RICHMOND School of Law

University of Richmond
UR Scholarship Repository

Law Faculty Publications School of Law

1968

# The American Doctrine of Sovereign Immunity: An Historical Analysis

Daniel T. Murphy
*University of Richmond*, dmurphy@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the International Law Commons, and the Legal History Commons

Recommended Citation
Daniel T. Murphy, Comment, The American Doctrine of Sovereign Immunity: An Historical Analysis, 13 Vill. L. Rev. 583 (1968)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

# THE AMERICAN DOCTRINE OF SOVEREIGN IMMUNITY: AN HISTORICAL ANALYSIS

## I. INTRODUCTION

Over the span of a century and a half many legal rules and concepts evolve and unfold in response to variant social conditions and as a means of restructuring social activity. Frequently a legal doctrine as presently understood and applied bears little relation, and may even be inapposite, to its germinal case.[1] The original contours of a legal concept may, therefore, often be of small practical import in its current application. This general thesis is not applicable, however, to the doctrine of sovereign immunity — that principle which provides that a recognized foreign sovereign is not susceptible, without its consent, to the judicial process of the courts in any other state. Although more than one hundred and fifty years old, the case vivifying this legal concept, *The Schooner Exchange v. McFaddon*,[2] is still repeatedly referred to in judicial opinions.[3] Significantly, it is cited not for purposes of distinction or historical perspective, but rather, is employed as a present underpinning for the concept of sovereign immunity, even though the political and social circumstances of today differ considerably from those existing in 1812.

Subsequent cases, however, while often justifying the conclusions reached by references to Marshall's discussion in *The Schooner Exchange*, have intertwined into the concept of sovereign immunity notions distinct from Chief Justice Marshall's rationale. Hence the present status of the doctrine of sovereign immunity is not the end product of, or even a stage in, the development of a freely evolving legal concept. Instead it is an amalgam of several distinct notions.[4]

As a prelude to a discussion of the concept of sovereign immunity it will be helpful to initially sketch certain distinctions so that the concept's historical development may be better understood. Two basic theories of sovereign immunity have struggled for ascendency in the cases and in the discourse of commentators. Traditionally, sovereign immunity has been regarded as either absolute or restrictive. The former notion is the simpler of the two. Under the absolute theory the sole inquiry is whether or not the entity being sued is a foreign sovereign. If so, the court will

1. For a concise demonstration of this proposition in the instance of the development of the doctrine of the manufacturer's liability for defective products see E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1948); H. BERMAN & W. GREINER, THE NATURE AND FUNCTIONS OF LAW 400-72 (2d ed. 1966).

2. 11 U.S. (7 Cranch) 116 (1812).

3. Victory Transp. Inc. v. Comisaria Generale Abastecimiestos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Harris & Co. Advertizing v. Republic of Cuba, 127 So. 2d 687 (Fla. Dist. Ct. App. 1961); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied*, 385 U.S. 822 (1967).

4. *See* Collins, *The Effectiveness of The Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. OF TRANSNAT'L L. 119, 120-25 (1965).

dismiss the action.[5] The restrictive theory is a refinement of the absolute theory. Not only must the defendant be a foreign sovereign, but the sovereign must also be acting in its public capacity and not its private capacity.[6] These two formulations represent the basic approaches to delineating the substantive content of the doctrine.

It is also appropriate to note the fact that an entirely distinct question may arise. In what situations will a court be ousted of its jurisdiction to try a claim of sovereign immunity? The resolution of this question lies in a consideration of the constitutional ramifications of the interrelationship of the judiciary and the executive's control of foreign affairs.

This Comment will trace the historical development of the two substantive theories of sovereign immunity, and analyze the case law that has developed.[7] The second point of departure will be the interrelationship between the judiciary and the executive, with special emphasis on whether the executive can have any effect on the judicial formulation of the substantive doctrine of sovereign immunity.

## II. THE HISTORICAL PERSPECTIVE

### *A. The Schooner Exchange*

The initial theoretical base of the doctrine of sovereign immunity was articulated by Mr. Chief Justice Marshall in *The Schooner Exchange v. McFadden.*[8] In July of 1811 a French naval vessel, *The Balaou No. 5,* entered Philadelphia harbor by reason of some distress. During the pendency of repairs a libel was filed against the ship in the federal district court. Two United States citizens who claimed to be the owners of a schooner named *The Exchange* contended that their vessel had been seized on the high seas by the French Navy, armed, and renamed *The Balaou No. 5.* It was the prayer of the petitioners that they be restored to the rightful possession of their vessel. A "suggestion"[9] that the attach-

5. *See* C. FENWICK, INTERNATIONAL LAW 308 (3d ed. 1948). For additional discussion see Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* in 28 BRIT. Y.B. INT'L L. 220, 221-26 (1951); Fensterwald, *Sovereign Immunity and Soviet State Trading,* 63 HARV. L. REV. 614, 616-20 (1950).

6. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965); Letter from Jack B. Tate, Acting Legal Advisor of the State Departmetn to Philip P. Perlman, Acting Attorney General, 26 DEP'T STATE BULL. 984 (1952); Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L L. 93 (1953).

7. There is a distinction drawn in the cases between immunity from jurisdiction and immunity from execution. However, no discussion of immunity from execution of judgments will be attempted. Nor will the distinction be drawn between cases in which an effective plea of sovereign immunity prevents the court from acquiring in personam jurisdiction and those in which the court is merely prevented from exercising its already acquired jurisdiction over property within the territory.

8. 11 U.S. (7 Cranch) 116 (1812).

9. A "suggestion" is the formal means by which the executive branch of the Government, through the State Department or other agency, makes a representation to the court. It is communicated to the Attorney General who instructs the local United States Attorney to make the appropriate representation to the court. *See* Feller,

ment of the ship be dissolved and that the suit be dismissed for lack of jurisdiction was filed by the United States Attorney. Marshall, however, addressed himself to the pertinent legal considerations, and the Court affirmed the district court's dismissal of the action.

