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The Courts, the State Department and National Policy: A Criterion for Judicial Abdication

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Professor Franck endorses the guiding principle of executive dominance in the conduct of foreign affairs, but contends that domestic courts confronted with questions of international law have failed to develop a method for determining when those questions should be decided in conformity with executive-determined policy. He urges that the courts may unnecessarily sacrifice private rights by acceding too readily to legal positions suggested by the executive in circumstances not affecting the national interest; and that on other occasions, by independently deciding questions of international law, the courts may undermine important aspects of national policy, compromising positions taken by the executive. Professor Franck recommends that in deciding questions of international law in the context of domestic cases, the courts should decide upon the degree of deference to be given to executive recommendations by determining whether any executive policy substantially affecting the national interest is likely to be impaired by the wrong decision.

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> *The guiding principle to be followed . . . is that the courts should not so act as to embarrass the executive arm in the conduct of foreign affairs.*[1]

I. The Problem

Disorder, as it is known to the lawyer, is perhaps less frequently an absence of legal order than a surfeit of it—the unrationalized, un-co-ordinated grinding of a plethora of legal gears. This is par-

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1. Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 1088, 192 N.Y.S.2d 469, 471 (Sup. Ct. 1959). See also Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943); United States v. Lee, 106 U.S. 196, 209 (1882).

ticularly true in the field of international law, where the postwar development of international contact, impact and contract has increasingly drawn domestic courts into cases which raise international issues emanating from a diversity of legal loci.

If the process of bringing order — of rationalizing and unsnarling the tangled strands knotted into an "international case" — were simply demanding of the judicial wisdom of a Solomon, it could be safely entrusted to the domestic courts. However, that process frequently demands, in addition, the political genius of a Talleyrand, for a judge must dispose of questions involving not only the private rights of individual litigants, but also strands of law and policy which emanate from the lego-political fabric of America's relations with foreign states. Where an issue is raised in the context of litigation over private rights, but the case also affects problems of international policy, the court is faced with an important question — to what extent may it independently decide the questions of international fact and law incident to the disposition of private rights, and to what extent should the judicial Solomons defer to the Talleyrands of the State Department?

II. Judicial Abdication and the Judicial Function

Why, it may be argued,[2] must the courts address themselves to issues of foreign policy in adjudicating private rights? Let Talleyrand rule the political branches and Solomon the judiciary. The Constitution has invested the judicial and political organs with separate responsibilities and separate decision-making powers. If, in the pursuit of their disparate functions, they may sometimes appear to be in conflict, what of it? Such conflict is neither a source of amazement nor of embarrassment when it occurs in the domain of domestic order-creation.[3] Certainly the possibility of occasional conflict cannot be said to diminish the great constitutional principle of government by a balance of powers.

Even in areas in which the balance of powers was constitutionally contrived by a grant of co-ordinate jurisdiction, the judicial and political branches have occasionally accommodated each other by abdicating from the exercise of a shared power. The refusal of the President to inject the powers of his office into the battle over school integration is an example of abdication from an issue which the executive believed to be properly pre-empted by the courts. Con-

2. See, *e.g.*, Jaffe, Judicial Aspects of Foreign Relations (1933); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168 (1946).

3. See, *e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Watkins v. United States, 354 U.S. 178 (1957); Toth v. Quarles, 350 U.S. 11 (1955). See also Chase, *The Warren Court and Congress*, 44 Minn. L. Rev. 595 (1960); Horn, *The Warren Court and the Discretionary Power of the Executive*, 44 Minn. L. Rev. 639 (1960).

versely, the courts, by characterizing disputes as political, have also abdicated from certain issues in deference to the political process.[4] This technique of accommodation by abdication is probably not preconditioned so much by the traditional decision-making processes of the political and judicial branches as by a desire to avoid the protracted conflict which may result from a trespass by one branch of government into the *sanctum sanctorum* of another branch.[5]

Whatever the validity of the reasoning underlying voluntary abdication from issues pertaining to domestic governance, there is better reason for mutual consultation and forbearance between Talleyrand and Solomon in issues with international implications. The Constitution establishes three separate branches of government, each of which is encouraged to address itself in its own way to the American public with the force of law. International law, however, recognizes no such "division of powers." The law of nations is a law of notions. It consists of the practiced opinions of states—and a state which does not speak with a single voice or, at least, with a single mind, cannot address itself effectively to any problem of international law.[6]

The importance of a state's speaking with a single voice is indicated by the pleadings of a recent case before the International Court of Justice.[7] To buttress Britain's claim to Minquiers and Ecrehos, two small islands in the English Channel, the attention of the court was directed to evidence that a British court had issued a writ of quo warranto to an official on Ecrehos as early as the fourteenth century, and that the official had responded.[8] Moreover, the criminal jurisdiction of British courts had been extended to the islands in 1826, 1913 and 1921.[9] Similarly, British coroner's courts

4. See, *e.g.*, South v. Peters, 339 U.S. 276 (1950); Colegrove v. Green, 328 U.S. 549 (1946); Coleman v. Miller, 307 U.S. 433 (1939); Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Field v. Clark, 143 U.S. 649 (1892); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

5. This sentiment was expressed by Mr. Justice Frankfurter when he said with respect to a suit to force reapportionment of state congressional districts: "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket." Colegrove v. Green, *supra* note 4, at 556.

6. See, *e.g.*, Norwegian Fisheries Case, [1951] I.C.J. Rep. 116, an excellent example of the relation between state practice and international law, in which the court stated:

> although the ten-mile rule has been adopted by certain States, both in their national law and in their treaties and conventions . . . other States have adopted a different limit. Consequently the ten-mile has not acquired the authority of a general rule of international law.

Id. at 131.

7. 1 MINQUIERS AND ECREHOS CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 75–92 (I.C.J. 1953). The judgments of domestic courts were also placed in evidence (although for other reasons, with less success) in SOVEREIGNTY OVER CERTAIN FRONTIER LAND, [1958–1959] I.C.J.Y.B. 100, 104.

8. 1 MINQUIERS AND ECREHOS CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 76 (I.C.J. 1953).

9. *Id.* at 79, 681–83.

had taken jurisdiction in the islands in 1917, 1938 and 1948.[10] Conversely, the British counsel was able to show that "there [was] no evidence of the application of French law, there [was] no judgment of any French courts in respect of [the islands], or of anything occurring in them or in relation to them."[11] The court considered this evidence to be of great importance, observing that throughout the middle ages, "The King of England . . . continued to exercise his justice and levy his rights in the [is]lands. . . ." It is not too much to say that the court, in granting Britain's claim of sovereignty over the islands, found that the decisions of the British courts were to be given decisive weight.[12] Quite obviously, a decision by a British court that its jurisdiction did *not* extend to the islands would have been telling evidence against Britain's claim of title.

