think that such a suggestion can be filed at any time up to the execution of the writ subjecting the funds.[35]

In any event, it seems doubtful that the majority dictum is law. The better policy would be to permit the State Department to present its suggestion at either the trial or the appellate level. Any other rule would be unduly restrictive, since the same foreign policy considerations which compel the suggestion at the trial level are equally compelling on appeal. Furthermore, since the State Department is not usually a party to these cases, it does not necessarily receive notice and opportunity to present the suggestion at the trial level.[36] Thus, if the case first comes to the attention of the Department on appeal, it should not be foreclosed from presenting its suggestion at that time; and as a practical matter, such a flexible rule would work little, if any, hardship on the parties.[37] The national interest should not be defeated by a mere technicality. This question simply points out the desirability of court notification to the State Department whenever a case arises involving a possible problem of

33. 104 Ga. App. 848, 123 S.E.2d 453 (1961).

34. Id. at 851, 123 S.E.2d at 455.

35. Id. at 853, 123 S.E.2d at 457 (concurring opinion).

36. Possibly, that was the case in the Republic of Cuba v. Arcade Bldg., Inc., 104 Ga. App. 848, 123 S.E.2d 453 (1961).

37. By not presenting the suggestion at the trial level, however, the Department might mislead the parties, possibly causing added expense.

foreign policy. If such a practice were consistently followed, there would seem to be little necessity for raising the suggestion for the first time on appeal.

Another question related to when a suggestion can be considered by the court is whether the suggestion of sovereign immunity can be considered before the court has jurisdiction over the property for which the immunity is sought. That is, can a suggestion of immunity be considered before the attachment giving jurisdiction is executed? In the recent case of *Rich v. Naviera Vacuba, S.A.*,[38] a federal district court in Virginia held that the court had jurisdiction to hear a State Department suggestion of immunity even before the attachment giving jurisdiction was completed.[39] Although this question has rarely been raised, there would seem to be little reason why the suggestion could not be considered at any stage of the proceedings. It would seem preferable that the suggestion that property is immune from attachment be considered by the court before attachment. Consequently, the courts should not be blindly controlled by conventional ideas of jurisdiction.

In considering any of these procedural questions concerning the State Department suggestion, it should be remembered that the purpose of the suggestion is to further our foreign policy and to utilize the expertise of the Department of State in international affairs.[40] To that end, we should avoid an overly rigid technical approach to the use of the suggestion.

III. Effect of the State Department Suggestion

The development of the law as to the effect of the State Department suggestion has been in great part a recent one.[41] With minor exceptions, it has been almost entirely of case law rather than of statutory origin.[42]

38. 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam).

39. "While there is considerable doubt as to the jurisdiction of the Court to entertain any suggestion of sovereign immunity until the res is attached, the Court, after due deliberation, permitted the same to be filed under the authority of The Carlo Poma, 2 Cir., 259 F. 369. . . . As a suggestion of sovereign immunity may be advanced at any stage of the proceedings, this Court has determined that jurisdiction exists to entertain the suggestion even though the res has never been arrested by the Marshal." Id. at 718-19. (Emphasis omitted.)

40. See note 15 supra.

41. The development has largely taken place in the twentieth century, although the courts adverted to the problem in a general way several times during the nineteenth century. See Jones v. United States, 137 U.S. 202 (1890); United States v. Lee, 106 U.S. 196, 209 (1882); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

42. There are at least two statutes, however, which sanction conclusive effect for State Department suggestions. See Federal Reserve Act § 632, 48 Stat. 184 (1933), amended by

Since some of the earliest and most important cases in the United States involving a suggestion were sovereign immunity cases,[43] it seems appropriate to analyze these decisions first.

A. *Sovereign Immunity Cases*

One of the earliest cases to consider the effect of the State Department suggestion was *The Schooner Exchange v. McFaddon.*[44] That case involved a dispute between certain private persons and the Government of France as to the ownership and immunity of The Schooner Exchange, a vessel unquestionably in the possession of France, which was forced to take refuge in an American port.[45] A United States attorney made a special appearance in the case, apparently at the request of the Executive Department, and filed a suggestion to the effect that The Schooner Exchange was entitled to sovereign immunity.[46] The Supreme Court agreed and held that the vessel was entitled to sovereign immunity. Speaking of the effect of the executive suggestion, the Court said, "if this opinion be correct, there seems to be a necessity for admitting that the fact *might* be disclosed to the court by the suggestion of the attorney for the United States."[47] From this language, it would seem that the Court was concerned with the question of whether it could place any reliance at all on executive suggestions in such cases, and not with

55 Stat. 131 (1941), as amended, 12 U.S.C. § 632 (1958) (Secretary of State's certificate as to which is proper government is conclusive protection for banks making payments in reliance thereon.); The International Organizations Immunities Act § 8(a), 59 Stat. 672 (1945), 22 U.S.C. § 288e(a) (1958) (Only those so designated by the Secretary of State are entitled to the privileges of the act.). See also Rev. Stat. §§ 4065-66 (1875), 22 U.S.C. § 254 (1958). Immunity will not necessarily be granted to residents of the United States or domestic servants of diplomats unless before process is issued, the name of the person has "been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office." Ibid. See this statute applied in Haley v. State, 200 Md. 72, 88 A.2d 312 (1952).

43. See note 6 supra.

44. 11 U.S. (7 Cranch) 116 (1812).

