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# Liberia v. Bickford: the Continuing Problem of Recognition of Governments and Civil Litigation in the United States

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# *LIBERIA v. BICKFORD*: THE CONTINUING PROBLEM OF RECOGNITION OF GOVERNMENTS AND CIVIL LITIGATION IN THE UNITED STATES



## I. INTRODUCTION

In *Liberia v. Bickford*,[1] a U.S. district court held that the Interim Government for National Unity of the Republic of Liberia, which was not formally recognized by the United States, had standing to represent the Republic of Liberia in an action to recover funds placed with legal counsel in the United States by a state-owned Liberian corporation. The court so held by relying upon a Statement of Interest submitted by the U.S. Department of State declaring that "it would be consistent with the foreign policy interests of the United States for this Court to confer standing upon the Interim Government . . . ."[2] A rival organization claiming sovereignty, the National Patriotic Reconstruction Assembly Government (NPRAG), moved to intervene, but the court denied its motion.[3] The court noted that the Department of State was

1. 787 F. Supp. 397 (S.D.N.Y. 1992).
2. *Id.* at 400.
3. *Id.* at 401.

aware of NPRAG's claim but did not mention this claim in its Statement.[4]

The decision is consistent with precedent, as the judiciary generally takes a significant amount of guidance from the executive branch in foreign affairs matters. Nevertheless, the judiciary's complete deference to the executive on the type of purely jurisdictional matter featured in this case (i.e. whether or not a particular party has standing) is tantamount to allowing the executive branch to determine the outcome of cases even before those cases are litigated.

In most matters, the jurisdiction of the federal courts is the province of Congress,[5] while the executive's role is limited to its presentment privilege and veto power over enabling legislation.[6] When, however, the issue involves a foreign national, the executive has been allowed virtually unfettered discretion to decide who does and does not have standing.[7]

This Note examines the *Liberia* case in the context of older recognition decisions and more recent cases of a similar nature. It then examines this case as a separation of powers issue. Next, it discusses recognition and standing practice in the United Kingdom and recommends that the executive and judicial branches of U.S. government resolve to emulate British practice.

## II. THE CASE

### *A. The Facts*

Civil war in Liberia broke out in December 1989, when Charles Taylor's National Patriotic Front of Liberia (NPFL) mounted an attack from the Ivory Coast.[8] In August 1990, several Liberian political parties and other interested groups met in Banjul, the Gambia under the auspices of the Economic Community of West African States (ECOWAS).[9] ECOWAS had developed a peace plan that the United States supported,[10] and an Interim Government was formed with Amos

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4. *Id.*

5. U.S. CONST. art. III, §§ 1, 2. *But cf.* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (arguing that federal jurisdiction is really determined by a "dialogue" between the Supreme Court and Congress).

6. U.S. CONST. art. I, § 7.

7. *See infra* part IV.

8. *Liberia*, 787 F. Supp. at 399.

9. *Id.*

10. *Id.*

Sawyer as its President.[11] Despite the intervention of an Economic Community of West African States Military Observer Group, the insurgency grew and President Samuel Doe was killed on September 12, 1990.[12]

An All-Liberian National Conference composed of Liberian political parties and interest groups, ECOWAS, the United Nations, and the Organization of African Unity was held in the late winter of 1991.[13] Significantly, NPRAG, which is associated with Charles Taylor's NPFL, did not attend the conference[14] at which the conferees reelected Amos Sawyer as President.[15] Since the election, President Sawyer has been treated as a head of state by the United Nations and has met with an Acting Secretary of State in Washington.[16] Additionally, Liberia's counsel offered evidence that the Interim Government continued to accredit Eugenia Wordsworth-Stevenson, the Doe-appointed Liberian ambassador, as that country's representative in Washington.[17] The United States continued to accept her as such.[18]

Before the civil war, the state-owned Liberian Mining Corporation (LIMINCO) retained Bickford as legal counsel in the United States.[19] The Interim Government alleged that Bickford received certain properties on behalf of LIMINCO valued at $1,681,000.[20]

In February 1991, the Sawyer government initiated attempts to recover the property held by Bickford,[21] but Bickford refused to provide an accounting of the property because it did not believe that a final determination had been made as to who properly represented the Republic of Liberia.[22] After several unsuccessful attempts to recover Liberia's property, the Interim Government filed suit in October

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *See Vital Statistics on Diplomatic Corps*, L.A. TIMES, Apr. 4, 1991, at A1 (Eugenia Wordsworth-Stevenson listed as Liberian ambassador).
19. *Liberia*, 787 F. Supp. at 398.
20. *Id.*
21. *Id.* at 400.
22. *Id.* Bickford alleged that the former Finance Minister, who gave the money to Bickford, "purportedly asserted that he retained authority over the disputed funds at least until a new Liberian government received the formal recognition of the governments of certain enumerated countries." *Id.* at 399-400. The court noted that Bickford so alleged without affidavit or exhibit. *Id.* at 399.