This case illustrates that whatever the merits of the "dynamic tension" between the judicial and political processes in domestic forums, these merits may not persist in the international forum. Solomon and Talleyrand should, *in matters of international law affecting the national interest*, express their notions with a single mind. This is not to say, however, that the courts must increasingly sacrifice "justice" for the individual litigants to the higher purpose of international legal consistency. A survey of the cases, evaluating the truly pragmatic application of the above principle, indicates that Solomon has sometimes abdicated to Talleyrand in disputes which are really none of Talleyrand's concern. The courts are abdicating to *ad hoc* determinations of fact and law by the political branches of government where no *matters of international law affecting the national interest* could possibly be at stake and where there is, consequently, no need for consistency in the decisional processes of the various branches of government.

This Article is not intended to explore all of the areas of international law affected by the relation between the political and judicial branches of government,[13] but merely to examine several of these areas in order to illustrate a pragmatic technique for answering the question—when should the courts and the State Department speak with one mind, and when need they not?

A. Cases Involving Title to Territory

International law is still largely in what might be called its "common law" stage—a stage in which the notions and practices of

10. *Id.* at 80, 91.

11. 2 MINQUIERS AND ECREHOS CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 26 (I.C.J. 1953).

12. Minquiers and Ecrehos Case, [1953] I.C.J. Rep. 47, 62, 67–68. Also see SOVEREIGNTY OVER CERTAIN FRONTIER LAND, [1958–1959] I.C.J.Y.B. 100, 104.

13. For a general enunciation of additional areas of international law affected by

states are a principal source of the law between nations. Evidence of the practices of states is found in the behavior not only of the political but also of the judicial organs of the state.[14] Nowhere is this more apparent than in the development of an international law of real property or of title to territory.

The recent case of *Cheng Fu Sheng v. Rogers*[15] demonstrates the international legal stakes that may be at issue in domestic litigation which incidentally involves a question of title to territory. In this case the Justice Department was attempting to deport a Chinese alien to Formosa in accordance with a statute which authorizes deportation to the alien's *country* of origin.[16] The Justice Department urged that Formosa was an appropriate destination because it is part of the *country* of China. There was certainly evidence to support the Justice Department's contention. The Chinese government recognized by the United States has established its capital on Formosa and rules it as a part of China. Japan, the former owner, had renounced all title to the island, thereby restoring the status existing prior to its legal cession to Japan in the Treaty of Shimonoseki.[17] Nevertheless, the federal district court regarded itself as bound by a determination of the State Department that Formosa is *not*, in this country's view of international law, a part of the *country* of China.

This result, while frustrating the deportation proceedings on a technicality, did safeguard an important international law posture of the United States. When, inevitably, the United States extends diplomatic recognition to the Chinese Communist regime, this country will be able to rely upon a consistent legal contention supporting a political doctrine of an independent Formosa (the doctrine of "two Chinas"), and it will be able to defend itself against the otherwise undeniable allegation that continued American presence on Formosa would constitute aggression against China in international law.[18]

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this relation, see RESTATEMENT, FOREIGN RELATIONS LAW § 133 (Tent. Draft No. 3, 1959).

14. See notes 7–12 *supra*.

15. 177 F. Supp. 281 (D.D.C. 1959).

16. 66 Stat. 212 (1952), 8 U.S.C. § 1253(a) (1958).

17. Treaty of Peace With Japan, Sept. 8, 1951, [1952] 3 U.S.T. & O.I.A. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45; Treaty of Peace Between the Republic of China and Japan, April 23, 1952, 138 U.N.T.S. 3. Art. IV of the latter treaty provided: "It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war." *Id.* at 40. Thus, Japan renounced the dominion over Formosa that it had acquired in the Treaty of Shimonoseki, April 17, 1895, art. 2, para. (b), Inspector General of Customs, China, 2 TREATIES BETWEEN CHINA AND FOREIGN STATES 590 (2d ed. 1917), 1 FOREIGN RELATIONS OF THE UNITED STATES 199, 200 (1895).

18. If the United States recognizes the Peking regime as the government of

Similarly, it was not timid abdication, but a desire to have America speak with a single, clear mind on crucial issues of international law, which led a federal district court in another recent deportation proceeding to adopt, without itself weighing the facts, the position taken by the State Department that Okinawa belongs to Japan.[19] The court said that "the reasonable construction of treaty terms by the State Department, acquiesced in by other signatory powers, is entitled to great weight."[20] Similarly, in an earlier case, a federal district court, in ascertaining executive policy with respect to the sovereign status of the government of South Africa, laid down the sound rule that, where "the legislative or executive department of the government of the United States has taken action regarding the diplomatic or international status of any place or country, this court is ordinarily bound by that action. . . . [The court] investigates the question presented, follows the decisions made by the legislative and executive departments, where these decisions exist, and, in their absence, decides for itself upon such information as it deems most trustworthy."[21]

In the face of such reasoning, there will be some who will remain unconvinced that individual rights should be sacrificed even to the high policy of international legal consistency. To them it 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. This may be because the "facts" of territorial status in international legal questions are so policy-charged that it is difficult for *any* branch of government not to view them through policy-tinted glasses. It is also because domestic courts venturing upon the waters of international law soon find themselves adrift on a turbulent, uncharted sea, dotted very rarely with solid precedents. With judicial recourse still largely a consensual process in international law, the number of facts which international courts have classified for purposes of legal deductions is far smaller than in domestic law. Thus the judicial process of reasoning by analogy, which effects "consistency" and "justice," has much less grist for its mill.

For example, in *United States v. Rice*,[22] the United States Supreme Court, in interpreting custom and excise legislation, determined that an American city occupied by the enemy during the war

China — *including Formosa* — the continuing of military intervention on behalf of the Nationalists would be an unlawful intervention or aggression.

19. United States v. Shiroma, 123 F. Supp. 145 (D. Hawaii 1954).

20. *Id.* at 149.

21. *In re* Taylor, 118 Fed. 196, 197 (D. Mass. 1902).