45. The libel alleged that The Schooner Exchange owned by John McFaddon and another "while lawfully and peaceably pursuing her voyage, . . . was . . . forcibly taken by certain persons, acting under the decrees and orders of Napoleon . . . and was then in the . . . possession of a certain Dennis M. Begon, her reputed captain. . . ." Id. at 116.

46. Apparently the Attorney General also suggested that the case receive priority on the docket, which the Supreme Court granted. "This being a cause in which the sovereign right claimed by Napoleon, the reigning Emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney-General, ordered to a hearing, in preference to other causes which stood before it on the docket." Ibid.

47. Id. at 146. (Emphasis added.)

the question as to whether such suggestions must be treated as conclusive. In fact, the language used by the Court—"*might* be disclosed to the court"[48]—suggests that it thought such suggestions were merely permissive. Although the Court speaks obscurely of a "fact" which might be disclosed by the suggestion, it is not at all clear whether it is referring to the "fact" of ownership or the legal question of immunity, or both.[49] As most of the following cases demonstrate, this obscurity has remained a characteristic of the State Department suggestion.

In *United States v. Lee*,[50] the Supreme Court clarified somewhat the meaning of the obscure language in *The Schooner Exchange*. Although the actual issue in *Lee* was whether the United States could be sued without congressional consent, in dictum distinguishing *The Schooner Exchange*, the Court stated:

> [I]t has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange v. McFaddon*. . . .[51]

This dictum, although admittedly for the purpose of distinguishing *The Schooner Exchange*, foreshadowed the great weight subsequently to be given State Department suggestions.[52]

The principal development of the effect of the State Department suggestion actually began in 1926 after the decision in *Berizzi Bros. v. Steamship Pesaro*.[53] There a government-owned Italian merchant ship which was engaged in commercial activities had been libeled in rem. The Italian Ambassador intervened in the case and pleaded sovereign immunity. The State Department, however, went on record against the immunity.[54] The issue to be decided was the essentially legal question of whether government entities engaged in nongovernmental or commercial activities

48. Ibid.

49. The suggestion refers both to the French ownership and to the dismissal of the attachment. Id. at 117.

50. 106 U.S. 196 (1882).

51. Id. at 209.

52. See note 9 supra.

53. 271 U.S. 562 (1926). See also The Pesaro, 255 U.S. 216, reversing 277 Fed. 473 (S.D.N.Y. 1921).

54. The Pesaro, 277 Fed. 473, 479 n.3 (S.D.N.Y. 1921). "'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.'" Ibid. See 2 Hackworth, Digest of International Law 463 (1941).

were entitled to sovereign immunity.[55] The Supreme Court held, without actually mentioning the State Department position, that the vessel was entitled to immunity. This decision represents the only real judicial holding which might be considered contrary to a suggestion of the State Department.[56] As might be expected, the decision on the sovereign immunity issue was widely criticized.[57] Perhaps largely because of this criticism, the Court made an abrupt about-face in subsequent decisions[58] and, in effect, declared the suggestion conclusive. Regardless of the reason, there can be no doubt that the change of effect occurred. It was first evident in *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*,[59] a case involving a dispute between a Spanish corporation and the Government of Spain as to the title of a vessel. The State Department declined to make a suggestion. Nevertheless, despite this lack of a suggestion, the Supreme Court took the opportunity to make some new law. In dictum the Court said: "If the claim 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 by the Attorney General of the United States, or other officer acting under his direction."[60] The primary authority which the Court assigned for this proposition was *The Schooner Exchange*.[61] That case, however, is certainly doubtful authority for such a proposition. In any event, this dictum in *The Navemar* became law just five years later in 1943 in the

55. In 1952, the Department of State strongly asserted the restrictive theory of sovereign immunity in the famous Tate Letter. Letter From Acting Legal Advisor of the State Department to the United States Attorney General Concerning Sovereign Immunity of Foreign Governments, May 19, 1952, in 26 Dep't State Bull. 984 (1952). This famous letter seems clearly based on legal principles. "A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity. . . ." Ibid. The Department's communications are often based on principles of international law. See, e.g., Letter From Acting Secretary of State Polk to the Russian Charge d'Affaires Ughet, March 6, 1919, in 2 Hackworth, Digest of International Law 467 (1941).

56. Apparently the court in Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam), did not so consider it. There it drew a distinction between a "recommendation" and a "suggestion." 197 F. Supp. at 725.

57. Dickinson, The Law of Nations as National Law: "Political Questions," 104 U. Pa. L. Rev. 451 (1956). "The decision in The Pesaro was widely criticized as mistaken and unfortunate. As yet there was no question that it had been a proper case for judicial determination. It was only that it had been badly decided." Id. at 473-74.

58. Ibid.

59. 303 U.S. 68 (1938).

60. Id. at 74.

61. The other authority cited by the court for this proposition was largely insubstantial. See Dickinson, The Law of Nations as National Law: "Political Questions," 104 U. Pa. L. Rev. 451, 474-75 (1956).

case of *Ex parte Republic of Peru*.[62] There, a Peruvian steamship had been libeled by a Cuban corporation in the United States courts, and at the request of the Peruvian Ambassador, the State Department "recognized and allowed" the Peruvian claim to sovereign immunity. The Supreme Court held that the courts must follow the suggestion of the executive in such questions, and thus the ship was entitled to immunity. It stated:

> The certification and the request 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.[63]

Mr. Justice Frankfurter, in dissent, argued that the Supreme Court should not have taken jurisdiction of the case.[64] Although somewhat uncertain from the language used, it seems probable that Mr. Justice Frankfurter objected to what he considered to be executive interference in the judicial process.[65] In any event, the majority decision plainly holds that, at least in sovereign immunity cases, the State Department suggestion is conclusive on the courts.