1991.[23] NPRAG sought to intervene, stating that the Interim Government was not the legitimate government of Liberia.[24]

### *B. Issues and Holding*

The court faced two questions: did the Interim Government, which lacked a formal declaration of recognition by the United States, have standing to represent the Republic of Liberia in a U.S. forum, and did NPRAG have standing to intervene?[25] Notably, Bickford agreed that the Republic of Liberia owned the funds.[26] The court held that the Interim Government did have standing to represent the Republic of Liberia and NPRAG did not have standing to intervene.[27]

The court, while noting that the Interim Government lacked formal recognition by the United States,[28] followed the holding of a similar case, *National Petrochemical Co. v. M/T Stolt Sheaf*.[29] In that case, the court found that the United States had evinced a willingness to allow the unrecognized Khomeini regime of Iran to litigate in a U.S. forum because, *inter alia*, the U.S. government had stated that it would be consistent with its foreign policy interests to allow the Iranian government access to U.S. courts for the purposes of that suit.[30]

The judge in the *Liberia* case was equally influenced by a Statement of Interest submitted pursuant to 28 U.S.C. § 517.[31] At the request of the parties and the court, the U.S. government submitted a statement on January 24, 1992, in which it approved the Interim Government's standing in this suit and, significantly, made no mention of the standing of NPRAG.[32] The court, "defer[red] to the Executive branch's statement in this matter" because it found the circumstances similar to those in *National Petrochemical*.[33]

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23. *Id.* at 400.
24. *Id.*
25. *Id.* at 401.
26. *Id.*
27. *Id.*
28. *Id.*
29. 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).
30. *Id.* at 555.
31. *Liberia*, 787 F. Supp. at 399. See *infra* text accompanying note 144 for the text of 28 U.S.C. § 517.
32. *Liberia*, 787 F. Supp. at 400-01.
33. *Id.* at 401.

## III. LEGAL CONTEXT

### A. *The Executive's Power to Recognize Foreign Governments and its Effect on Standing*

The President possesses the express constitutional power to appoint ambassadors[34] and to receive ambassadors.[35] It is generally agreed that the President derives from these express provisions his implied powers to recognize or not to recognize a foreign government or state as well as to direct the foreign affairs of the United States in general.[36]

The Supreme Court has long held that the decision to recognize a state or government is a political decision not to be undertaken by the judiciary, but by the political branches.[37] That decision, once made, is binding on the courts.[38] The Court has never wavered in its adherence to these principles.[39]

Until recently, governments that were not recognized by the Presi-

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34. U.S. CONST. art. II, § 2.

35. U.S. CONST. art. II, § 3.

36. In United States v. Belmont, 301 U.S. 324, 331 (1937), the Court took judicial notice of the President's recognition of the Soviet Government, thereby validating all of that government's acts for the purposes of that case. The Court stated that in respect of all actions taken regarding this particular case, "the Executive had authority to speak as the sole organ of [the U.S.] government." *Id.* at 330. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a (1987) [hereinafter RESTATEMENT].

Of course, Congress also has constitutionally-derived powers to influence foreign affairs. Beyond Congress' power over the national purse, U.S. CONST. art. I, § 7, Congress has powers via section 8 of article I. These include the power:

> [t]o provide for the common Defence[;] [t]o regulate Commerce with foreign Nations[;] [t]o establish a uniform Rule of Naturalization[;] [to] regulate the value . . . of foreign Coin[;] [t]o define and punish Piracies and Felonies committed on the high Seas and Offenses against the Laws of Nations[;] [t]o declare War, grant letters of Marque and Reprisal, and support Armies [and;] [t]o provide and maintain a Navy . . . .

U.S. CONST. art. I, § 8.

37. Jones v. United States, 137 U.S. 202, 212 (1890). Interestingly, the Court stated that the decision "by the *legislative and the executive* departments bind[s] the courts." *Id.* (emphasis added). The wording of the passage, especially the use of the conjunctive "and" would seem to suggest that Congress might also play a role in the decision-making. That issue has never been settled, probably because it has not been raised. The recognition power, like so many other issues in foreign affairs, seems to have devolved entirely upon the President.