22. 17 U.S. (4 Wheat.) 246 (1819).

of 1812 thereby became a "foreign port" subject to the "sovereign jurisdiction" of the occupying power.[23] The Court also held, in *Luckenbach S.S. Co. v. United States*,[24] that the cities of the Panama Canal were "foreign ports" for purposes of a mail carriage law, even though the Court had earlier expressed the view that the Canal Zone was one of the "territories of the United States" and that "it is hypercritical to contend that the title of the United States is imperfect, and that the territory described [Canal Zone] does not belong to this Nation."[25]

Inconsistent judicial treatment of the status of leased foreign bases provides another illustration of the difficulties involved in developing consistent international theories in the context of domestic cases. In *Vermilya-Brown Co. v. Connell*,[26] the Court determined for itself—against the advice of the State Department[27]—that leased American bases in Bermuda were within the definition "states, territories and possessions of the United States" used to define the jurisdictional scope of the Fair Labor Standards Act.[28] Shortly thereafter, the Court ruled that bases held under identical leases in Newfoundland were within the act's definition of a "foreign country" for purposes of the Federal Tort Claims Act[29]—much to the surprise of the lower court which had thought *Vermilya-Brown* to be "persuasive, if not well-nigh conclusive" of the status of the Newfoundland bases.[30]

Aside from the disarray into which these decisions have thrown the United States' international law position respecting the status of these various leased bases, they have obviously evolved no reasonably predictable standard for fact-evaluation. In each case the Court has tried to guess what Congress meant by its use of very specific terms of art applicable to the international law of real property. Sometimes terms like "possession," "territory" and "foreign" have been given a meaning based on the international law usage as understood by the courts. At other times the courts have

23. "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place." *Id.* at 254. The narrow decision in the case did not, however, warrant these words.

24. 280 U.S. 173 (1930).

25. Wilson v. Shaw, 204 U.S. 24, 33 (1907).

26. 335 U.S. 377 (1948).

27. "The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States." Letter of the Legal Advisor of the State Department, quoted in Vermilya-Brown Co. v. Connell, *supra* note 26, at 380.

28. 52 Stat. 1060 (1938), 29 U.S.C. § 1 (1958).

29. United States v. Spelar, 338 U.S. 217 (1949). See also Burna v. United States, 142 F. Supp. 623 (E.D. Va. 1956), in which the Federal Tort Claim Act was held inapplicable to Okinawa.

30. Spelar v. United States, 171 F.2d 208, 209 (2d Cir. 1948).

interpreted the same terms as having mere lay connotation. Moreover, the courts have frequently applied these terms in the light of evidence, not of territorial status, but of congressional intent. In the *Luckenbach* case, for example, the Court did not concern itself at all with the treaties upon which the United States' claims to the Canal Zone are based. Rather, the Court proceeded entirely on a finding that the "foreign" rates for mail-carriage had always applied to the Canal Zone and that Congress could not be presumed to have intended to alter this arrangement.[31]

It is by no means certain, therefore, that the domestic court is *per se* better equipped than the State Department or the Congress to achieve "justice" or "consistency" by exercising its right to make its own fact-classifications and draw its own legal deductions in these cases. Too frequently, the courts have not concerned themselves at all with the international law which they are inevitably making, and have decided issues on parochial findings of "congressional intent." At other times they have merely substituted their own international "policy" for that of the State Department or Congress. Such performance may result in the sacrifice of a consistent international legal posture. If Congress intends that the Fair Labor Standards Act should apply to employment relations at the Bermuda bases, Congress should amend the statute. The courts should not amend it by torturing Congressional meanings. Nor should the courts be compelled — by Congressional imprecision — to embarrass the State Department by an act of judicial annexation. If Chinese aliens must be deported to Formosa, let the legislation make their port of departure, and not merely their country of origin, the place to which they may be deported, as under former enactments of the same statute.[32]

The courts ought to be using their powers to compel Congress to draft its legislation with as much attention to the meaning of international legal terminology as it gives to the terminology of contract or agency. "I am satisfied," said one court in a rare display of determination, "that Puerto Rico is no longer a Territory in the sense that the term is used in the Constitution and the cases. Therefore, if the Congress of the United States proposes in the future to make a statute applicable in Puerto Rico, I believe that, generally speaking, it will have to make it so other than by the use of the term 'Territory.'"[33]

Most matters touching upon title to, or status of, territory fall within the "matters of international law affecting the national in-

31. Luckenbach S.S. Co. v. United States, 280 U.S. 173, 182–83 (1930).

32. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 890.

33. Cosentino v. Local 1585, International Longshoremen's Ass'n, 126 F. Supp. 420, 422 (D. P.R. 1954).

terest" in which a co-ordinated political and judicial posture is of great importance. Some matters, however, do not; and yet the courts have not always in these cases felt themselves free to proceed with their own determinations. For example, in deciding whether certain goods shipped from Puerto Rico in 1898 fell within the scope of customs legislation, it was necessary for the Court of Claims to determine whether the goods were "from a foreign country." The decision was not rendered until 1914. Nevertheless, the court examined the policy of the State Department as it was in 1898 and found that, although Puerto Rico had, at the time of shipment, been occupied by the United States and that a peace treaty had been signed which made provision for its annexation, the treaty had not yet been ratified. Thus, the court considered itself obliged to conclude that the goods had been shipped from a "foreign country."[34]

Clearly, the national policy or interest of the United States in the legal status of Puerto Rico had, by 1914, been fully vindicated and had become moot. The court could certainly have afforded to determine the issue on the private merits alone. Moreover, even in 1898 a judicial determination that Puerto Rico was no longer foreign territory could not have done anything but strengthen the American international legal claim to "equitable inchoate" or "contingent" title. Here was a case in which the court could well have afforded to determine the issue of the status of territory for itself; for, whatever decision it might have reached, it could have done no harm to an international legal interest of the United States. It is not enough that an issue before a court raise a question of international law to justify a court's abdicating its determinative function in that matter. The court must be convinced that only *one* of the several conclusions it might reach would protect an established American posture in international law.

This pragmatic distinction was not overlooked in a recent British case, *Ex parte Mwenya*,[35] in which the Court of Appeal held that habeas corpus ran from an English judge to public officials in the "protectorate" of Northern Rhodesia. Even though the Crown had urged the court to follow the parliamentary determination that a protectorate is "a place outside Her Majesty's Dominions,"[36] the judges refused to be bound by this technicality because they had before them ample evidence that Britain was, both in fact and under international law, in full sovereign possession of Northern Rhodesia. Could the Crown prove a national interest in the notion that Northern Rhodesia was, under tenets of international law any the

34. Lascellas v. United States, 49 Ct. Cl. 382 (1914).
35. 3 Weekly L. R. 767 (C.A. 1959).
36. Foreign Jurisdiction Act, 1890, 53 & 54 Vict. c. 37; 3 & 4 Geo. 5, c. 16 (1913).

less subject to British jurisdiction than any colony? It could not; indeed, the contrary was the case, and the court acted accordingly.