The next important case before the Supreme Court concerning the effect of the State Department suggestion was *Republic of Mexico v. Hoffman*.[66] There the issue to be decided was, as in *Steamship Pesaro*, an essentially legal one, namely, whether a vessel owned but not possessed by a foreign government was entitled to sovereign immunity. Although the State Department did not specifically "recognize and disallow" the claim as such, it did cite several cases to the Court which were some authority for the proposition that mere ownership without possession was not enough for sovereign immunity. The Court, citing those cases, disallowed the immunity.[67] However, not content with its decision which apparently conformed to the State Department position on the matter, the Court further said that the judiciary could never allow a claim for sovereign immunity which the State Department had not seen fit to "recognize and allow," and which was based on new grounds which the State Department had not previously recognized. The Court asserted:

> It is . . . not for the courts to deny an immunity which our government has seen

62. 318 U.S. 578 (1943).

63. Id. at 589.

64. Id. at 590-604.

65. "But surely this is to introduce the formal elegancies of diplomacy into the severe business of securing legal rights through the judicial machinery normally adapted for the purpose." Id. at 601.

66. 324 U.S. 30 (1945).

67. Id. at 32, 37-38.

fit to allow, *or to allow an immunity on new grounds which the government has not seen fit to recognize.*[68]

This, however, was not the end of the matter, since in a footnote to this language the Court further stated: "It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it."[69] This apparent afterthought suggests that the Court felt that State Department nonrecognition was merely a factor to be considered in making a decision, and was not conclusive of the issue. Partly due to this contradictory dictum, the effect of State Department nonrecognition of sovereign immunity claims remained somewhat in doubt. If the Court actually meant that State Department nonrecognition in such a situation was conclusive, then only a small and uninteresting role was left for the courts in such cases. The courts could only apply the law as the State Department developed it. But even if the Court merely intended that nonrecognition was but a factor to be considered by it in making an independent decision, it is clear that they attached great weight to it. Consequently, on any interpretation of *Hoffman* the Court substantially curtailed the permissible limits of judicial action in sovereign immunity cases.[70] This curtailment of the judicial function was objected to by Justices Frankfurter and Black in their concurring opinion in *Hoffman*.[71] They urged that the decision in such cases was a judicial function which the courts should not abdicate in the absence of a clear suggestion from the State Department.

In *National City Bank v. Republic of China*,[72] the Supreme Court adverted to *Hoffman*,[73] but perhaps retreated somewhat from its earlier position in that case. The Republic of China brought suit against an American bank to recover a $200,000 deposit allegedly made by an agency of the Republic. The bank in turn sought to assert a counterclaim against the Republic of China; but the Republic then sought to invoke sovereign immunity as to the counterclaim. The State Department was neither asked nor did it give any indication whether the counterclaim should be allowed. Once again, the issue was essentially one of law. The Court held that the Republic was not entitled to sovereign

68. Id. at 35. (Emphasis added.)

69. Id. at 35 n.1.

70. See Jessup, The Use of International Law 77-85 (1959). "[T]he attitude which the Supreme Court has taken, particularly as illustrated by Republic of Mexico v. Hoffman, is clearly an abdication of the judicial function." Id. at 82.

71. 324 U.S. 30, 38-42 (1945).

72. 348 U.S. 356 (1955).

73. Id. at 360.

immunity in these circumstances. Nevertheless, the decision was clearly a judicial one. Mr. Justice Frankfurter, writing for the Court, said of *Hoffman*: "Its [the Department of State's] failure or refusal to suggest such immunity has been accorded significant weight by this Court."[74] Thus, once again, the Court's language suggested that State Department nonrecognition of a sovereign immunity claim was merely a factor to be considered in making its independent judicial decisions and was not necessarily conclusive. Moreover, Justices Reed, Burton, and Clark dissented, arguing that the Court had abused its judicial power, and that a change in policy on questions of sovereign immunity should come only from the executive or Congress.[75] This dissent is a good indication that the majority of the Court considered such questions judicial ones, at least in the absence of a State Department suggestion to the contrary. Thus, a strong case can be made out that the *Republic of China* is, at least to some extent, a retreat from the principles of *Hoffman*. Consequently, in the future, it is doubtful that State Department nonrecognition of a sovereign immunity claim will necessarily be conclusive of the sovereign immunity issue. In any event, the principle of *Ex parte Republic of Peru* that a positive suggestion of immunity is conclusive, continues undiminished.[76]

Although the Supreme Court's lead has not always been strictly followed, in the lower courts,[77] most decisions have at least held that positive suggestions of sovereign immunity are conclusive. In turn, this extreme willingness of the courts to give greater effect to suggestions has perhaps encouraged the Department of State to assert itself more boldly to the courts. For example, in *Weilamann v. Chase Manhattan Bank*,[78] the Soviet Union argued that its deposits with the Chase Manhattan Bank were immune from attachment. The Department of State recognized the claim of immunity for the funds. Moreover, the Department directed the court to " 'forthwith . . . release any property of the State of the Union of Soviet Socialist Republics hitherto attached in this proceeding and . . . deny any pending motion for execution or action

74. Ibid.

75. "Judicial views of supposed public interests are not the touchstone whereby to determine the law. The change from a generous to a parsimonious application of the principle of sovereign immunity should come from Congress or the Executive. . . . The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power." Id. at 370-71.