38. *Id.*

39. *See generally* Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938) (referring to the "political department," not the President); United States v. Belmont, 301 U.S. 324, 330 (1937); and United States v. Pink, 315 U.S. 203, 230 (1942).

dent were denied access to state and federal courts.[40] In the most important early cases, the Soviet government was consistently denied standing to litigate in U.S. courts from the period of the Communist Revolution of 1917 to that government's eventual recognition by the Roosevelt Administration in 1933.[41] During that period the Provisional Government, which was in exile, was the only body recognized by the U.S. government as the proper and lawful representative of Russia and the other republics.[42] Courts denied access to other communist regimes during the second half of the century as well.[43]

While non-recognition has precluded governments from litigating in the United States, severance of diplomatic relations with *recognized* governments has not had that effect. In *Banco Nacional de Cuba v. Sabbatino*,[44] the state-owned Cuban bank initiated an action for conversion against the bankruptcy receiver of an American commodities broker.[45] The defendant attempted to equate the severance of diplo-

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40. RESTATEMENT, *supra* note 36, § 205. However, "the policy of denying an unrecognized regime access to the courts does not extend to corporations owned by such a regime . . . ." *Id.* cmt. a. That has not stopped litigants from trying to prevent such wholly-owned corporations from litigating in U.S. courts. See the discussion of the *Ronair* case *infra* notes 102, 103 for an example of such an attempt.

Regarding the states, the Court has said, "the external powers of the United States are to be exercised without regard to state laws or policies." *Belmont*, 301 U.S. at 331.

41. *Pink*, 315 U.S. at 211. "On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia . . . ." *Id.* The *Pink*, *Belmont*, and *Guaranty* cases are examples of the litigation concerning ownership of Russian property that occurred in the aftermath of U.S. recognition.

42. *See generally* The Penza, 277 F. 91 (E.D.N.Y. 1921); The Rogdai 278 F. 294 (N.D. Cal. 1920); and, R.S.F.S.R. v. Cibrario, 139 N.E. 259 (N.Y. 1923). In all of these cases, the Soviet Government had no chance to be a litigant in a U.S. court despite the fact that it had de facto control over the territory. Contrast that with Russian Government v. Lehigh Valley R. Co., 293 F. 135 (D.C.N.Y. 1923), in which the Ambassador representing the fallen Provisional Government did have standing to commence an action.

In Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934), the court held that a corporation wholly-owned by the Soviet Government did have standing to sue in a U.S. court because it was incorporated and operated entirely in New York and therefore a citizen of that state. *Id.* at 528-29.

43. *See, e.g.*, Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977) (affirming dismissal of suit by representatives of the recognized Republic of Vietnam (South Vietnam) when it ceased to exist after surrender to the unrecognized Socialist Republic of Vietnam (North Vietnam)) and Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973) (affirming denial of attempt by the German Democratic Republic (East Germany) to intervene in a suit).

44. 376 U.S. 398 (1964).

45. *Id.* at 406.

matic relations with non-recognition, thus rendering the Cuban government ineligible to sue in American courts.[46] The Court stated that severance of diplomatic relations may occur for a variety of reasons and may last for various lengths of time.[47] The justices refused to impute to such an act the significance of a declaration of war, which would have precluded Cuba from litigating in U.S. courts.[48] Furthermore, the Court refused to equate a severance of diplomatic relations, a political act with political implications, with non-recognition, a political act with legal implications, holding that Banco Nacional did have standing to sue.[49]

It also has been held that non-recognition of a government will not preclude citizens of the particular state from suing in a U.S. court as long as the existence of the state as a state is recognized. In *Iran Handicraft & Carpet v. Marjan International Corp.*,[50] a U.S. district court allowed a citizen of Iran to maintain a suit despite the fact that the Khomeini regime had not been recognized by the U.S. government.[51] The court stated that "[o]nce the United States recognizes an entity as a sovereign state . . . a subsequent withdrawal of recognition of that state's government does not effect a change in the underlying recognition of the state as an international juridical entity."[52]

### *B. Recognition Practice in General*

Non-recognition of governments is considered a relatively new phenomenon.[53] States originally used non-recognition to protect monarchies from the revolutionary change sweeping Europe in the 19th century.[54] As noted earlier, the United States used it to withhold recognition of communist revolutionary change in this century.[55] The key to the problem is that the recognition question arises when regimes change under extra-constitutional circumstances.[56] When new govern-

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46. *Id.* at 410.

47. *Id.*

48. *Id.*

49. *Id.* at 410-11. See *infra* notes 151-168 and accompanying text for a discussion of the Court's Act of State Doctrine holding.

50. 655 F. Supp. 1275 (S.D.N.Y. 1987), *aff'd without opinion*, 868 F.2d 1267 (2d Cir. 1988).

51. *Id.* at 1281.

52. *Id.* Under international law, once recognition of statehood is granted, it cannot be revoked. *See, e.g., infra* note 73 and accompanying text.

53. Diplomatic Relations and Recognition, 1977 DIGEST § 3, at 20.

54. *Id.*

55. *See supra* notes 42, 43 and accompanying text.