The *Mwenya* case also affords another example of a situation in which courts should refuse to abdicate from the determination of international law issues. The Crown, in *Mwenya*, not only sought to advise the court—it was also the defendant in the action. It may be true that—as *Cheng Fu Sheng* demonstrates—the executive does not always act or speak with a single interest in international cases.[37] Nevertheless, in cases in which the executive branch of the government is a party, courts—like the *Mwenya* court—should treat executive determinations with lively skepticism, unless it can be shown that those determinations were made *before* contemplation of the existing controversy.[38]

B. Cases Involving the Right to Sue

Whereas the status of particular territory is the concern of the international law of real property, the right to sue constitutes an international chose in action and thus raises questions under the international law of personal property. It may be that in international law, as in domestic law, litigation affecting the status of personal property arouses less passion than most litigation affecting the status of realty. Nevertheless, the right of foreign sovereigns to sue in the domestic courts is a prize the awarding or withholding of which is an international law problem frequently charged with important considerations of national policy. This is true not so much because of the monetary value of the chose in action but because a determination that a particular national government may pursue an action in an American court is a form of judicial recognition of the legal status of that claimant in international law. Again, it is important to emphasize the behavioral, notional, or common law aspect of contemporary international law. Whether a particular politico-geographical agglomeration constitutes a *state* or a *government* in international jurisprudence depends, in practice, on whether a substantial number of the states, which are the "persons" of the international law community, recognize it as such. No state can effectively speak with a divided mind in making such a determination.

With respect to the right to sue, the law appears to be clear in this country. Just as an agglomeration of directors and stockholders may invest a corporation with the capacity to bring an action in the

37. Cheng Fu Sheng v. Rogers, 177 F. Supp. 281 (D.D.C. 1959). See also text accompanying note 15 *supra*.

38. See, *e.g.*, United States v. Shiroma, 123 F. Supp. 145, 148–49 (D. Hawaii 1954). In the *Shiroma* case, the advice of the State Department was based on a policy statement made much earlier, at the San Francisco Peace Conference by John Foster Dulles. *Id.* at 148.

courts only after incorporation by legislative and executive fiat, so a foreign regime and its subjects have capacity to bring a representative action in the name, or on the behalf of a state only after its status has been verified by the executive act of recognition.[39] "[T]he question of sovereignty is a political question, the determination of which by the political branch or branches of our government . . . binds the judicial department."[40]

The courts' understandable reluctance to undermine the position of the United States as regards the legal status of a foreign political entity has not, however, precluded them from enabling these entities to carry on commercial and other "non-sovereign" functions in this country. Thus, both the Russian Volunteer Fleet[41] and Amtorg,[42] (The Soviet State Trading Agency) were permitted to maintain actions in their own name even though they were, at the time, wholly-owned agencies of an unrecognized Soviet government.[43]

The case of *Amtorg Trading Corp. v. United States*[44] is particularly interesting because it illustrates the correct application of the pragmatic test of state interests—with its restrictive implications—in an international law matter. The State Department had intervened to show that the Amtorg Trading Corporation was in substance the Soviet government and that it should, accordingly, be denied standing as a plaintiff. However, this advice was rejected by the court. The national policy pursued by the State Department in its intervention was not based upon precepts of international law, but was designed to exert economic pressure. Recognition of the status of the Soviet government was therefore not at stake in the litigation. The sole concern of the State Department was to block

39. There is only one reported case of an unrecognized government being allowed to sue in a United States court. See Consul of Spain v. The Conception, 6 Fed. Cas. 359, 360 (No. 3137)(C.C. S.C. 1819) (dictum), *rev'd on other grounds*, 19 U.S. (6 Wheat.) 235 (1821). See also 17 AM. J. INT'L L. 742 (1923).

40. Agency of Canadian Car & Foundry Co. v. American Can Co., 253 Fed. 152, 155 (S.D. N.Y. 1918), *aff'd*, 258 Fed. 363, 368 (2d Cir. 1919). See also, Lehigh Valley R.R. v. State of Russia, 21 F.2d 396, 400 (2d Cir. 1927); The Penza, 277 Fed. 91, 92–94 (E.D. N.Y. 1921); The Rogdai, 278 Fed. 294, 296–97 (N.D. Cal. 1920); Russian Socialist Federated Soviet Republic v. Cibrario, 120 Misc. 256, 260, 139 N.E. 259, 262 (Ct. App. 1923). It should be noted that in the event of a conflict between official recognition and a State Department suggestion made in good faith, the latter has been held to be decisive. See Japanese Gov't v. Commercial Cas. Ins. Co., 101 F. Supp. 243 (S.D. N.Y. 1951).

41. See Russian Fleet v. United States, 282 U.S. 481 (1931).

42. See Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.Pa. 1934).

43. *But cf.* Royal Norwegian Navy v. David Smith Steel Co., 185 Misc. 880, 58 N.Y.S.2d 705 (Sup. Ct. 1945). Also note that the relationship between the agency and the unrecognized government must not be such as to preclude the court from finding a separate corporate personality. See, *e.g.*, Russian Socialist Federated Soviet Republic v. Cibrario, 120 Misc. 256, 139 N.E. 259 (Ct. App. 1923) and Preobazhenski v. Cibrario, 199 App. Div. 899, 192 N.Y.S. 275 (Sup. Ct. 1922).

44. 71 F.2d 524 (C.C. Pa. 1934).

the Soviet government from doing business effectively in the United States. This objective could have been pursued by the political branch through its own process—by legislation excluding Soviet corporations. The court quite rightly refused to deny to a legally incorporated entity the benefits of the fifth amendment of the Constitution after that entity had been admitted to the lawful pursuit of commercial activity in this country. The judiciary may need to defer to the State Department in the determination of certain issues of international law; but the courts ought not to be asked to decide cases devoid of international legal implications on the basis of a State Department economic or political policy—unless, of course, that economic or political policy has previously assumed the form of law.