76. See note 9 supra.

77. See United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945); Frazier v. Hanover Bank, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct.), aff'd mem., 281 App. Div. 861, 119 N.Y.S.2d 918 (1st Dep't 1953).

78. 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

analogous to execution.' "[79] The Supreme Court of New York meekly held that the attachment must be denied, stating:

> We are to be concerned solely with the position which is taken by the State Department; and its position with respect to the immunity of the particular bank accounts must be honored by this court. The court may not proceed contrary thereto in this or any similar case and thereby jeopardize international relations.[80]

In this case, the State Department "suggestion" would more aptly be termed a direction.

In the recent *Naviera* case, the court made it clear that a suggestion of sovereign immunity by the State Department is conclusive regardless of its basis in existing law. That is, in *Naviera* the State Department suggestion of immunity was seemingly inconsistent with the Tate Letter's restrictive theory of sovereign immunity[81] which apparently had previously been the State Department view of international law. The court said that, "no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive."[82]

As further evidence of this trend toward greater dependency on State Department determination, several decisions have held either that the suggestion deprives the court even of its jurisdiction,[83] or that the question of sovereign immunity itself is exclusively one for the State Department,[84] and that consequently even nonrecognition of a claim is conclusive. As a practical matter, the State Department suggestion has become virtually conclusive on the issue of sovereign immunity. In fact, even in the absence of a suggestion, it is largely State Department policy which governs these cases. Thus, the question of sovereign immunity which was treated in 1812, in *The Schooner Exchange*, as a judicial matter has, in the United States, now become to a great extent a matter exclusively for State Department determination.

The Continental and Latin American practice, on the other hand, has been generally contrary to the United States position.[85] There, the courts

79. Id. at 1088, 192 N.Y.S.2d at 472.

80. Id. at 1089, 192 N.Y.S.2d at 473.

81. See Tate Letter, op. cit. supra note 55.

82. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 724 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam).

83. Republic of Cuba v. Dixie Paint & Varnish Co., 104 Ga. App. 854, 123 S.E.2d 198 (1961).

84. See Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687 (Dist. Ct. App. Fla. 1961). See also Republic of Cuba v. Arcade Bldg., Inc., 104 Ga. App. 848, 851, 123 S.E.2d 453, 457 (1961) (dissenting opinion).

85. Lyons, Conclusiveness of the Statements of the Executive—Continental and Latin-American Practice, 25 Brit. Yb. Int'l L. 180 (1948). "[C]ontinental courts are not bound to accept the answers of the Executive as conclusive and exhaustive. They are for the most part at liberty to draw their own conclusions. . . ." Id. at 210.

have largely retained their responsibility for decision of international law questions, and although the suggestion of the executive may be persuasive, it is not conclusive. The aim of their courts has been to give effect to the rules of international law, and the executive suggestion has been mainly an aid to them in that process.

B. *Diplomatic Immunity Cases*

Although the State Department suggestion has, in the United States, principally developed in the sovereign immunity cases,[86] it has also been important in the so-called diplomatic immunity, recognition, and territory and possession cases. Of these, the effect of the suggestion has been most similar to that in the sovereign immunity cases in the diplomatic immunity decisions.[87] That is, decisions in which the principal issue is whether certain individuals are entitled to diplomatic immunity from the operation of our domestic laws. Since there has not been extensive authority in the United States concerning the effect of the suggestion in diplomatic immunity cases, the courts have relied heavily on the sovereign immunity analogy and on the English cases. As a result, the decisions almost uniformly have held that diplomatic status is a "political question." Generally, then, the State Department determination on the issue of diplomatic immunity is conclusive. Illustrative of this general rule is *United States v. Coplon*,[88] where a United Nations employee was being prosecuted for espionage, and sought to invoke diplomatic immunity. The Department of State certified that the employee was not entitled to diplomatic immunity.[89] The federal district court in New York then held that the State Department certificate was binding, saying, "diplomatic status is a political question and a matter of state; the finding of the Secretary of State must be accepted unquestioned."[90] This rule that State Department determinations are conclusive on questions of diplomatic status is undisputed. There is, however, some doubt whether, given the fact of diplomatic status, the courts may decide if immunity necessarily follows.[91] But in *County of Westchester v. Ranollo*,[92]

86. See note 6 supra.

87. See Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1949); United States v. Coplon, 88 F. Supp. 915 (S.D.N.Y. 1950); Haley v. State, 200 Md. 72, 88 A.2d 312 (1952); County of Westchester v. Ranollo, 187 Misc. 777, 67 N.Y.S.2d 31 (New Rochelle City Ct. 1946).

88. 88 F. Supp. 915 (S.D.N.Y. 1950).

89. "The Department of State has certified to the Attorney General by communication dated December 30, 1949 that Gubitchev did not enjoy diplomatic status. . . ." Id. at 920.

90. Id. at 921.

91. If the State Department suggestion as to diplomatic immunity is necessarily conclusive as the courts say, why the often lengthy discussion as to the principles of immunity in international law? See 88 F. Supp. at 920-21.