The theoretical basis of the doctrine of sovereign immunity asserted in this opinion is a fusion of two components. The conclusion represents an exercise of syllogistic reasoning concerning the practices of nations; this is conjoined with an inductive demonstration that the demands of the comity of nations, or international law, require recognition and application of the sovereign immunity concept. The Court, reasoning from the unarticulated premise of *"par non habet in parem imperium,"*[10] concluded that any forum state's authority within its territory must be absolute and plenary, and that this authority admitted of no extrinsic limitation. If restrictions on the sovereign's authority originated externally, a concomitant diminution of the sovereign's plenary power would result, and there would necessarily be state inequality. The assumed maxim would thus be contradicted, since the state imposing restraints on another would, by this very fact, exercise authority over the latter. The premise requires that all exemptions from the sovereign's absolute power must come from within, from the consent of the sovereign state itself.[11]

The Chief Justice then proceeded to demonstrate the factual application of this abstract conclusion. He enumerated three spheres of international relations in which the nation states have voluntarily and for their mutual self-advantage ceded a portion of their inherent and absolute authority. In these enumerated areas the states forbear from the exercise of judicial power. Insofar as the customary practices of the nation states comprise the corpus of international law, these concessions of authority may be said to derive their force from international law. The Court enumerated, as the final sphere[12] in which the sovereign is understood to cede a portion of its territorial jurisdiction, the rights of foreign military forces in transit across the territory of another sovereign. Assuming that the sovereign of the place of crossing has granted generally, or in a specific instance, the right of free passage across its territory, it is presumed that the state has waived jurisdiction over the force during the passage. Thus, the consent to allow passage through the territory implies an immunity not expressly stated — the freedom from the jurisdiction of the local sovereign. If the military force commences transit without a general or specific authorization, no such presumption of immunity arises. Such a qualification proceeds necessarily from the local sovereign's right and duty to protect its territory. Addressing itself to the

---

*Procedure in Cases Involving Immunity of Foreign States in Courts of the United States,* 25 AM. J. INT'L L. 83, 86 (1931).

10. "An equal has no authority over an equal." Marshall's opinion is, in a sense, a specific application of this principle.

11. 11 U.S. (7 Cranch) at 136.

12. *Id.* at 139. The other two areas of ceded authority discussed are the exemption from judicial process of the sovereign himself and his diplomatic ministers while in the territory of another state. *Id.* at 137-39.

case at bar, an armed public vessel in a domestic port, the Court applied, by analogy, this third exception. There is no inordinate threat of harm occasioned by the admission of a ship of war into a port of another state. Thus, the Court concluded that if the port is open to ships of all nations, an armed public vessel may enter and obtain the protection of the local sovereign, and the immunity from jurisdiction, although no specific license to enter is granted.[13]

The foundation of these concessions is the common consent of the nation states and their coequal dignity.

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[14]

Apparently Chief Justice Marshall was cognizant that this cession of authority, compelled as it was by the necessity of intercourse among states and the coequal dignity of the nations, formed a precept of international law. This is evidenced by his assertion that the immunity of an armed ship of a foreign sovereign "seems . . . to be a principle of public law."[15] Although the sovereign is capable of destroying the implication of this ceded authority, the presumption that he has not breached his implicit compact with the other nation states lies until some unequivocal action to the contrary is taken. It therefore appears that in the absence of affirmative action by the executive department to vitiate the cession of jurisdictional authority, the courts in the United States must apply this concept of sovereign immunity as a part of the federal common law, for those customary practices of nation states which form a part of international law are incorporated into the constitutional concept of "the supreme Law of the Land."[16]

---

13. *Id.* at 141-44.
14. *Id.* at 137.
15. *Id.* at 145. Hackworth in a passage reiterating much of Marshall's thought states:

> These exemptions . . . are theoretically based upon the consent, express or implied, of the local state, upon the principle of equality of states in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly intercourse between members of the family of nations. While it is sometimes stated that they are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e., international law.

2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 393 (1941). One recent commentator has stated: "Sovereign immunity is perhaps the best example of a rule of international law derived from the demands of 'comity' among supposedly friendly nations." Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?* 48 CORNELL L.Q. 461, 469 (1963).

16. U.S. CONST. art. VI, § 2. *See* The Western Maid, 257 U.S. 419 (1922); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

The opinion in *The Schooner Exchange* is considered the classic statement of the absolute theory of sovereign immunity.[17] However, the fundamental distinction between the activities of a sovereign in its public capacity as opposed to those undertaken in a private capacity, the basis of the restrictive theory of sovereign immunity, was evidenced in the opinion: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual. . . ."[18] Further, the conduct of the French naval forces that formed the factual setting of this opinion would have been exempted from judicial process under either the absolute or restrictive theories of sovereign immunity, since the conduct at issue could in no sense be termed as commercial in nature.[19] It might be more accurate to maintain that, although the rationale of *The Schooner Exchange* had its foundation in the comity among states and their coequal dignity, the actual holding of the case is somewhat equivocal as to the exact scope of the doctrine. It is also significant that the Court considered the merits of the defendant's claim after the executive had filed a suggestion of immunity.

### *B. Early Case Law*

For more than a hundred years following *The Schooner Exchange* the vast majority of the cases involving a possible plea of sovereign immunity were suits in admiralty.[20] Ships of foreign nations were libeled in American ports, and jurisdiction in rem and quasi in rem was thereby established. The opinions in these cases are weighted with references to *The Schooner Exchange.* Immunity was generally granted to those ships in the actual possession of a foreign government and employed for a

---

17. Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 573 (1926); Ocean Transp. Co. v. Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967). *See* Fensterwald, *Sovereign Immunity and Soviet State Trading,* 63 HARV. L. REV. 614, 617–18 (1950).

18. 11 U.S. (7 Cranch) at 145. It was thus very consistent for Marshall to assert twelve years after *The Schooner Exchange:*

> [W]hen a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself. . . .

Bank of United States v. Planters Bank, 22 U.S. (9 Wheat.) 904, 907 (1824).

19. This action might be considered to be an act of expropriation or nationalization. The State Department has in fact suggested immunity for an act of nationalization. Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied,* 385 U.S. 822 (1967).