Judicial vigilance is always needed to prevent abuse of the working relationship between the courts and the State Department. Nevertheless, the judiciary should remain ready to cooperate by abdicating from deciding national policy in cases which raise *bona fide* questions of international law. What happens when this cooperation breaks down is illustrated in the recent litigation in *Bank of China v. Wells Fargo Bank & Union Trust Co.*[45] The Bank of China sought to draw upon funds it had deposited with Wells Fargo. Because voting control of the stock of the Bank of China belonged to the Chinese government, both the Nationalist and the Communist governments had elected rival boards of directors for the bank. In 1950, when the Nationalist directors attempted to withdraw funds, the Communist directors intervened, and Wells Fargo sought the protection of judicial resolution of the conflicting claims. Even though the plaintiff in this action was not a government, but a state-controlled corporation, the case differed from the *Amtorg* and the *Russian Volunteer Fleet* cases in that the court was, in essence, asked to judge between the legitimacy in international law of the two rival Chinese governments which claimed the controlling stock-interest. Nevertheless, the court refused to be bound by the recognition policy of the State Department and determined for itself that the Nationalist administration "is not now, and may never again be, in a position to speak for the Chinese people . . ."[46] and refused to "recognize" the right of the Nationalist directors to draw on the account. On the other hand, the court did not think that the Communist government was sufficiently established, so the funds were, in effect, frozen pending a later determination.[47]

45. 92 F. Supp. 920 (N.D. Calif. 1950).
46. *Id.* at 923.
47. *Id.* at 924.

Action was recommended the following year.[48] This time the court found that the dust had settled sufficiently for it to perceive two co-existing Chinese governments and two Banks of China. In choosing between them, the court stoutly declaimed that it would not allow an "expression of executive policy to usurp entirely the judicial judgment . . ."[49] and that "the decisions . . . reveal no rule of law obliging the courts to give conclusive effect to the acts of a recognized government to the exclusion of all consideration of the acts of an opposing unrecognized government."[50] An executive determination of this sort is merely a "fact which properly should be considered and weighed along with the other facts before the court."[51]

Having thus proclaimed its independence, the court concluded on the evidence that

> here, there co-exist two governments, in fact, each attempting to further, in its own way, the interests of the State of China, in the Bank of China. It is not a proper function of a domestic court of the United States to attempt to judge which government best represents the interests of the Chinese State in the Bank of China. In this situation, the Court should justly accept . . . that government which our executive deems best able to further the mutual interests of China and the United States.[52]

Such a rationalization sacrifices candor for sophistication. Either the court accepts the determination of the State Department for the sake of international legal consistency and defers to the expertise of the political arm of the government, or it weighs all the evidence itself and reaches its own objective determination. How can the subjective, aspirational, policy-dictated international law notions of the State Department be weighed against objective evidence of the actual conditions of government in China? Surely a court *really* seized of all the facts and *really* making a judicial determination without reference to executive policy could not reasonably have concluded that there are today two effective, equal governments of China.[53] Far better for a court honestly to defer to the political branch in such matters of high international policy than to leave itself open to the charge of conducting a hypocritical polemic for the sake of appearing to retain full powers of determination.

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48. Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59, 63 (N.D. Calif. 1952).
49. *Ibid.*
50. *Id.* at 64.
51. *Ibid.*
52. *Id.* at 66.
53. This is especially true since Formosa is not considered to be a part of China. See Cheng Fu Sheng v. Rogers, 177 F. Supp. 281 (D.D.C. 1959), discussed in text accompanying note 15 *supra.*

C. Cases Involving Sovereign Immunity

The judicial practice is not quite as clear in defining the respective roles of the courts and the State Department in matters of foreign sovereign immunity as in the related issue of the right to sue. Like the right to sue, the right to immunity is dependent upon executive recognition of a foreign state or government—a determination of major consequence in international law. Most courts agree with the New York Supreme Court that "the policies of the Department of State with respect to immunity of foreign nations and their property from local litigation are supreme." [54]

Occasionally, however, courts have appeared to deviate from the rule. The best-known example of such deviation was the 1923 case of *Wulfsohn v. Russian Socialist Federated Soviet Republic*,[55] in which the New York court ostensibly held that the then unrecognized Soviet government was entitled to sovereign immunity. Since, however, neither the act complained of, nor the property involved had its *situs* in the United States, the court could and should have achieved the same result by declining jurisdiction without reaching the question of immunity. Two other cases, in which the property at issue was in this country, appear upon cursory examination to have resulted in an independent judicial determination of the issue of sovereign immunity.[56] Both involved a short-lived counter-revolutionary regime in Russia. Both contain language indicating independent judicial recognition of that government. In one case the court said that the revolutionary government only "existed for a short time in the southern part of European Russia and was not recognized by the government of the United States as either a *de facto* or a *de jure* government. . . ." [57] Nevertheless,

> during its life no enforceable right or remedy in the courts of this country existed against that *de facto* government, for it could not be required to submit itself to our laws and to the jurisdiction of our courts. *This is true irrespective of whether or not such government were recognized by the government of the United States.*" [58]

Despite these brave words, however, both courts sought refuge in ambivalence. One court took the position that the counter-revolutionary government "when extinguished by conquest . . . became,

54. Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 1088, 192 N.Y.S.2d 469, 471 (Sup. Ct. 1959).

55. 234 N.Y. 372, 138 N.E. 23 (Ct. App. 1923).

56. Voevodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia, 232 App. Div. 204, 249 N.Y.S. 644 (1931); Nankivel v. Omsk All-Russian Gov't, 237 N.Y. 150, 142 N.E. 569 (1923).

57. Voevodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia, *supra* note 56, at 205, 249 N.Y.S. at 646.

58. *Id.* at 206, 249 N.Y.S. at 647. (Emphasis added.)

so far as its corporate existence was concerned, as if it had never existed."[59] Moreover, said the other court, the counter-revolutionaries were either "a *de facto* government, and, therefore, sovereign in character, or . . . a mere aggregation of robbers and murderers, outside the protection of the laws of war."[60] Thus, in concluding that the defendants could not be sued, these courts presented three possible explanations of the legal status of the counter-revolutionary regime: (1) that the defendants never formed a government; (2) that a government had been formed but no longer existed at the time the action was brought; (3) that a government had been formed and was entitled to sovereign immunity. Each of these explanations is commensurate with the same legal result: "Whether alive or dead, no valid judgment could be obtained against [the alleged 'government']."[61]

In virtually every other instance, the courts have adopted the recognition policy of the executive in disposing of claims of immunity advanced on behalf of foreign governments, their agents or property rights. Indeed, the practice suggests that the courts may be excessively self-effacing when confronted by determinations of the State Department which go beyond the maintenance of an essential position in international law.