92. 187 Misc. 777, 67 N.Y.S.2d 31 (New Rochelle City Ct. 1946).

the New Rochelle City Court suggested that diplomatic immunity should be restricted to those cases in which the State Department certified the exemption, thus making the question of diplomatic immunity exclusively one for the State Department. This case demonstrates the same type of judicial extension of the "political question" doctrine as has occurred in the sovereign immunity cases. Whether the courts will ultimately completely accept this extension remains to be seen.

The English practice, like the American, has largely developed toward a more conclusive effect for the Foreign Office certificate. In England, though, it was in diplomatic immunity cases that this practice emerged.[93] Perhaps the leading English case was that of *Engelke v. Musmann*,[94] where the question in issue was the diplomatic status of a certain officer. In a somewhat confused decision, with several different opinions, the court held that the Foreign Office certificate was conclusive on the issue of diplomatic status. At least one opinion, however, intimated that the legal effects arising from such status were matters for the court.[95] Subsequently, this English practice has been extensively developed in diplomatic immunity decisions, and to an extent, the American decisions have relied on them.

The practice of judicial deference to the executive in diplomatic immunity cases has been somewhat strengthened by congressional sanction of the practice in the International Organizations Immunities Act.[96] That act denies the privileges of the act to persons not designated by the Department of State as eligible to receive them.

C. *Recognition Cases*

The suggestion of the State Department has probably had the least effect in recognition cases. In these decisions, although the courts have been uniformly willing to accept the Department determination of recognition of a particular foreign government as conclusive of the official United States position, they have been reluctant to allow such a determination to bind them as to the legal effects of recognition.[97] That is, when the

93. See Lyons, The Conclusiveness of the Foreign Office Certificate, 23 Brit. Yb. Int'l L. 240 (1946).

94. [1928] A.C. 433.

95. "It must be borne in mind that all that is directly in issue is the fact of the appellant's status. Whether, that fact being established, a defendant is entitled to the immunity he claims is a further question, which might have to be determined by the Court." Id. at 457. (Opinion of Lord Warrington of Clyffe).

96. 59 Stat. 672 (1945), 22 U.S.C. § 288e(a) (1958). See note 42 supra.

97. See, e.g., Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59, 63 (N.D. Calif. 1952); Anderson v. N. V. Transandine Handelmaatschappij, 289 N.Y. 9, 43

legal issue has been whether a particular entity could sue in our courts, the courts have been more autonomous in making the essentially legal determination than they have been in sovereign immunity cases. The language used by the court in *Bank of China v. Wells Fargo Bank & Union Trust Co.*[98] illustrates this judicial autonomy in the recognition cases. The issue, although somewhat complicated, was essentially whether the Government of Nationalist China or the Government of People's China was entitled to funds on deposit in an American bank. Although the federal district court in California actually held, in conformity with State Department policy, that the funds should be given to the Government of Nationalist China, the court said:

> If whenever this court is called upon to determine whether there is a government justly entitled to act on behalf of a foreign state in respect to a particular matter, the court is bound to say, without regard to the facts before it, that the government recognized by our executive is that government, then nothing more need be said here. To permit this expression of executive policy to usurp entirely the judicial judgment would relieve the court of a burdensome duty, but it is doubtful that the ends of justice would thus be met. It has been argued that such is the accepted practice. But the authorities do not support this view.[99]

Similarly, in *Upright v. Mercury Business Mach. Co.*,[100] the Appellate Division of the Supreme Court of New York held that despite State Department nonrecognition of East Germany, an assignee of the claim of a corporation controlled by the East German Government was entitled to sue on the claim in the American courts. The court said that it need only give limited effect to such nonrecognition, and here, the allowance of the claim was within the competence of the judiciary.

As can be seen from these cases, the State Department has played only a limited role in the recognition cases. Similarly, although perhaps for different reasons, the suggestion has played a somewhat limited, although mixed, role in the so-called territory or possession cases. Contrary to what is suggested by the name of this category, the actual issues in these cases are almost always domestic issues involving very few, if any, considerations of foreign policy.[101] For one reason or another,

N.E.2d 502 (1942); Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1st Dep't 1961).

98. 104 F. Supp. 59 (N.D. Calif. 1952).

99. Id. at 63.

100. 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1st Dep't 1961).

101. Jones v. United States, 137 U.S. 202 (1890) (murder trial); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (insurance recovery); Connell v. Vermilya-Brown Co., 164 F.2d 924 (2d Cir. 1947) (coverage of Fair Labor Standards Act); Cheng Fu Sheng v. Rogers, 177 F. Supp. 281 (D.D.C. 1959) (deportation proceedings). See also United