20. Cases did arise outside the admiralty area. *See* Oliver Am. Trading Co. v. United States of Mexico, 5 F.2d 659 (2d Cir. 1924) (the plaintiff was not permitted to sue the defendant for its unlawful confiscation of the plaintiff's property). Although a plea of sovereign immunity was raised, the court determined that the rights of the parties were determined by treaty provisions. In French Republic v. Board of Supervisors, 200 Ky. 18, 252 S.W. 124 (1923), the right of the French Republic to be exempted from state tobacco taxes was considered.

public purpose.[21] Mere governmental ownership of the vessel, without allegation of public use and possession, was, however, held to be insufficient.[22]

A significant number of these cases arose during World War I, and the exigencies of the political situation demanded an expansion of the doctrine's range of application. Due to the necessity of supplying war material and other essentials during this critical period it was imperative that the ships employed for this purpose be free from attachment and sale in tort and breach of contract actions.

A resultant shift in emphasis to possession and purpose occurred which decidedly broadened the doctrine's scope beyond the three enumerated spheres of ceded authority which Marshall demonstrated. Thus the international law foundation of the doctrine was expanded to encompass current national practice.[23]

An interesting refinement took place in the case of *The Roseric*.[24] A privately owned vessel requisitioned for use by the British Navy was held to be immune from jurisdiction so long as she was used for a public purpose — this despite the fact that her officers and crew remained in the employ of the vessel's private owners.[25] In commenting on its expansion of the doctrine of sovereign immunity, the court stated: "The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships."[26] By assuming that the foundation of the decision in *The Schooner Exchange* was the employment of the property for a public purpose the court was able to distinguish the factual situation before it from that portion of Marshall's opinion wherein he determined that private ships need not be accorded the same exemption as public, armed vessels.[27] It is not the ownership or the exclusive possession of the property by the sovereign, asserted the court, but rather "its appropriation . . . to such [public]

21. The Carlo Poma, 259 F. 369 (2d Cir. 1919); The Attualita, 238 F. 909 (4th Cir. 1916); The Pampa, 245 F. 137 (E.D.N.Y. 1917).
22. Long v. The Tampico, 16 F. 491 (S.D.N.Y. 1883); *accord,* The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941).
23. The Attualita, 238 F. 909 (4th Cir. 1916); The Maipo, 252 F. 627 (S.D.N.Y. 1918); The Pampa, 245 F. 137 (E.D.N.Y. 1917).
24. 254 F. 154 (D.N.J. 1918).
25. On quite similar facts the Fourth Circuit Court of Appeals refused to hold as immune from suit a vessel owned by the Italian government in The Attualita, 238 F. 909 (4th Cir. 1916). The court held that the ship was not in the actual possession of the Italian government on the basis that the owners remained in possession and in effect chartered the ship to the government. *See* Societa Commerciale Italiana di Navigazione v. Maru Nav. Co., 280 F. 334 (4th Cir. 1922); The Luigi, 230 F. 493 (E.D. Pa. 1916); Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine,* 25 MINN. L. REV. 1 (1940).
26. 254 F. at 158.
27. *Id.* at 157.

service, that exempts it from judicial process."[28] However, *The Schooner Exchange* rested more properly on the sovereign character of the actor and the state's responsibility to other sovereigns, rather than on notions of public use. This isolation of the public purpose rationale for a rule of decision in *The Roseric* will be seen to have important ramifications.

In the same year as *The Roseric,* 1918, *The Maipo*[29] was decided. A vessel engaged in an admittedly commercial enterprise was libeled,[30] notwithstanding the allegation that the vessel was a transport of the Chilean Navy. As framed by the court, the issue was whether the ship, despite its commercial pursuit, ought to be exempted from judicial process if owned by another sovereign. In contradistinction to the holding in *The Roseric,* the court considered as the determining factor in *The Schooner Exchange* the notion that property of a sovereign owned in its sovereign capacity and in its possession is immune from judicial proceedings.[31] Its interpretation of *The Schooner Exchange* is apparently based on the logical assumption that since Marshall stated that all property held by the sovereign in a private capacity is not exempted, then he must by necessary implication have intended that all property held in a public capacity is immune from judicial process.[32] The court did not overtly find that *The Schooner Exchange* called for immunity of all vessels engaged in a public purpose as did the court in *The Roseric.* Nevertheless, it determined that immunity should be granted to this ship despite its commercial activity since the economic enterprise in which it was engaged was of a benefit to the entire population of the state.[33] The holding in this case may, therefore, be considered as a specific application of the public purpose rationale of *The Roseric,* notwithstanding the difference in conceptual approach. Such an interpretation may indicate that war time exigencies demanded an expansion of the public purpose concept to encompass activities normally considered as commercial. Alternatively, it may be construed as limiting the judicial inquiry to only the question of ownership, and, once it is determined that the owner is in a sovereign state, immunity attaches, even if the activity is commercial in nature. This latter view is supported by the court's statement that in consideration of the existing war conditions "[i]t is not to be presumed . . . that . . . our own government, will fail to do what is just and fair in connection

28. *Id.* at 161-62.
29. 252 F. 627 (S.D.N.Y. 1918).
30. The vessel was libeled to provide quasi in rem jurisdiction for a suit brought by the libellants for damage to a cargo of hides which the ship was transporting. It is interesting to note that although *The Maipo* was owned by the Chilean Navy and manned by naval personnel, it was in fact chartered to the libellants.
31. *Id.* at 629.
32. This is not a necessary logical conclusion. If a system is composed of only *A's* and *B's,* the fact that all *B's* are also *C's* does not compel the conclusion that no *A's* are *C's.*
33. 252 F. at 630-31. This statement illustrates one difficulty encountered by adherents to the restrictive theory of sovereign immunity. Even commercial acts when engaged in by a government manifest a public purpose, since they are entered into for the good of the state.

with operations of a commercial character."[34] Whichever of these two positions is accepted, it appears that the desire to protect American interests through the expectation of reciprocal treatment provided the incentive for expansion of the doctrine of sovereign immunity.

The early cases proved to be flexible in meeting the demands of changing and varying circumstances. However, subsequent conflicting threads can be traced to these cases.