The manner in which the courts should deal with claims of sovereign immunity was prescribed by the United States Supreme Court in *Ex parte Muir*.[62] It is obviously not enough that the foreign sovereign allege immunity for itself, its servants, or property. Where the foreign government itself is a party, the courts may rely upon the fact of recognition or nonrecognition, and special advice frequently is not necessary. However, where the issue before a court affects the status of the property or personnel of the foreign government, the court must seek a special executive certification explaining the legal status of the specific person or property involved.[63]

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59. *Ibid.*

60. Nankivel v. Omsk All-Russian Gov't, 237 N.Y. 150, 156, 142 N.E. 569, 570 (N.Y. County Ct. App. 1923). (Emphasis added.)

61. *Ibid.* However, the Supreme Court of New York has cited these cases to support a contention, itself irrelevant to the issue before it (the sovereign immunity of a hostile but recognized foreign government) that "our courts hold that lack of diplomatic recognition does not affect . . . immunity." Telkes v. Hungarian Nat'l Museum, 265 App. Div. 192, 196, 38 N.Y.S.2d 419, 423 (1942). In Frazier v. Foreign Bond Holders Protective Council, 283 App. Div. 44, 125 N.Y.S.2d 900 (1953), the court interpreted the recognition of Hungarian sovereign immunity in the *Telkes* case to turn on political recognition of the Hungarian government and not on the authority of cases in which unrecognized governments could not be sued. *Id.* at 48, 125 N.Y.S.2d at 903.

62. 254 U.S. 522 (1921).

63. *Id.* at 533. For a definitive study of the State Department "certification of

It is in the certification cases that the danger of unwarranted executive usurpation arises. In *Ex parte Peru*,[64] for example, the Peruvian government, alleging immunity for one of its vessels, persuaded the State Department to send a certification to the court stating: "This Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity."[65] The court thereupon held itself barred from any further examination of the case. "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."[66]

This represents quite unnecessarily broad abdication. Most cases require determination of several distinct matters, some of which are quite inappropriate to informal *ex parte* proceedings before an officer of the State Department, for they have nothing to do with national notions of international law. For example, in *Compania Espanola v. Navemar*,[67] the immunity of a Spanish vessel was at issue. The vessel had been ordered appropriated to the public service by the Spanish Republican Government. However, it was alleged that the Spanish Republican Government, by failing to take the necessary physical possession, had failed to establish its title.

In determining the status of the property, the court was confronted with three separate issues: diplomatic recognition of the Republican Government; applicability of the concepts of sovereign immunity to this type of property (a merchant vessel); and the validity of the Republican Government's claim of title in light of its doubtful possession of the vessel.

Whatever primacy the State Department ought to enjoy in the determination of the first and second of these issues, the third is clearly a matter which ought to have been determined by the court. The question whether seizure of the vessel by the crew had been "an act of or in behalf of the Spanish Government"[68] was an issue to be determined by the domestic law of constructive possession and agency. Yet the court thought that "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 . . ."[69] without further inquiry.

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immunity" procedure, see Feller, *Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83 (1931).

64. 318 U.S. 578 (1943).

65. *Id.* at 581.

66. *Id.* at 589.

67. 303 U.S. 68 (1938).

68. *Id.* at 72.

69. *Id.* at 74. However, this statement was dictum, because the State Department did not, in this particular case, issue a certification of immunity. Where the

Such judicial abdication is open to objection. The State Department ought to be confined to determining matters of international law that affect the national interest. The question of who is lawfully in possession of a ship is, on its face, not such a matter. No evidence of a policy-determined notion of international law relating to constructive possession was advanced by the executive.

In the course of litigation, the State Department has properly, and in accordance with the dictates of its international legal philosophy, certified whether a diplomat is "on the list,"[70] an accredited delegate to the United Nations,[71] the representative of a recognized government,[72] or an accredited official of an international agency (and the purpose for which he is accredited).[73] When a foreign government claims ownership of property the State Department should also convey the executive decision respecting recognition of that government by the United States. It may also advise the court as to what position the United States has assumed in international law with respect to the kinds of governmental property which are entitled to sovereign immunity.[74] 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.[75]

Such limitations upon the effective scope of State Department certifications are necessary to restrict the development of quasi-judicial, *ad hoc*, non-adversary procedures within the State Department. The State Department should certify only as to fact-deductions with international law implications. Sometimes, in the absence of other elements in the case, the position taken by the State Depart-

executive has not explicitly made a determination, courts remain free to decide this issue for themselves. See, *e.g.*, Hanes v. Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940); Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (1939). Nevertheless, the courts will examine sympathetically any general declarations of international legal policy made by the State Department without reference to a particular case. See, *e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

70. See Haley v. State, 200 Md. 72, 88 A.2d 312 (1952). The "list" is a State Department register of persons entitled, by congressional enactment, to judicial immunity because of their diplomatic employment or relation. See REV. STAT. §§ 4063–66 (1875), 22 U.S.C. §§ 252–54 (1958). For an excellent discussion of the "list" and the statute, see Trost v. Tompkins, 44 A.2d 226 (D.C. Munic. Ct. App. 1945).

71. See Tsiang v. Tsiang, 194 Misc. 259, 86 N.Y.S.2d 556 (Sup. Ct. 1949).

72. *Ibid.*

73. See United States v. Coplon, 88 F. Supp. 915 (S.D. N.Y. 1950).

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

75. In United States v. Coplon, 84 F. Supp. 472 (S.D. N.Y. 1949), the court, in effect, allowed the State Department to make an *ad hoc* determination of the meaning of the Immunities Act, 59 Stat. 669 (1945), 22 U.S.C. § 288 (1958). See also United States v. Coplon, 88 F. Supp. 915, 920 (S.D. N.Y. 1950).

ment will be virtually conclusive—but that conclusion, too, must be drawn by the courts. Moreover, the State Department's certifications should be binding upon a court only where they effectuate an established international legal contention advanced by the United States with reasonable consistency. This would be an effective working test of whether the substance of a State Department certification is really a matter of international law affecting the national interest. Where no policy-determined legal posture is likely to be infringed, all other legal deductions and conclusions —including questions of international law—must be left to the courts to determine on the basis of their own evaluation of the evidence.