however, the question of territory or possession becomes important in determining this domestic issue. In these cases, the Department of State rarely makes a suggestion in the sense that it seeks to alter the outcome of the case. Instead, the State Department policy considered in these cases is usually in reply to specific questions from the court or the parties, or is sometimes simply based on extraneous indications of State Department policy formulated by the Department for other problems or in other situations. Consequently, as befits the nature of the various policies and domestic issues involved, such suggestions are treated with varying degrees of deference.[102] They are not necessarily conclusive of the domestic issue, nor should they be. For example, in *Connell v. Vermilya-Brown Co.*,[103] the Court of Appeals for the Second Circuit held, despite a State Department indication to the contrary, that the United States Bermuda base was a possession of the United States. The issue, however, was simply the domestic one of whether the Fair Labor Standards Act applied to this base. Clearly, in such a situation the considerations of foreign policy, if any, are insignificant in relation to the domestic issue. Although the State Department suggestion may be helpful to the court in such cases, in the final analysis the essentially domestic issues should be determined by the courts and not by the State Department. It is doubtful that even policy considerations for maintaining a unified foreign policy justify the judicial abdication of this duty, since a unified foreign policy is largely meaningless unless based on the judicial process.[104] In any event, it is clear that the effect of the suggestion in these cases primarily deciding domestic issues should not be used as authority for the effect of the suggestion in situations with a characteristically high foreign policy involvement, such as the sovereign immunity, diplomatic immunity and recognition cases, and vice versa.

Although the State Department suggestion could be potentially important in the decision of any so-called "political questions," it has achieved its primary importance in the types of cases discussed previ-

States v. Bussoz, 218 F.2d 683 (9th Cir. 1955) (naturalization proceeding); United States v. Ushi Shiroma, 123 F. Supp. 145 (D. Hawaii 1954) (criminal prosecution for failure to report as an alien where treaty interpretation was involved).

102. Compare Jones v. United States, 137 U.S. 202 (1890); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Cheng Fu Sheng v. Rogers, 177 F. Supp. 281 (D.D.C. 1959), with United States v. Bussoz, 218 F.2d 683 (9th Cir. 1955); Connell v. Vermilya-Brown Co., 164 F.2d 924 (2d Cir. 1947).

103. 164 F.2d 924 (2d Cir. 1947).

104. For an emphasis somewhat to the contrary, see Franck, The Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101 (1960).

ously.[105] Its effect varies from virtually conclusive in sovereign immunity cases to a sometimes negligible effect in cases dealing with essentially domestic issues. Since the suggestion performs several entirely different functions, a variation in effect would seem inevitable. Consequently, any discussion of the effect which should be given the suggestion should be based on an examination of these functions in the light of the reasons for the suggestion.

IV. Evaluation

A. *The Purposes of the Suggestion*

An examination of the cases construing State Department suggestions reveals that the suggestion performs several different roles. Although these roles are not mutually exclusive, and shade into one another in an almost inextricable fashion, they are somewhat distinguishable by their principal emphasis.

The first of these functions is that of determining certain uniquely political questions, which will be deemed "political facts." That is, there are certain questions which are peculiarly within the executive sphere of competence. Such questions are largely unique in that they involve highly political decisions requiring expert knowledge of the politically oriented branches of government. Traditionally, such questions have been decided only by the executive. For instance, determinations which by their very nature require executive action, such as official recognition, are essentially "political facts." The determination as to whether the Government has officially recognized a foreign government is properly made only by the executive. As a result, when the State Department makes a suggestion to the courts that the United States officially recognizes the government of X country, the suggestion is essentially intended to determine and inform the courts of this "political fact." Similarly, when the Department of State informs the court that a particular individual is registered as a diplomat, it is essentially performing an evidentiary function.[106] In the latter situation, however, there is nothing inherently political in the determination that per se, an individual is registered with the State Department. Such a determination is merely one of fact, but not of "political fact."[107]

105. Cases involving the status of hostilities occasionally raise the suggestion question. Id. at 1119-22. See also Note, International Law—Power of Courts to Determine When a State of War Exists, 26 Va. L. Rev. 226 (1939).

106. The State Department, however, may go beyond this factual determination and suggest further a legal conclusion to be drawn therefrom. See Haley v. State, 200 Md. 72, 88 A.2d 312 (1952).

107. Consequently, perhaps such suggestions should not be conclusive. Cf. Franck, The

Although not always separable from a determination of fact, the suggestion is also used for determination of law. That is, the suggestion may be utilized to decide an essentially legal question. For instance, the State Department suggestions in both *Steamship Pesaro* and *Hoffman* concerning the circumstances in which sovereign immunity should be allowed, were essentially suggestions of law. In fact, the famous Tate Letter, although perhaps not a suggestion in the strict sense, was by its very terms a determination of law.[108] And in *The Schooner Exchange*, the suggestion was not only factual, but was also whether the vessel was entitled to sovereign immunity given those certain determinations of fact—an essentially legal question. At least to some extent, the State Department has been reluctant to make these "pure" suggestions of law to the courts,[109] particularly on an individual case basis. When it has made such suggestions, the language often readily shows the Department's reluctance to tread on what it fears is a traditional area of judicial prerogative.[110] Surprisingly enough, the courts, on their part, have been most anxious to obtain the expert views of the State Department on what they consider such difficult and little understood matters as international law.

The suggestion occasionally may perform yet another function. In some situations, immediate considerations of foreign policy require that a certain case be decided in a particular way possibly even in disregard of determinations of "political facts" or principles of international law. In such a case, the suggestion may be used simply as a method of deciding the case in a manner consistent with the exigencies of foreign policy. In the recent *Naviera* case,[111] the Department of State, apparently in an attempt to ease the strained relations between the United States and Cuba, and possibly to secure reciprocal treatment from the Cuban Government, promised to release the Bahia De Nipe and facilitate its return to the Cuban Government. As a result, the Department made

Courts, The State Department and National Policy: A Criterion for Judicial Abdication, 44 Minn. L. Rev. 1101 (1960). "The State Department should not, however, purport to decide cases. It should not withdraw from the courts such questions as the identity of parties, the occurrence of certain alleged events, or the interpretation of domestic statutes relevant to the determination of the case. . . . The State Department should certify only as to fact-deductions with international law implications." Id. at 1117.