56. L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS 3 (1978).

ments come to power via a state's constitutionally provided mechanisms, no announcement of recognition by other governments is required.[57]

In the United States, recognition is seen as an inherently political matter.[58] Others argue that norms and practices developed by the community of nations have made their way into customary international law, thereby rendering the recognition decision a legal obligation under certain circumstances.[59] These circumstances include the new government's de facto control of its territory and population,[60] its willingness to comply with the country's obligations and treaties under international law,[61] and whether it governs with the assent of the governed.[62] Though U.S. presidents have occasionally relied upon these prerequisites, American recognition policy, in fact, has been inconsistent, with executives changing theories with some rapidity.[63]

The developing nations and world powers have often differed

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57. *Id.* This question of "constitutionality" or "legality" could be fertile territory for scholars and polemicists alike. One writer discussing the difficulty of defining a governmental change as legal or illegal, described the following common practice:

> [A] group seeking to take over without putting the armed forces in the streets would first persuade (with threats if necessary) the vice-president, or whoever stood to succeed the presidency, to resign. This official would be replaced by the person the group wished to see in power. After a suitable, but fairly short, interval, the president would be induced to resign and the new vice-president would succeed. The government would have been changed according to constitutional procedures and without overt violence.

M.J. Peterson, *Recognition of Governments Should not be Abolished*, 77 AM. J. INT'L L. 31, 40 (1983).

58. Foreign policy decision makers have utilized recognition in myriad ways, depending on the political circumstances of the time and their perception of the national interests involved in a change of government. Thus, for example, the United States has used recognition as a political tool to support antimonarchical governments (under George Washington), to advance economic imperialism (under Theodore Roosevelt), to promote constitutional government (under Woodrow Wilson), and to halt the spread of communism (under Dwight Eisenhower). The practice of other states is similarly diverse.

GALLOWAY, *supra* note 56, at 1. *See also* John Foster Dulles, *Our Politics Toward Communism in China*, 37 DEP'T ST. BULL., July 1957, at 93-94. (arguing that the decision to recognize a new government is a political decision).

59. HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 87-97 (1947).

60. Recognition, 1 Hackworth DIGEST § 33, at 175.

61. Recognition, 2 Whiteman DIGEST § 4, at 73.

62. *Id.*

63. GALLOWAY, *supra* note 56. This is essentially the thesis of the whole book. According to another scholar, the British honored the legal obligation principles with considerable consistency. Colin Warbrick, *The New British Policy on Recognition of Governments*, 30 INT'L & COMP. L.Q. 568, 570 (1981).

sharply in their attitudes about recognition practice. Developing nations argue that recognition practice is wrongly used to extract promises that intrude upon their sovereignty.[64] They argue that recognition should be granted automatically once effective control has been established by a regime.[65] Developed nations argue that the recognition decision is discretionary and that they can impose any conditions they wish.[66] This conflict led to two important developments.

The first development was the 1930 announcement by Mexican Foreign Minister Genaro Estrada that the Mexican government would confine itself to maintenance or withdrawal of diplomatic relations after a revolution in a neighboring state.[67] Foreign Minister Estrada stated that recognition of governments

> is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide favorably or unfavorably, as to the legal qualifications of foreign regimes.[68]

The second development was the 1933 Montevideo Convention on the Rights and Duties of States[69] which is often cited as the model for international recognition practice.[70] The Convention was signed by most states in North, South and Central America and its purpose was to end intervention by nations in the affairs of neighboring states.[71] The most important contribution of the Convention is its definition of statehood: "The state as a person of international law should possess the following qualifications: *a)* a permanent population; *b)* a defined territory; *c)* government; and *d)* capacity to enter into relations with the other states."[72] Recognition of statehood, once granted, is "uncondi-

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64. GALLOWAY, *supra*, note 56, at 2.

65. *Id.*

66. 1944 DIGEST, vol. 2, at 5-6.

67. *Estrada Doctrine of Recognition*, 25 AM. J. INT'L L. 203 (Supp. 1931).

68. *Id.*

69. Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States, Dec. 26, 1933, 49 Stat. 3097 [hereinafter Montevideo Convention].

70. *See, e.g.*, RESTATEMENT *supra* note 36, § 201 cmt. a. *See also infra* part V.B.