### C. *Berizzi: Establishment of the Absolute Theory*

Following World War I the Supreme Court decidedly broadened the prior concepts of sovereign immunity. In *Berizzi Bros. v. The Pesaro*[35] the Supreme Court effectively adopted the absolute theory of sovereign immunity. A vessel, *The Pesaro,* was libeled to provide the jurisdictional basis for a breach of contract action. As stated by the Court, the issue to be decided was identical to that in *The Maipo*: whether a ship, engaged in the purely commercial venture of transporting merchandise for hire, should be granted immunity because it was owned and possessed by a sovereign state, the Italian government. For resolution of this question Mr. Justice Van Devanter relied upon *The Schooner Exchange:*

> We think the principles [of *The Schooner Exchange*] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.[36]

This approach is precisely the reverse of that employed by Judge Mack in the lower court opinion wherein the claim of sovereign immunity was disallowed.

> [T]he immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. . . .
>
> . . . [I]mmunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade.[37]

In this latter opinion Judge Mack succinctly applied a restrictive approach to the application of the doctrine of sovereign immunity. In contrast, Mr. Justice Van Devanter in the Supreme Court opinion demonstrated a definite

34. 252 F. at 631.
35. 271 U.S. 562 (1926).
36. *Id.* at 574.
37. The Pesaro, 277 F. 473, 481 (S.D.N.Y. 1921). This same thought is expressed again in the opinion: "[A] government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged." *Id.* at 482.

adherence to, and application of, the absolute theory of sovereign immunity.[38] Hence a determination of the character of the actor becomes the paramount consideration. Once the actor is found to be a sovereign state, the distinction between governmental functions and commercial activities is meaningless.[39] All its activities should be exempted from judicial process. Inasmuch as the decision in *Berizzi Bros.* is grounded on, and purports to be an expansion of, *The Schooner Exchange* doctrine, it too must be founded on international law.

However, even if the distinction between public and private purpose, which forms the basis of the restrictive theory, were to be acknowledged, the *Berizzi* Court stripped this distinction of its reality by adopting an expansive interpretation of the public purpose test of *The Roseric.* All activities of a sovereign, including its ownership of property, were characterized as public in nature since they were directed toward the public good. Therefore, the concept of public purpose subsumes what some had argued to be private activity.

### *D. The Stone Trilogy and the Foreign Affairs Power*

A little more than a decade after *Berizzi Bros.* was decided, the Supreme Court, in three decisions authored by Mr. Justice Stone, effectively interjected a new aspect into the concept of sovereign immunity that was distinct from that of *The Schooner Exchange.* In the first of the Stone trilogy, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,*[40] the alleged owner of a Spanish merchant ship, *The Navemar,* filed a libel in the federal district court to recover possession of the ship. After the State Department refused to request immunity, a suggestion of immunity was submitted to the court by the Spanish Ambassador. It was asserted therein that the vessel was the public property of the Spanish Republic and was therefore exempted from the procedure of the court. There are, declared Mr. Justice Stone, two methods by which a foreign state may assert the public status of property and its attending immunity from judicial process. It may make a diplomatic representation of the public ownership of the property to the State Department, or it may intervene in the suit as a claimant to the property.[41] Should the foreign state elect the former procedure, then "[i]f 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

38. The adoption of the absolute theory of sovereign immunity was in contravention of State Department policy. In answer to the Italian Ambassador's diplomatic request for immunity, the State Department took the position that government-owned vessels engaged in commerce were not entitled to immunity. 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 434 (1941).

39. *See* Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court,* 67 HARV. L. REV. 608, 609 (1954).

40. 303 U.S. 68 (1938).

41. *See Ex parte* Muir, 254 U.S. 522 (1921). The Restatement position is in accord. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 71 (1965).

upon appropriate suggestion by the Attorney General. . . ."[42] Alternatively, if the foreign state determines to appear as a claimant in the suit and does not make a diplomatic representation to the State Department or if the State Department has refused to "recognize and allow" the claim, "the want of admiralty jurisdiction because of the alleged public status of the vessel . . . [is an] appropriate [subject] for judicial inquiry upon proof of the matters alleged."[43] Should this latter procedure be followed, the foreign state must prove factually that the "vessel . . . [is] in its possession and service. . . ."[44] Such a requirement of factual proof is an advance from the position of the courts in some of the earlier admiralty cases such as *The Carlo Poma*[45] and *The Rogday*.[46] In these cases the suggestion, or allegation of public possession and use, which the foreign diplomatic representative made to the court, was itself held to be conclusive proof of the facts alleged.[47]

Of more decided import is the declaration of a new basis for the allowance of a claim of sovereign immunity. The issue of sovereign immunity is, by the holding in *The Navemar,* both a political and a judicial question. If the issue is presented politically through a representation made to the State Department by the foreign nation and a "recognition and allowance" of the claim by that organ of the executive branch is presented to the court, it must be given cognizance. The effect of the suggestion is to oust the court of jurisdiction. If, instead, the matter is put at issue through an appearance by the foreign state in the suit, then the court will determine the efficacy of the plea in accord with accepted legal precedent. It is noteworthy that the interjection of the political aspect by the court in *The Navemar* does not affect the theoretical legal basis of sovereign immunity. The opinion assumes that the State Department

42. 303 U.S. at 74. Justice Stone apparently relied on the following language in *The Schooner Exhange:* "[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." 11 U.S. (7 Cranch) at 147. This statement lends little support to his proposition. The origin of his concept is more accurately derived from a passage in United States v. Lee, 106 U.S. 196 (1882).

> [Q]uestions . . . which . . . might involve war and peace, must be primarily dealt with by those departments of this government which had the power to adjust them. . . . In such cases the judicial department of the government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.

*Id.* at 209.

43. 303 U.S. at 75. The decision of the Court was that the Spanish government should be permitted to intervene in the cases as an actual suitor and present its claim of actual possession and public use in that capacity. In the proceeding below she intervened but not as an actual party. 18 F. Supp. 153 (E.D.N.Y. 1937). In *Ex parte Muir,* the British Ambassador was not permitted to claim sovereign immunity in an amici curiae capacity. Sovereign immunity could be claimed only by a party. To the same effect is the Supreme Court decision in The Pesaro, 255 U.S. 216 (1921), an earlier case involving the same facts as Berizzi Bros v. The Pesaro, 271 U.S. 562 (1926).

44. 303 U.S. at 74.

45. 259 F. 369 (2d Cir. 1919), *rev'd on other grounds,* 255 U.S. 219 (1921).

46. 279 F. 130 (N.D. Cal. 1920).