108. See note 55 supra and accompanying text.

109. The language of the famous Tate Letter indicates the uncertainty of the Department as to its suggestions of law.

110. See the suggestion in United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945). Contra, Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

111. 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam).

a suggestion to the court that since the United States must honor its obligations, the Bahia De Nipe was entitled to immunity. Since also this suggestion of immunity was seemingly inconsistent with the Department's heretofore restrictive theory of sovereign immunity, it seems probable that the suggestion in this case represents only a determination of a particular case for compelling political reasons, and does not necessarily represent the Department's long-range views of international law. In any event, it would seem preferable for the Department to more clearly enunciate its reasons for making such a suggestion. By doing so, if a decision does not in fact represent a determination of international law, it will not be confused for a precedent.[112] For the result in *Naviera* has been to create grave doubts as to whether the United States follows the restrictive or absolute theory of sovereign immunity.

B. *The Rationale of the Suggestion*

The rationale uniformly espoused by the courts for their judicial deference to the State Department suggestion is simply that considerations of foreign policy require such deference. In regard to this, the Supreme Court has said:

> This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.[113]

It is, of course, important that the courts should not interfere with the executive branch in its conduct of our foreign relations. Moreover, it may be argued that in today's world the nation must speak with but one voice in international affairs.[114] By requiring the courts to follow the lead of the executive in such matters, the suggestion of the State Depart-

112. The suggestion has often created confusion as to the basis for a particular decision. See Bishop, International Law 433 (1953). "Does this statement, [the holding in Ex parte Republic of Peru] or the holding in Republic of Mexico v. Hoffman, suggest that immunity is controlled by international law, or by foreign policy considerations?" Ibid. Katz & Brewster, The Law of International Transactions and Relations 368 (1960). "In the light of National City Bank of New York v. Republic of China . . . Guaranty Trust Co. of New York v. United States . . . Republic of Mexico v. Hoffman . . . and the other decisions of American courts . . . do you consider the immunity of foreign governments in courts of the United States to rest upon international law, municipal law or executive policy?" Ibid. Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 88 (1948). "It would seem to follow from these opinions [in Republic of Mexico v. Hoffman] that transient diplomatic relations are to determine legal issues, a situation which can only lead to inconsistent decisions." Ibid.

113. Ex parte Republic of Peru, 318 U.S. 578, 589 (1943).

114. See note 15 supra.

ment is useful in effectuating these aims. Furthermore, it would appear that on many questions of foreign policy and international law the Department of State is more expert than the courts. It has a large staff of foreign policy and legal experts who devote their time almost exclusively to questions of international significance. The courts, on the other hand, at least in the past, have handled such questions infrequently. Moreover, as a practical matter, judicial decision by the domestic courts of international law questions has sometimes been lacking.[115] Consequently, the suggestion can often be useful for utilizing this expertise of the State Department on international issues.

The courts should, however, avoid thinking of and using the suggestion as a panacea. Admittedly, it is often necessary to defer to executive determination in the interest of foreign policy, but if the courts insist on executive determination of every case involving international aspects, the resulting decisional role may greatly embarrass the State Department.[116] In many instances, it is to the political advantage of the nation that the courts make the decisions. Moreover, it is open to serious question whether *ad hoc* decisional power exercised by the Department of State rather than the courts will, in the long run, better promote international law and our foreign relations. For would not judicial rather than executive determination ultimately create more confidence in the decisional process and thus better promote international law?[117] Although the State Department may be expert in the conduct of foreign affairs, the courts are expert in and peculiarly equipped for the decisional process. Not only does this process include a traditional ability to deal with and develop the law, but it also includes procedural safeguards which are generally lacking in executive determinations. For instance, State Department determinations as to sovereign immunity may be made ex parte, without notice or hearing.[118] In this connection, it has been said:

> All this may happen [a conclusive suggestion] before the plaintiff has any notice that it is in the wind, and when he does receive notice that the motion is to be made, it is too late. The State Department having allowed the claim, it is "the court's duty" to dismiss. The plaintiff gets no true "day in court," for now his only recourse is to ask the same Department of State to present his case through diplomatic channels and depend on the comity of nations to provide redress.[119]

115. Franck, supra note 107, at 1106.

116. See note 25 supra.

117. See Jessup, The Use of International Law 77-85 (1959).

118. See note 16 supra.

119. M. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608, 613 (1954). But, "if the State Department were to set up a procedure for hearings, its exercise of a judicial function would merely be more apparent." Jessup, op. cit. supra note 117, at 83-84.

One wonders how many of these claims are succesfully presented through diplomatic channels after the State Department suggests that the judicial proceedings in which they are espoused be dismissed. Of course, pressures of foreign policy no doubt occasionally require that these private interests be subservient to the general interest. This should not be the case, though, unless there are genuinely compelling reasons why these rights should be denied.