71. Montevideo Convention, *supra* note 69, art. 8, 49 Stat. at 3100.

72. *Id.* art. 1, 49 Stat. at 3100.

tional and irrevocable."[73] Recognition of a state may also be express or tacit.[74] Additionally, states should not recognize states or governments that have effected control by force.[75] It is clear from the structure of the Convention that states are not required to recognize other states or governments and that states are not required to maintain diplomatic relations with other states and governments.[76]

The signers of the Montevideo Convention understood that recognition was a political act, but they added a duty to treat even an unrecognized government as the government in fact or an unrecognized state as a state in fact.[77] There is, however, no obligation to allow unrecognized states and governments access to domestic courts.[78]

The United States, therefore, has few real obligations under international law. While not recognizing an entity that clearly is a state is considered bad form, there is no law compelling recognition, only law stating that the state must nevertheless be treated as a state. Recently, States have responded to the recognition problem by doing away with the practice of formally recognizing new governments.

### *C. Recent Recognition Practice*

In 1980, the Carter Administration announced that the United States would no longer recognize new governments, effectively making official a practice that had begun in the 1970s.

> In recent years, U.S. practice has been to deemphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments.
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> The Administration's policy is that establishment of relations does not involve approval or disapproval but merely dem-

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73. *Id.* art. 6, 49 Stat. at 3100.

74. *Id.* art. 7, 49 Stat. at 3100.

75. *Id.* art. 11, 49 Stat. at 3101. See also RESTATEMENT *supra* note 36, § 203, which notes that states may not recognize states or governments that effect control in violation of the United Nations Charter. The United Nations Charter does not specifically address the issue of recognition of governments. The Charter, however, calls for Members to respect the territorial integrity of other members. U.N. CHARTER art. 2, ¶¶ 1, 3, 4. The Charter also mandates that Member States refrain from assisting States that violate the Charter. U.N. CHARTER art. 2, ¶ 5.

76. *See* RESTATEMENT, *supra* note 36, § 203.

77. Montevideo Convention, *supra* note 69, art. 3, 49 Stat. at 3100. *See also* RESTATEMENT, *supra* note 36, § 203 cmt. b.

78. Montevideo Convention, *supra* note 69, art. 3, 49 Stat. at 3100. *See also* RESTATEMENT, *supra* note 36, § 203 cmt. b.

> onstrates a willingness on our part to conduct our affairs with other governments directly.[79]

This declaration, which is similar to the Estrada Doctrine,[80] has presented an entirely new challenge for courts. The statement does not hint at how courts are expected to handle future questions regarding unrecognized states and thus has led to the troubling decisions discussed in this Note.[81]

Succeeding administrations appear to have adhered to the Carter policy. Though President Clinton recently announced the recognition of the "Government of Angola,"[82] the history of U.S.-Angola relations demonstrates that the United States had never formally recognized the existence of Angola *as a state*.[83] Indeed, while the United States con-

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79. Diplomatic Relations and Recognition, 1977 DIGEST § 3, at 20.

80. *See supra* notes 67, 68 and accompanying text.

81. In a similar announcement, the British government stated that it's attitude toward a new government would have to be inferred from the nature of its dealings with that government. *See infra* notes 181-184 and accompanying text. Not all commentators are totally sanguine about the way British courts have handled this challenge. *See* M.J. Dixon, *Recent Developments in United Kingdom Practice Concerning Recognition of States and Governments*, 22 INT'L LAW. 555, 558 (1988). Dixon criticizes the Court of Appeal's decision in Gur Corp. v. Trust Bank of Africa Ltd, 3 W.L.R. 583, 587 (1986), discussed in some detail at *infra* part V.A.

82. *U.S. Recognition of Angolan Government*, 4 DEP'T ST. DISPATCH, May 24, 1993, at 375. The President's statement was interesting for many reasons, not the least of which was his statement that he "tried to use the possibility of U.S. recognition as a leverage toward promoting an end to the civil war." *Id.* See the discussion at *supra* notes 55-64 about the use of recognition as a coercive tool of foreign policy and various attitudes about this use.

83. *See The United States and Angola, 1974 - 88: A Chronology*, 89 DEP'T ST. BULL., Feb. 1989, at 16 [hereinafter *Angola Chronology*]. On November 11, 1975, two independent republics were declared on the soil of an Angola recently freed from Portuguese rule. The Popular Movement for the Liberation of Angola (MPLA) established the People's Republic of Angola with its capital in Luanda, while the National Front for the Liberation of Angola (FNLA) and the National Union for the Total Independence of Angola (UNITA) established separate spheres of influence in what they called the People's Democratic Republic of Angola with its capital at Huambo. *Id.* at 17. Secretary of State Kissinger announced that the United States would not recognize the MPLA. *Id.* More significantly, the United States did not recognize the UNITA regime at Huambo. *See id.*

The conflict in Angola eventually became a proxy for the Cold War and the United States eventually sided with UNITA. On November 22, 1976, the United States abstained on a U.N. Security Council Resolution recommending that the General Assembly admit Angola to membership in the United Nations. On this date the U.S. representative to the United Nations expressed the view that Angola was not yet an independent country.

tinues to recognize new states,[84] the United States has not declared its recognition of any new governments. This problem of recognition and jurisdiction is influenced by the fact that though all three branches of government can impact foreign affairs, the real power is exercised by the president and the executive branch.