47. It should be noted that even if the factual evidence of state ownership and possession is insufficient to meet the requirements for a successful plea of sovereign immunity, the state may very well prove a superior title on the merits.

will make a determination in accord with the traditional norms. Thus the courts merely substitute a factual determination made by the executive branch for their own.

*Ex parte Republic of Peru*[48] provided Mr. Justice Stone with the opportunity to reaffirm the concepts of *The Navemar* and to further explicate their underlying basis. A Cuban corporation libeled the vessel *Ucayali* for the failure of its owner, a corporate agent of the Peruvian government, to comply with the terms of a contract. Following the procedural requirements of *The Navemar,* the Peruvian government sought and obtained a suggestion of sovereign immunity from the State Department. Apparently the State Department determined itself bound by the Supreme Court's adoption of the absolute theory of sovereign immunity in *Berizzi Bros.,* for prior to that case the State Department had not readily granted a suggestion of immunity when the foreign government was engaged in purely commercial transactions.[49]

Justice Stone again asserted that in the absence of a State Department recognition and allowance of immunity the courts have the prerogative to determine themselves whether the requisite conditions for a plea of sovereign immunity have been satisfied.[50] However, when, as in the case at bar, the State Department has made the determination, the courts are bound to conform themselves to a principle of substantive law:

> That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations. "In such cases the judicial department . . . follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction". . . . More specifically, the judicial seizure of the vessel of a friendly sovereign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that the courts are required to accept and follow . . . [that] determination. . . .[51]

Although *The Schooner Exchange* is cited by Justice Stone as support for this general proposition, there appears to be no direct reference to the concept of a separation of powers and the exclusive executive control over the conduct of foreign affairs. Concededly, Chief Justice Marshall did grant immunity to and relinquish jurisdiction over the *Balaou No. 5* in an instance where a suggestion was filed, but he did so out of compliance with the dictates of the comity of nations and international law

48. 318 U.S. 578 (1943).

49. *See* The Attualita, 238 F. 909 (4th Cir. 1916); G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 423-36 (1941).

50. 318 U.S. at 588.

51. *Id.* The quotation of the Court is from United States v. Lee, 106 U.S. 196, 209 (1882).

as he judicially found them and not through the constitutional compulsion of the doctrine of separation of powers.[52]

In *The Navemar* and *Peru* the Supreme Court enunciated a new theoretical basis for the application of the doctrine of sovereign immunity parallel to that stated in *The Schooner Exchange.* When an executive determination to recognize and allow the plea of sovereign immunity has been made by the State Department, the courts are required to give it conclusive effect. But when no suggestion has been sought from the executive branch, or if a request is rejected by it, the courts may, under the rationale of *The Schooner Exchange,* as sanctioned by both *The Navemar* and *Peru,* determine for themselves the efficacy of the plea of sovereign immunity. Both of these opinions allow a conclusive factual determination to be made by the executive branch, one that precludes an independent determination by the judiciary. It is presumed that the State Department will utilize in its factfinding process the same standards that are used by the courts. Thus the theoretical basis of the doctrine of sovereign immunity is not changed. As a matter of substantive law the doctrine is still governed by precepts of international law. In effect, the separation of powers and exclusive executive department control of foreign affairs arguments, as stated in both *The Navemar* and *Peru,* may be characterized as jurisdictional in nature. An executive factual determination ousts the courts of their jurisdiction to decide the question of sovereign immunity.

In the last of the three Stone opinions, *Republic of Mexico v. Hoffman,*[53] the distinction between the political and judicial functions in the formulation and application of the doctrine of sovereign immunity, as put forth in *The Navemar* and *Peru,* was severely reoriented. An attempt was also made to supplant it with an alternative theoretical basis.

The vessel *Baja California* was libeled to provide the jurisdictional base for a maritime tort action. The Mexican Ambassador filed a suggestion with the court that the ship was owned by the Mexican government. Though a representation was made to the State Department, no suggestion of "recognition and allowance" of immunity was issued. The Mexican government then defended the suit on the merits and attempted to use sovereign immunity as an affirmative defense. As presented for the Supreme Court's determination the question was whether the mere fact that title was vested in a foreign state was, in itself, sufficient to allow or require judicial recognition of sovereign immunity. Relying on his opinion in *Peru,* Justice Stone reasserted that in the absence of State Department recognition and allowance of sovereign immunity the courts

52. U.S. CONST. art. II, § 2; *see* Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?* 48 CORNELL L.Q. 461, 469–75 (1963); Frank, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication,* 44 MINN. L. REV. 1101–04, 1114–19 (1960).

53. 324 U.S. 30 (1945).

may determine whether the requisites for such immunity exist. In this opinion, however, Stone declared that such a judicial determination must be made in accord with executive policy:

> It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. . . . [R]ecognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests. . . .[54]

In applying this principle to the facts of the case, Stone found that it had never been the State Department's policy to recognize sovereign immunity on mere assertion by a foreign state of title alone, but only on allegations of possession and public use.[55] This qualification of the former position which Stone put forth in *The Navemar* and *Peru* decisions may be somewhat unsound, and it may in fact yield a result in direct opposition to that which he intended.[56] It forces the court to consider past executive policy as the sole source of the substantive metes and bounds of the doctrine. For example, if in the past the State Department had recognized and allowed a plea of sovereign immunity in a particular situation, and yet for extraneous political reasons the Department deems it expedient not to issue a recognition and allowance of immunity in this individual case, the court would nonetheless be forced to recognize and allow the plea of sovereign immunity at the trial on the merits; this would be necessitated by an adherence to past executive policy to do so under these factual conditions.[57]

Conceptually, this qualified position which Stone took in *Hoffman* obliterates the neat distinction between the situations in which a suggestion is interposed by the State Department and instances in which no suggestion is filed or requested. It reduces the issue to one of solely political concern.[58] *Hoffman* appears to grant to the executive control of the substantive doctrine of sovereign immunity. Under the rationale of *The Navemar* and *Peru* it was assumed that the determination of the

---

54. *Id.* at 35-36. In a footnote the Court indicated its displeasure with the decision in *Berizzi Bros.* wherein the Court upheld a plea of sovereign immunity despite the refusal of the State Department to issue a suggestion.

55. *Id.* at 38.