These distinctions were apparent to the courts of an earlier period. In *The Ambrose Light*,[76] an armed ship in the service of a Colombian rebel movement had been seized by a United States naval vessel, and a court had to determine whether it could lawfully be confiscated as prize. Resolution of this question in turn depended upon whether the owners of the ship were to be accorded the status of an immune belligerent government or were to be treated merely as "pirates." In an *ad hoc* determination made after the case had arisen, the State Department "certified" that the insurgents "had not been recognized by the United States as belligerents."[77] The court, however, refused to follow this suggestion. Instead, it relied upon evidence that the State Department, on the very day the Ambrose Light was seized, had sent a note to the Colombian government declaring the United States a "neutral" and refusing to honor a closure of the Colombian ports unless the blockade could be made effective[78]—a legal position evidencing United States recognition of a state of belligerency and inconsistent with the subsequent *ad hoc* certification.

The decision in *The Ambrose Light* turned on facts which, on their face, arouse judicial caution. In such cases the interest of the executive as a party to the action will at once lead the court to suspect that a suggestion is motivated less by considerations of national policy in a matter of international law than by a desire to justify an official action of the executive branch. Even without the likelihood of executive self-interest, however, the courts should still be wary. If a matter of international law is of national concern, the fact ought to be evidenced by a *precedent* general determination—a statement of law made *before* the event—by the executive or Congress. The courts should normally accept nothing less. Moreover, the courts should determine the effect and relevance of that

76. 25 Fed. 408 (S.D. N.Y. 1885).
77. *Id.* at 443–44.
78. *Id.* at 444.

general determination in the specific circumstances and weigh it together with determinations of all the other issues in the case. Insistence by the State Department on an international legal principle or legal fact originally devised for purposes of specific litigation ought generally to be viewed with reservation. If such a nationally-important legal precept is involved, why, the court should ask, was it not enunciated earlier, *in abstracto*?

D. Cases Involving the Status of Hostilities

Executive and legislative determinations of the state of hostilities are brought to bear on adjudications involving such terms as "war," "neutrality" and "armistice."

Of these terms, the most complex is "war," for it has not only international but also constitutional law meanings, as well as general connotations for the layman which do not necessarily coincide with either of the other two. It may well be, as a court recently pointed out, that "under our present membership in the United Nations, a declaration of war by the Congress is no longer necessary in order to commit our armed forces to combat."[79] Consequently, it may follow that the term is becoming obsolete in constitutional usage, and that it is being replaced by such concepts as "police action" and "collective self-defense." Nevertheless, the term is still widely used in statutes, treaties, and private contracts.

In interpreting the term "war," a court may choose to adopt the international law definition—which much more frequently coincides with the "popular" than with the constitutional concept. Thus, during hostilities in Korea, a court might properly have found that the United States was at "war" in both the international sense and the "popular" sense in spite of the absence of any formal (constitutional) declaration of war. Similarly, it would have been permissible for a court to find that the United States was no longer at war with Germany even prior to the joint resolution of Congress of October 19, 1951, which terminated the state of war with Germany.[80]

Serviceable definitions of both the "popular" and the "international law" meanings of war are found in *New York Life Ins. Co. v. Bennion*:[81]

> When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with

79. Miele v. McGuire, 53 N.J. Super. 506, 612, 147 A.2d 827, 830 (L. 1959).

80. Joint Resolution To Terminate the State of War Between the United States and the Government of Germany, 65 Stat. 451 (1951). An excellent discussion of this point may be found in KELSON, PRINCIPLES OF INTERNATIONAL LAW 67–71 (1952). The act of accepting an unconditional surrender is incompatible in international law with a continuing state of war.

81. 158 F.2d 260 (10th Cir. 1946).

> all the force at its command, we have war in the grim sense of reality. . . . To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts.[82]

The State Department, because it is part of the executive branch is uncomfortably committed to the constitutional definition of the term "war" and rarely intervenes to suggest a definition based on the realities of international law. This is because the interest of the executive branch in continuing, as a constitutional fiction, a war which has obviously ended, or in ignoring the existence of a war which is obviously raging, is generally greater than any international legal interest. Occasionally, however, such intervention does occur, as when the State Department, in *Japanese Gov't v. Commercial Casualty Ins. Co.*,[83] asked the court to prevent the status of Japanese-American relations in 1949 from being determined by technical reference to the constitutional definition of war. Had the court found that the absence of a constitutionally-ratified peace treaty was determinative, that Japan and the United States were still at "war," then the government of Japan would not have been entitled to sue in a court of the United States.[84] In urging the cause of the Japanese government, the State Department pointed out that granting access to United States courts would encourage Japanese commercial growth, thereby reducing "the requirement for aid from the United States."[85]

Generally, however, the State Department will not intervene in favor of the international law and "popular" definition in opposition to the constitutional definition advanced by another branch of the executive. Consequently, the international law concept of "war" is generally reflected in the decisions of United States courts only inadvertently, in those instances where the courts, of their own initiative, have chosen to ignore the constitutional definition in favor of a "popular" one that happens to coincide with the realities of international law. The general rule, however, is that the constitutional definition is adopted by the courts in cases involving the application of public statutes[86] or in other cases affecting the

82. *Id.* at 264.

83. 101 F. Supp. 243 (S.D. N.Y. 1951).

84. "The strongest case would be one wherein the State of the forum was at war with the State which desired to institute a proceeding. In such a case, it seems clear that no duty could be laid upon the state of the forum to permit the institution of a proceeding." Harvard Law School, *Research in International Law, Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 451, 504 (1932).

85. 101 F. Supp. 243, 246 (S.D. N.Y. 1951).

86. See, *e.g.*, Ludecki v. Watkins, 335 U.S. 160 (1948); United States *ex rel.* Krauff v. Watkins, 173 F.2d 599, 604 (2d Cir. 1949), *aff'd sub nom.*, United States *ex. rel.* Krauff v. Shaughnessy, 338 U.S. 537 (1950); Edwards v. Woods, 168 F.2d 827 (8th Cir. 1948); Arroyo v. Puerto Rico Public Transp. Authority, 164 F.2d

public interest. On the other hand, the "popular" definition is frequently applied in cases involving private contracts, wills and other non-public interests.[87] Unfortunately for the systematizers, however, the constitutional concept is sometimes adopted in cases involving private interests,[88] while the "popular" concept has, on occasion, been adopted in litigation involving public statutes.[89] In any event, this public-private distinction has no logical relevance to the demands of international legal policy.