### *D. The Executive's Foreign Affairs Powers*

The Supreme Court held in the landmark *Curtiss-Wright* case that the President has an implied power to conduct the foreign relations of the United States.[85] The Court upheld a statute which empowered the President to invoke and revoke at his discretion an embargo of arms to warring parties in South America,[86] rejecting an argument "that Congress abdicated its essential functions and delegated them to

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> We still have serious doubts about the true independence of the current Angolan Government. It is hard to reconcile the presence of a massive contingent of Cuban troops with the claim that Angola enjoys truly independent status. The Angolan government exercises only tenuous control over much of Angola that still resists domination by the regime in Luanda. The fact that it depends heavily on Cuban forces for the maintenance of its security casts doubt on the degree of popular support which it can command within the country.

*U.S. Abstains on Application of Angola for U.N. Membership*, 75 DEP'T ST. BULL., Dec. 20, 1976, at 742. The representative said that the United States abstained rather than oppose the application "out of respect for the sentiments expressed by our African friends." *Id.* Of course, the recognition granted the Angolan Government by President Clinton came about only after the end of the Cold War and the exit of Cuban troops from Angola.

It is also important to note that as early as 1978, the Carter Administration was using the nomenclature of the no "recognition of governments" policy. On June 26, 1978, the President said that there were no plans to "normalize" relations with Angola. *Angola Chronology*, at 18.

84. *See U.S. Recognition of Former Yugoslav Republics*, 3 DEP'T ST. DISPATCH, Apr. 13, 1992, at 287 ("The United States recognizes Bosnia-Hercegovina, Croatia, and Slovenia as sovereign and independent states."); *U.S. Recognizes Czech and Slovak Republics*, 4 DEP'T ST. DISPATCH, Jan. 18, 1993, at 35 ("The President recognized the new Czech and Slovak Republics . . . ."); *U.S. Recognition of Eritrea*, 4 DEP'T ST. DISPATCH, May 3, 1993, at 320 ("[O]ur consulate in Asmara informed the authorities that we recognized Eritrea as an independent state.").

In each of the announcements, the next phrase or sentence spoke of the U.S. desire to establish full diplomatic relations with the new nations. These statements are demonstrations of the important distinctions between recognition and diplomatic relations that the Supreme Court drew in deciding Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). See *supra* notes 44-49 and accompanying text for a discussion about this aspect of the *Sabbatino* decision.

85. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

86. *Id.* at 312-13.

the Executive."[87] In that era at the dawn of the regulatory state, the Court justified its position by stating that there are fundamental "differences between the powers of the federal government in respect of foreign affairs . . . and those in respect of domestic . . . affairs."[88] Those differences allow Congress greater latitude in delegating authority to the President.[89]

The Court, however, went farther than it may have needed and stated that the President has "exclusive power . . . as the sole organ of the federal government in the field of international relations."[90] Without actually citing a provision of the Constitution, the Court relied on the notion that this was the only logical way to conduct foreign affairs, citing, *inter alia*, an early incident in which President Washington refused to reveal to Congress details of a negotiation he was conducting with a foreign power.[91] The Court further demonstrated that since the beginning of the Republic, Congress has passed laws in the foreign affairs area "which either leave the exercise of the power to [the President's] unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."[92] The Court stated that while mere repetition does not make such an act constitutional, such an "impressive array of legislation . . . must be given unusual weight."[93] A longstanding practice such as this demonstrates the constitutionality of the power in the origin or history of the power involved.[94] Presidential pre-eminence in for-

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87. *Id.* at 315. In general, the delegation doctrine has been considered dead since the middle 1930s, J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582 (1972), but with both Chief Justice Rehnquist and Justice Scalia on the Court, it may still have some life in it. For an example, see then-Justice Rehnquist's concurring opinion in Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring). The *Curtiss-Wright* case has been introduced not for the point it makes about delegation but to illustrate the solicitude of both Court and Congress for the executive's prerogative in foreign affairs.

88. *Curtiss-Wright*, 299 U.S. at 315.

89. *Id.*

90. *Id.* at 320.

91. *Curtiss-Wright*, 299 U.S. at 320-21. *See also* Michael J. Glennon, *The Use of Custom in Resolving Separation of Power Disputes*, 64 B.U. L. REV. 109 (1984) (arguing that the Supreme Court's approach to separation of powers issues has been inconsistent as it relies alternately on the text of the Constitution, the framers' intent or custom to arrive at the desired solution). This case has been described as "the Court's recognition of the president's *unenumerated* sole-organ power." HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 135 (1990) (emphasis added).