56. The rationale did work properly on the particular facts of *Hoffman.* It had never been the State Department's policy to grant sovereign immunity on a mere assertion of title, but only in cases of public use and possession.

57. Such a situation would be the precise reverse of *Berizzi Bros.*

58. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court,* 67 HARV. L. REV. 608 (1954).

> Whether a defendant is entitled to immunity as a sovereign depends on the resolution of two issues: (1) is it considered a sovereign government? and (2) will the interests of foreign relations be furthered by relieving it from responding in court? . . . [N]either of these issues is a question of law to be left to the courts for decision.

*Id.* at 614. *See* Jessup, *Has the Supreme Court Abdicated One of Its Functions?* 40 AM. J. INT'L L. 168 (1946).

State Department would be in accord with the accepted legal norms;[59] however, this literal reading of *Hoffman* reverses that presumption. Now the judicial determination is merely one of fact which must be made in light of the executive's substantive interpretation of the doctrine.

The lower courts have not considered themselves bound by such an interpretation of *Hoffman*. Instead, they have refused to go beyond the *Peru* position, and they assert that in the absence of State Department action they may determine the effectiveness of a plea of sovereign immunity in accord with traditional legal principles.[60] Mr. Justice Frankfurter's concurring opinion in *Hoffman* lends credence to this more restrictive reading of the opinion.

> It is my view . . . that courts should not disclaim jurisdiction which otherwise belongs to them. . . . except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention.[61]

Such a statement indicates judicial disfavor for total executive or political control of the substantive doctrine of sovereign immunity.

It is significant that in the recent authoritative treatment of the question of sovereign immunity, the *Restatement (Second) of Foreign Relations Law*, the *Hoffman* qualification — that sovereign immunity is exclusively a political question to be determined by the executive branch — applies only when the issue is raised diplomatically through a representation to the State Department. Section 72 provides:

> (1) [A] suggestion [of immunity] from the executive branch of the government . . . is conclusive as to issues determined by executive action within the exclusive constitutional competence of the executive branch . . . and as to other issues directly affecting the conduct of foreign relations. As to all other issues, such a suggestion will be given great weight.
>
> (2) [A]n objection made by the government of a foreign state through its accredited diplomatic representative . . . raises an issue for disposition by the court or other enforcing agency upon the basis of proof.[62]

Mr. Justice Stone's three opinions have had marked effect on the current status of the doctrine. He created the distinction between what has been characterized as the jurisdictional or political aspects of the doctrine and its substantive content. *The Navemar* and *Peru* were his

59. In *The Navemar* the State Department granted immunity to commercial activity relying on the Supreme Court's adoption of the absolute theory of sovereign immunity in *Berizzi Bros.*

60. *E.g., In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).

61. 324 U.S. at 41-42.

62. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 72 (1965) (emphasis added).

vehicles for this. Subsequently, however, he merged these two aspects in the *Hoffman* case. Despite this final turn, the *Hoffman* qualification has been largely disregarded. The courts have felt free to determine, in the absence of a State Department suggestion, the existence *vel non* of the requisites for an effective plea of sovereign immunity, and this determination has been made in accord with traditional legal precedent, not executive policy. Since 1952, however, this distinction between the substantive basis of the doctrine and its jurisdictional aspects has taken on a marked significance. It serves as a basis for an analysis of the cases decided after the issuance of the Tate Letter.

### III. THE TATE LETTER — PRESENT CONFUSION

In 1952 the Acting Legal Advisor to the State Department, Mr. Jack B. Tate, in a letter directed to the Attorney General,[63] articulated an official State Department position on sovereign immunity: "[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity. . . ."[64] Such a declaration was based on the familiar objections to the absolute theory: (1) it is anomalous and unfair to exempt a foreign sovereign state from responsibility for its actions when most governments have consented to allow themselves to be sued in their domestic courts under provisions similiar to the Federal Tort Claims Act[65] and the Tucker Act;[66] (2) the absolute necessity of governmental commercial activity makes it equally imperative that persons who engage in such transactions with governments have available to them forums in which causes of action arising from such transactions might be adjudicated.[67]

Near the conclusion of this letter Mr. Tate asserted:

> 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.[68]

This enigmatic paragraph embodies, and is in part responsible for, the current difficulties in the application of the doctrine of sovereign immunity. Several possible interpretations may be assigned to it which essentially embody the distinctions made in the prior Supreme Court cases.

---

63. 26 DEP'T STATE BULL. 984 (1952).
64. *Id.* at 985.
65. 28 U.S.C. § 1346 (1964).
66. 28 U.S.C. § 1496 (1964).
67. *See* National City Bank v. Republic of China, 348 U.S. 356 (1955); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* in 28 BRIT. Y.B. INT'L L. 220 (1951).
68. 26 DEP'T STATE BULL. 985 (1952).

Conceivably this statement by Mr. Tate may express a State Department view that the courts are not bound in any manner by its suggestions. Under such a reading not only would a court be free to disregard a State Department suggestion, but it would also sanction the judicial practice of making independent determination of the present legal scope of the doctrine. It is evident that such an interpretation would be contrary to the position of *The Navemar, Peru,* and the *Restatement* that a court is ousted of jurisdiction by a suggestion. Also, this interpretation would imply an affirmation of the absolute theory of *Berizzi Bros.* Mr. Tate quite apparently did not intend this construction, for it reduces the Tate Letter to an exercise in futility.

Directly opposed to this first construction is the reading of the Tate Letter which in fact approaches the *Hoffman* position. Not only must a court give conclusive effect to a State Department suggestion when one is issued, but even when the question is presented judicially the court must, in considering the efficacy of the plea, be guided by executive policy. Under this reading, in the absence of a suggestion, there is room for a legal determination of the fact. However, the scope of the legal doctrine would be guided by executive policy — *i.e.,* the content of the doctrine would be solely one of political concern.

Such an interpretation has a vital flaw if the literal language of the letter were carried to its logical conclusion, and may result in a finding by a court that the court need not follow present State Department policy. After reading the second sentence of the quoted paragraph in conjunction with the *Hoffman* decision a court may feel constrained to defer to the State Department's past policy of adherence to the restrictive theory of sovereign immunity, even in the absence of a suggestion from the executive branch. However, if the court were to carry its analysis one step further it would find itself in a circular line of reasoning. After deferring to the executive as *Hoffman* would require, the court may conclude from the first sentence of the quoted passage that it is not the State Department policy to require compliance. The court, therefore, would reach the position that it would not be bound by the executive's declared policy, and it would decide the question of sovereign immunity according to prior precedent. This is equivalent to the result under the first interpretation. Presumably, most courts would not take this last step, but instead would confine themselves to the *Hoffman* position.