Generally, it is quite clear from a state's participation in or abstention from military hostilities whether that state is at war for purposes of international law. Where the national conduct is clear, the international law notion has less need of evidentiary support from the decisions of national tribunals. On the other hand, there are twilight zones in the international law of war and peace in which it may be extremely important for the state to speak with a

748 (1st Cir. 1947); United States *ex rel.* Schluler v. Watkins, 67 F. Supp. 556 (S.D. N.Y. 1946); Bowles v. Soverinsky, 65 F. Supp. 808 (E.D. Mich. 1946); Citizens Protective League v. Byrnes, 64 F. Supp. 233 (D.D.C. 1946); State v. Gilessin, 258 Ala. 512, 64 So. 2d 75 (1953); Meier v. Schmidt, 150 Neb. 383, 34 N.W.2d 400 (1949).

87. Navios Corp. v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958) (charter contract); Carius v. New York Life Ins. Co., 124 F. Supp. 388 (S.D. Ill. 1954) (life insurance contract); Gaglormella v. Metropolitan Life Ins. Co., 122 F. Supp. 246 (D. Mass. 1954) (life insurance contract); Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953) (life insurance contract); Zaccardo v. John Hancock Mutual Life Ins. Co., 20 Conn. Supp. 75, 124 A.2d 926 (Super. Ct. 1956) (life insurance contract); Mutual Life Ins. Co. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949) (life insurance contract); Gudewicz v. John Hancock Mutual Life Ins. Co., 331 Mass. 752, 122 N.E.2d 900 (1954) (life insurance contract); Langlas v. Iowa Life Ins. Co., 245 Ia. 713, 63 N.W.2d 885 (1954) (life insurance contract); Darnall v. Day, 240 Ia. 665, 37 N.W.2d 277 (1949) (lease); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E.2d 687 (1942) (life insurance contract); Lynch v. National Life & Acc. Ins. Co., 278 S.W.2d 32 (Mo. App. 1955) (life insurance contract); Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134 (N.J.L. 1953) (life insurance contract); Berg v. Berg, 13 N.J. Super. 479, 80 A.2d 584 (Ch. 1951) (will); Schaffer v. Oldak, 12 N.J. Super. 80, 78 A.2d 842 (Ch. 1951) (will); Wilkinson v. Equitable Life Assur. Soc., 2 Misc. 2d 249, 151 N.Y.S.2d 1018 (N.Y. Munic. Ct. 1956) (life insurance contract); Watkins v. Cohen, 91 N.E.2d 708 (Ohio C.P. 1949) (lease); Thomas v. Metropolitan Life Ins. Co., 338 Pa. 499, 131 A.2d 600 (1957) (life insurance contract); Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554 (1953) (life insurance contract); Lincoln v. Harvey, 191 S.W.2d 764 (Tex. Civ. App. 1946) (lease); Christensen v. Sterling Ins. Co., 46 Wash. 2d 713, 284 P.2d 287 (1955) (life insurance contract).

88. See, *e.g.*, Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (W.D. La. 1944); Rosenau v. Idaho Mutual Benefit Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); Harding v. Pennsylvania Mutual Benefit Ass'n, 373 Pa. 270, 95 A.2d 221 (1953); Beley v. Pennsylvania Mutual Life Benefit Ass'n, 373 Pa. 231, 95 A.2d 202 (1953); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943).

89. See, *e.g.*, Hamilton v. McClaughry, 136 Fed. 445 (C.C.D. Kan. 1905); Miele v. McGuire, 53 N.J. Super. 506, 147 A.2d 827 (L. 1959); Lefevre v. Healy, 92 N.H. 162, 26 A.2d 681 (1942); Cahan v. McNamara, 192 Misc. 453, 81 N.Y.S.2d 351 (Sup. Ct. 1948).

single voice. These instances may arise in litigation over either public or private interests, but should not be decided on the basis of that distinction or by reference to either the constitutional or the "popular" definition. Thus, the absence of continuing hostilities at the end of a war may be peace in the "popular" sense, but in international law the admission that the former protagonists are at peace, even in the absence of a peace treaty, may make the occupying troops subject to the criminal and other laws of the defeated state.[90] Extremely damaging international legal repercussions may also result from a judicial determination that a minor military incident, or a policy like lend-lease, neither of which accord strictly with some concepts of neutrality, amounted to "war."[91] Obviously, such a determination, ought not to be made in disregard of the advice of the State Department.

Even in these relatively rare instances, however, State Department suggestions must be subject to the closest judicial scrutiny to determine the *bona fides* of intervention. For example, in the recent case of *United States v. Bussoz*,[92] the right of an alien to naturalization turned on a determination of the status of France with respect to hostilities in 1943. The State Department intervened with a statement which was held to be conclusive by the lower court, to the effect that, at the critical time, France was not a neutral. What international law posture of the United States could possibly have been served by such a suggestion? The court of appeals, quite properly, decided that this was not, in 1952, an issue in which the courts were bound to follow the Secretary of State. It said, "The District Court was in error in assuming that the State Department had any power or authority whatever to determine the status of aliens under the Selective Service Act. It is of no moment what the Secretary of State . . . opined."[93] There was no evidence that the Secretary intervened to safeguard an international law position affecting the United States or for any purpose other than to assist one of the parties to the dispute. On the contrary, as in *The Ambrose Light*, there was evidence that the State Department, itself, had previously determined the same question *in abstracto* and come to the opposite conclusion.

90. See, *e.g.*, *In re* Lo Dolce, 106 F. Supp. 455 (W.D. N.Y. 1952).

91. The closest a court has come to making such a determination is Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E.2d 687 (1942). There the Massachusetts court held that the death of an insured while on convoy duty with the United States Navy, prior to the United States' entry into World War II, was within the terms of a life insurance policy excluding death resulting "directly or indirectly from . . . war."

92. 218 F.2d 683 (9th Cir. 1952).

93. *Id.* at 686.

III. Conclusion

What emerges from the foregoing considerations is not a rule, but a method. There is a good reason for co-ordinating the determinations of the various branches of government in important matters of international law affecting the national interest. Therefore, in view of the primary concern of the political branches of government with both the national interest and emergent international law, it is right that the legal notions of the political branches of government should be respected by the courts. On the other hand, there is no reason for the courts to abdicate their function in deference to this principle in those cases in which there is at stake no matter of international law substantially affecting the national interest. Particularly, the courts should restrict the tendency of the executive to take over, in proceedings which lack procedural safeguards, the determination of an entire case merely because the case happens to have an international law element.

Finally, it is for the courts to decide whether or not to accept "suggestions," and to determine what effect to give these "suggestions." The courts should accede to such "suggestions" only where a sufficient reason — the safeguarding of the national interest by preservation of the United States' posture in international law — has been convincingly shown.