92. *Curtiss-Wright*, 299 U.S. at 324.

93. *Id.* at 327.

94. *Id.* at 328. Note the similarity between this approach and that of Justice

eign affairs was simply taken as an article of faith by the Court.

The *Curtiss-Wright* case is just one of many cases that stand for the proposition that the President is the primary actor in the realm of foreign relations. Congress has attempted to impose its own will in this area infrequently and with varying degrees of success.[95]

The challenge to the courts today is how to reconcile their traditional deference to the executive with the lack of direction provided by the new non-recognition of governments doctrine. In earlier practice, the executive stated explicitly whether or not it recognized a state or

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Frankfurter in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-614 (1952) (Frankfurter, J., concurring). He wrote: "[A] systemic, unbroken executive practice long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power.' " *Id.* at 610-11.

It should be noted that for all the hue and cry about the "Imperial Presidency" usurping Congressional power in the realm of foreign affairs, the Congress itself is largely responsible for this turn of events. *See* Philip R. Trimble, *The President's Foreign Affairs Powers, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 39 (Louis Henkin et al. eds., 1990). The author argues that for various reasons, Congress has chosen to delegate considerable power to the executive in the foreign affairs area (the *Curtiss-Wright* case is a prime example). He notes that Congress does have the potential to exercise considerable power, by virtue of its power to legislate and its power over the budget. See also *supra* note 36 for an enumeration of Congress' constitutionally-derived foreign affairs powers.

95. See the saga of Congressional attempts to limit U.S. involvement in Angola via the Tunney and Clark Amendments. *Angola Chronology*, *supra* note 83, at 17-18 (entries for the following dates: Dec. 19, 1975; Dec. 20, 1975; Jan. 27, 1976; June 30, 1976; May 25, 1978; June 26, 1978; Dec. 16, 1980; Mar. 19, 1981; and May 19, 1981.) Even President Carter was concerned about the Amendment's effect on the President's "capacity to act in the national interest." *Id.* (entry for May 25, 1978).

Congress also has made it clear that it would like to be informed by the Secretary of State when the executive commits the United States to any international agreements. *See* 1 U.S.C. § 112b (1988) (calling upon the Secretary of State to transmit to Congress the text of any such agreement no later than sixty days after it has come into force). Even here, the Congress was solicitous of executive concerns for secrecy:

> [A]ny such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted [to the relevant Congressional committees] under an appropriate injunction of secrecy to be removed only upon due notice from the President.

*Id.* § 112b(a).

Of course, Congress' attempt to place limits on President Reagan's efforts to unseat the Sandinista Government in Nicaragua by controlling the expenditure of funds, led the administration to look to outside sources of funding for its *Contra* allies. Frank G. Colella, *Beyond Institutional Competence: Congressional Efforts to Legislate United States Policy Toward Nicaragua: The Boland Amendments*, 54 BROOK. L. REV. 131, 133-34 (1988).

government.[96] Once the Supreme Court decided that it was the executive's prerogative to make these decisions, it was relatively easy to decide each case. Certainly the Court added nuances to the process as in *Sabbatino*,[97] but even refinements like this deviated little from the cut and dry conceptions of recognition and non-recognition. Under the new doctrine, there are no cut and dry situations. The courts have responded by allowing the executive even greater influence, creating inroads into the very jurisdiction of the courts.

## IV. ANALYSIS

### *A. The Standing of Unrecognized Foreign Governments*

Recent decisions featuring litigation by unrecognized foreign regimes[98] (or their wholly-owned corporations) have several common elements. They involve countries in which change was brought about by unconstitutional measures or violence, and they involve Statements of Interest by the United States government which were generally dispositive. Each case suffers from some conceptual weakness. The most glaring weakness is that each court could have reached the same result without seeking Department of State input on whether it would be in the best interests of the United States to allow the regime in question to litigate in a U.S. court.

Foreign governments and corporations assert their standing via 28 U.S.C. § 1332 which confers diversity jurisdiction on the federal district courts.[99] Standing is granted to foreign states, and foreign citizens

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96. *See supra* part III.B.

97. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (severance of diplomatic relations a with recognized country is not enough to deny standing to that country). *See supra* notes 44-49 and accompanying text.

98. Of course, pursuant to the non-recognition doctrine, it is technically meaningless to state that a government has been recognized or not recognized by the U.S. government. However, because the cases discussed in the following sections featured challenges to the standing of "non-recognized" governments, it is necessary to continue using these terms.