The final construction of the Tate Letter is essentially that expressed in section 72 of the *Restatement.* When the State Department has suggested immunity, it is conclusive upon the courts. If no suggestion is sought by the foreign state, or if the State Department has refused to honor the request, the issue, if presented to the court, is to be determined in accord with prevailing international law. This latter situation is identical to the construction employed in the first reading of the passage, although limited to cases in which no suggestion is filed by the State Department. There is no executive control over the substantive contours of the doctrine.

If the executive has issued a suggestion it is unimportant to determine whether the court's deference to the State Department is on a political level or is but an acceptance of the restrictive theory, because in those instances where the State Department applies the restrictive theory, a fortiori the sovereign would qualify under the absolute theory.

In light of such ambiguous, or virtually nonexistent guidelines, it is understandable that the courts differ on the effect to be given a suggestion of immunity which is granted by the State Department in accord with the policy of the Tate Letter. In the only Supreme Court decision which has discussed the doctrine since the issuance of the Tate Letter, *National City Bank v. Republic of China,*[69] Mr. Justice Frankfurter enunciated a detailed criticism of the absolute theory; however, he wrote only one sentence, and that guardedly neutral, on the Tate Letter: "Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government."[70] Obviously, no guidance can be gleaned from this reference by the Supreme Court. Therefore the courts, in the absence of any definitive criteria, have taken diverse positions.

In several cases, such as *Frazier v. Hanover Bank*[71] and *Stephen v. Zivnostenska Banka,*[72] the New York courts have seemingly adopted the first reading of the Tate Letter in instances where suggestions were presented. Both of these cases essentially involved disputed claims to assets held in New York banks. The courts did not give a conclusive effect to the State Department suggestions. Rather they proceeded to factually determine if the suit did involve a claim against a sovereign.[73] This approach is not firmly supported by a close reading of the Tate Letter. The thrust of the letter pertains to instances in which a suggestion is not issued. No implication is apparent that would call for a position contrary to that of *The Navemar* and *Peru* — that a court is always bound when a suggestion is issued.

In numerous other decisions the courts have given a broad and conclusive effect to the State Department suggestions of immunity. Once they are issued, the suit must be dismissed.[74] Possibly the circuit court

69. 348 U.S. 356 (1955).

70. *Id.* at 361.

71. 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct.), *aff'd,* 281 App. Div. 861, 119 N.Y.S.2d 918 (1953).

72. 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961), *aff'd,* 12 N.Y.2d 781, 235 N.Y.S.2d 1, 186 N.E.2d 676 (1962).

73. In the *Frazier* case the court found that the claims to the funds were in effect claims against a sovereign and allowed a plea of immunity. In the *Stephen* case immunity was not granted to the Czechoslovakian government. In commenting on what he deems to be the lamentable judicial deference to State Department suggestions, Mr. Justice Musmanno, dissenting in Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied,* 385 U.S. 822 (1967), stated: "The majority Opinion in this case is built on an erroneous concept of the law, namely, that once the State Department whispers sovereign immunity the Courts must close their doors to everyone who may come within the breeze of the zephyric suggestion." *Id.* at 178–79, 215 A.2d at 886.

74. Ocean Transp. Co. v. Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967); United States v. Anchor Line, Ltd., 232 F. Supp. 379 (S.D.N.Y. 1964); Rich

opinion in *Rich v. Naviera Vacuba, S.A.*[75] exemplifies the most extreme judicial deference to the State Department's political determination. In a suit containing a great many collateral and purely judicial matters, including an alleged waiver of sovereign immunity, the court dismissed the suit with the remark that "our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State."[76] Such a statement strongly affirms an adherence to the position that a suggestion is always binding when issued by the executive.

In situations where no suggestion is issued, the second reading of the Tate Letter, the *Hoffman* approach, and the third reading, the *Restatement* view, are both pertinent. Under the latter, in the absence of a suggestion the court could apply the existing absolute theory of *Berizzi Bros.* However, under the *Hoffman* approach the court would have to take cognizance of the State Department's adoption of the restrictive theory and would premise its judicial determination on that theory. The application of the absolute theory presents relatively few problems, but the courts face a difficult task in determining what is or is not a commercial act under the State Department's restrictive theory. A brief overview of the cases is indicative of this difficulty.

Originally the Department's position was quite narrow and evinced an overly zealous adherence to the literal language of the Tate Letter. In *New York & Cuba Mail S.S. Co. v. Republic of Korea*,[77] one of the plaintiff's ships was unloading rice in the harbor of Pusan, Korea, as per a contract of transportation entered into by the plaintiff and defendant. One of the Korean government's small tenders, while assisting in this operation, collided with the plaintiff's vessel. The Korean government did not intend commercial sale of the cargo, rather it distributed the rice to feed the civilian and military population during the Korean crisis. Notwithstanding this factual setting, the State Department refused to recognize the Korean government's claim of immunity.

In many cases a factual situation is presented which would fall outside the restrictive theory; nevertheless, in several more recent cases the State Department has felt compelled by the pressures of political considerations to issue a suggestion of immunity. In looking to these decisions the courts find themselves trying to reconcile opposed positions — the Tate Letter's adherence to the restrictive theory and the issuance of a suggestion in a particular case.

---

v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd per curiam*, 295 F.2d 24 (4th Cir. 1961); State v. Dekla, 137 So. 2d 581 (Fla. Dist. Ct. App. 1962); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied*, 385 U.S. 822 (1967).

75. 197 F. Supp. 710 (E.D. Va.), *aff'd per curiam*, 295 F.2d 24 (4th Cir. 1961).

76. 295 F.2d at 26.

77. 132 F. Supp. 648 (S.D.N.Y.), *aff'd*, 238 F.2d 400 (2d Cir. 1956). Jurisdiction was acquired by attaching Korean assets in a New York bank.