Another danger of carte blanche use of the executive suggestion is that to do so may lead to uncertainty in the law. Granted that flexibility is important in the conduct of our foreign relations, it is also extremely important that a large body of clearly defined principles of international law be developed. It is elementary jurisprudence that certainty in the law is extremely important in enabling the planning of actions. As was evident in *Naviera*, a suggestion may often lead to great uncertainty in the law,[120] and since the suggestion may perform several very different functions, it may be difficult to ascertain the true rationale of the decision. If, then, it is used indiscriminately, it might seriously impair an orderly development of international law.

In short, there are valid and often compelling reasons for the courts to defer to the suggestion of the State Department. But there is nothing inherently sacred about the suggestion, as the Continental and Latin American practice to the contrary clearly shows. Although the exigencies of foreign relations may on occasion demand such judicial deference, the courts should not needlessly defer to executive determinations when, in fact, there are no compelling reasons. To that end, the real issues should not be obscured by the often repeated generality that the "national interests will be best served . . . through diplomatic channels. . . ."[121] The national interest will realistically be best served if the rights of its litigants are not needlessly sacrificed and if its decisional process fosters the orderly growth of international law. Therefore, the effect of the suggestion should largely depend on the actual purpose for which it is used.

If a suggestion is used by the State Department merely as a device for deciding a certain case as the particular exigencies of foreign policy may require, then the same compelling reasons for using the suggestion require that it be given conclusive effect by the courts. In such a case there is no judicial question.[122] This *ad hoc* decisional power in the

120. See also note 112 supra.

121. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945). Virtually the same language was used in Ex parte Republic of Peru, 318 U.S. 578, 589 (1943).

122. The courts, however, should perhaps determine when the State Department is so acting.

executive, however, should be considered an extraordinary power only to be used when absolutely necessary for the conduct of foreign affairs. Moreover, the executive should make it absolutely clear to the courts that its suggestion in such a case is based on such extraordinary reasons.[123] It would then be clear that the decision was not an authority or precedent of international law. Such a policy of explanation would also have the salutary effect of enabling the courts to check possible abuse of this extraordinary executive power, while at the same time emphasizing to the courts the necessity for the power. Furthermore, it would place the responsibility for these essentially political decisions squarely with the State Department, where such responsibility properly belongs.

It would also seem proper to give the suggestion conclusive effect when it is used essentially as a determination of "political facts." Since these facts are by their very definition questions peculiarly within the executive competence, the courts need not redetermine them.[124] In addition, these "political facts" are most frequently the "facts" which must be uniformly presented if we are to have a consistent foreign policy. These "facts," however, should not be confused with domestic issues based on quite different considerations. What is a possession for the purposes of the State Department and our foreign policy is not necessarily a possession for the purposes of the Fair Labor Standards Act,[125] or other such essentially domestic legislation. No compelling reason appears why suggestions or determinations in this latter situation should be considered conclusive. No doubt they are of meritorious evidentiary value, but in such circumstances that should be the limit of their effect.[126]

When a suggestion is used as a determination of law, unquestionably it can be of great value to the courts. The expert legal advice of the State Department on questions of international law should, whenever possible, be made available to the courts. Moreover, making the State Department position on questions of international law readily available to the courts would also tend to promote uniformity among the courts as to the law. No doubt, as a practical matter, the position of the Department would be accorded great weight simply on its own merits. It would even be entirely reasonable to make the State Department

123. Note, Judicial Deference to the State Department on International Legal Issues, 97 U. Pa. L. Rev. 79, 93 (1948). "For its part, the State Department should declare in unmistakable terms when it desires that policy factors should be overriding." Ibid.

124. The courts, however, should determine what facts are "political facts."

125. See Connell v. Vermilya-Brown Co., 164 F.2d 924 (2d Cir. 1947).

126. See note 106 supra.

position on international law prima facie the law.[127] It is one thing, though, to make the suggestion of the State Department on questions of international law available to the courts, and quite another to make it conclusive on the courts. In our system of government the responsibility for deciding legal questions is with the courts, and no compelling reasons appear why this should be changed on questions of international law. Furthermore, to place the complete responsibility with the Department of State might needlessly deprive the parties of their "day in court," and impair orderly development of international law. It seems highly probable that in the final analysis the courts, and not the State Department, are more expert in the judicial process. Consequently, absent compelling and immediate policy considerations to the contrary, the courts should not generally defer to the executive determination on questions of international law.

V. Conclusion

Unfortunately the decisions dealing with State Department suggestions have largely obscured the several purposes for such suggestions. As a result, the effect to be afforded the suggestion has had a confusing and sometimes unnecessary development.

At the present time, the effect given these State Department determinations varies greatly from one type of case to another. At least in the sovereign immunity cases, though, the law is fairly well settled that such suggestions are virtually conclusive. This is clearly the law, but it is not so clearly desirable. Rather it would seem that on an analysis of the purposes and effects of the suggestion it should be given conclusive effect only when compelling reasons of foreign policy so require or possibly also when it is limited to determinations of what has been termed "political facts." Questions of law, however, are peculiarly within the competence of the courts. Hence, the State Department suggestion of law should at most be no more than a prima facie indication of the law.[128] By thus limiting the role of the State Department in judicial proceedings, our foreign policy will, in the long run, be better effectuated without needlessly sacrificing the rights of our litigants.

127. See generally Jessup, op. cit. supra note 117.

128. In some circumstances, possibly compelling considerations of foreign policy would require a general rule of law. In most cases, however, the courts will be guided by the same considerations, and as a practical matter, the Department suggestion will be weighed heavily.