In *Chemical Natural Resources, Inc. v. Republic of Venezuela*[78] the plaintiff attached a ship belonging to the defendant that was engaged in commercial activity. On the basis of the jurisdiction thus acquired, he sued the defendant for breach of contract alleging unilateral cancellation of concessions, breach of a construction contract, and illegal nationalization of property. The Pennsylvania supreme court determined, despite a vigorous dissent by Justice Musmanno, that conclusive effect must be given to the suggestion of immunity issued by the State Department.[79] *Rich v. Naviera Vacuba, S.A.*[80] presented similar political exigencies. A Cuban merchant ship bound from Cuba to Russia with a cargo of sugar turned into a Virginia port, whereupon several members of the crew sought asylum. The ship was libeled to satisfy outstanding judgments against the original owners of the vessel; these same owners also brought a libel in an attempt to regain its possession. Although the ship was engaged in a purely commercial venture, the State Department acceded to the Castro regime's protestation of immunity. Consequently, the court determined itself to be conclusively bound by the suggestion of immunity issued by the executive. Such cases present little difficulty in themselves. Under either the second or third interpretation of the Tate Letter, the courts are undeniably bound by the suggestion since it emanates from the foreign relations power. The problem presented by such cases is the lack of discernible criteria which they offer to a court which feels itself bound by the *Hoffman* interpretation of the Tate Letter. At present it is not possible for a court to discern precisely what the executive policy is.

*Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*[81] provides the only attempt at a judicial solution of this dilemma. In this Fourth Circuit Court of Appeals opinion Judge Smith, in the absence of a suggestion, adopted the *Hoffman* approach and attempted to implement the restrictive theory by delineating the difference between governmental and commercial acts. A rather conservative approach was adopted in that sovereign immunity need only be granted by a court if the activities are:

(1) internal administrative acts, such as expulsion of an alien,
(2) legislative acts, such as nationalization,
(3) acts concerning the armed forces,

78. 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied,* 385 U.S. 822 (1967).

79. Concededly the State Department may have issued a suggestion of immunity in this case in an attempt to thwart application of the Hickenlooper Amendment, Foreign Assistance Act of 1964, Pub. L. No. 88–633, Part III, ch. 1, § 301, 78 Stat. 1009, which would have enabled the court to consider if the nationalization or expropriation was in violation of international law despite the Supreme Court decision in Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964). For a discussion of the interrelation between the act of state doctrine and sovereign immunity see American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary, 257 F. Supp. 622 (D.N.J. 1966); Note, *The Castro Government in American Courts: Sovereign Immunity and The Act of State Doctrine,* 75 HARV. L. REV. 1607 (1962).

80. 197 F. Supp. 710 (E.D. Va.), *aff'd per curiam,* 295 F.2d 24 (4th Cir. 1961).

81. 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).

(4) acts concerning diplomatic activity,
(5) public loans.[82]

Such a set of criteria exempts only those acts which are strictly political. It would have authorized a grant of immunity in the *Chemical Natural Resources* case because a nationalization of property was the root issue, but conceivably not in *Rich.*

## IV. CONCLUSION

The foregoing discussion has attempted to chronicle the evolution of the doctrine of sovereign immunity in the past one hundred and fifty years. Its theoretical basis and structural limits were first set forth in *The Schooner Exchange.* In the subsequent admiralty cases the scope of application was decidedly expanded, but Marshall's rationale was employed to justify the enlargement. *The Navemar* and *Peru* superimposed the concept of separation of powers and the correlative duty to accept an executive request for immunity. Then, in *Hoffman,* Mr. Justice Stone attempted to supplant the traditional basis by characterizing the doctrine as an instrument of foreign affairs, and, therefore, within the exclusive control of the executive. Whatever certainty and predictability that existed under this case law was obfuscated by the issuance of the Tate Letter in 1952. As indicated above, the Tate Letter can be read in at least three different ways, and it is impossible to determine whether it represents a retreat from, or an affirmation of, *Hoffman.* If it is the latter, the implementation of the *Hoffman* approach is exceedingly difficult because the executive has not delineated the substantive criteria of its policy and apparently departs from the restrictive theory when political considerations are found to be controlling.

The fairest synthesis of the doctrine is found in section 72 of the *Restatement.* When a suggestion is issued by the executive it must be accepted by the judiciary. This preserves the constitutional principles of *The Navemar* and *Peru.* Contrariwise, in the absence of a suggestion, the courts act as factfinders and apply the substantive rule of sovereign immunity as it has developed judicially. By omission, the *Restatement* rejects the implications of *Hoffman* that the executive policy should control the substantive principles. It should be noted that the absolute theory of immunity, as understood by the courts, includes the restrictive theory of sovereign immunity, and that, therefore, embarrassment to the executive seems limited to those situations where the State Department, pursuant to the restrictive theory, refuses to issue a suggestion and the courts subsequently grant immunity. Moreover, it is difficult to understand how a nation experiences embarrassment by acknowledging the integrity of the rule of law as applied by its courts.

82. *Id.* at 360.

Throughout this rather abstract discussion of the absolute and restrictive theory of sovereign immunity, the pragmatic interests of the private party plaintiff have been given only passing consideration. Since the absolute theory of sovereign immunity subsumes the restrictive and grants to a foreign nation an even greater measure of protection, there can be little diplomatic or political embarrassment to our government consequent to its application by our courts. Thus, any determination to recast the doctrine of sovereign immunity will probably be based on considerations of fairness and justice to the private plaintiff.[83] Those same pressures which impelled enactment of the Federal Tort Claims Act and the Tucker Act may force a more definitive articulation of a plaintiff's rights. Two possible procedures might be utilized. Treaties may be entered into which more precisely detail the rights of citizens of one contracting party to sue the other nation state.[84] Alternatively, a congressional enactment such as the Hickenlooper Amendment[85] might be employed to delineate the precise scope of the sovereign immunity doctrine in American courts.

*Daniel T. Murphy*

---

83. *See* Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

84. Treaty of Commerce, Friendship and Navigation with the Republic of Ireland, Jan. 21, 1950, art. 15 [1950] 1 U.S.T. 1859, T.I.A.S. No. 2155.

85. Foreign Assistance Act of 1964, Pub. L. No. 88-633, Part III, ch. 1, § 301, 78 Stat. 1009.