99. The statute states:

> (a) The district courts shall have original jurisdiction of all civil matters where the matter in controversy exceeds the sum of $50,000 exclusive of interests and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.

as they are defined elsewhere in the title.[100] The statute does not specify that the government must be recognized by the United States; that has been left up to case law.[101]

Since the U.S. government stopped explicitly recognizing governments, the courts have begun to develop other ways to determine whether certain regimes have standing to litigate here. They have consistently relied on several factors: the objective behavior of the United States toward the regime in question; the continuing existence of agreements and treaties between the United States and the government in question; and the explicitly stated desires of the executive branch. The courts have relied most heavily on the third of these factors.

In *Transportes Aereos de Angola v. Ronair, Inc.*,[102] a district court declined to dismiss a suit brought by a corporation wholly-owned by the People's Republic of Angola, a country with which the United States maintained no diplomatic relations at the time.[103] The court cited two facts to support its holding. First, the Commerce Department, in consultation with the State Department, allowed the defendant American corporation to contract with the Angolan corporation.[104]

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28 U.S.C. § 1332(a) (1988).

See Iran Handicraft & Carpet v. Marjan Int'l. Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987), *aff'd without opinion*, 868 F.2d 1267 (2d Cir. 1988), discussed at *supra* notes 50-52, for a construction of this statute when the United States has recognized the state as an international juridical entity, but does not recognize the particular government.

100. 28 U.S.C. § 1603(a) (1988) states that a "foreign state . . . includes a political subdivision of a foreign state, or an agency or an instrumentality of a foreign state as defined in subsection (b)." Subsection (b) states:

> An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporation, or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b).

101. *See supra* part III.

102. 544 F. Supp. 858 (D.Del. 1982).

103. *Id.* at 859. Curiously, neither the court nor the Department of State drew a distinction between diplomatic relations and recognition. Yet the Supreme Court in the *Sabbatino* case made much of this distinction. *See supra* notes 44-49 and accompanying discussion. One of the circumstances that makes this area of law so difficult is this kind of imprecision and lack of rigor on the part of the courts.

President Clinton has now recognized the Republic of Angola. *See supra* note 82 and accompanying text.

104. *Id.* at 860. Interestingly, the U.S. position on economic relations with Angola

Permission to contract, according to the court, "could in itself be considered a grant of standing to litigate any claim arising out of that transaction in the courts of the United States."[105] Second, the State Department issued a letter to Angola's counsel stating that while the United States did not maintain diplomatic relations with the People's Republic of Angola, allowing the Angolan government to pursue its claim in U.S. courts "would be consistent with the foreign policy interests of the United States."[106] The court stated that by relying on the actions and words of the executive to confer jurisdiction on this unrecognized government, it was giving proper effect to the executive branch's political judgments.[107]

Counsel for Angola argued that the absence of the word "recognition" from the State Department's letter signalled an "abandonment of the recognition dichotomy as a vehicle for exerting pressure on foreign governments."[108] Interestingly, the court never addressed this assertion. If it had, the court might have had to agree for one very important reason—the United States had never formally recognized the existence of a *state* of Angola. If the court had addressed the fact that Angola had never been recognized by the United States *as a state*,[109] it would have been bound to dismiss the suit for lack of standing because standing is granted to foreign states and their citizens.[110]

On the other hand, the Montevideo Convention states quite explicitly that recognition of a state can be express or tacit.[111] "The latter results from any act which implies the intention of recognizing the new state."[112] It is arguable that by its various actions over the years, particularly allowing American corporations to trade with Angola,[113] the

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hardened later during the Reagan Administration. A State Department spokesman was quoted as saying that economic policy toward Angola was "to deny, pending an achievement of a negotiated settlement, all U.S. exports to Angola with military use and to not support . . . Angola's ability to earn foreign currency and thus fund its war against UNITA." *Angola Chronology*, *supra* note 83, at 20. Later when the Angolan peace process appeared to be succeeding, the State Department once again favored increased U.S. economic ties with Angola. *See Potential for US Private Sector Activity in Angola*, 3 DEP'T ST. DISPATCH, Mar. 9, 1992, at 198.

105. *Ronair*, 554 F. Supp. at 863.

106. *Id.*

107. *Id.*

108. *Id.* at 861.

109. See *supra* note 83 and accompanying text for an extended discussion of U.S. relations with Angola.

110. *See* 28 U.S.C. § 1332(a)(4).

111. Montevideo Convention, *supra* note 69, art. 7, 49 Stat. at 3100.

112. *Id.*

113. *See Ronair*, 544 F. Supp. at 861. *See also* discussion *supra* note 104.

United States tacitly recognized Angola.[114] The court, therefore, could have ended its inquiry once it discovered that the Commerce Department had sanctioned the contract.[115] There was no need to depend on the letter from the State Department.

In its opinion for *National Petrochemical Co. v. M/T Stolt Sheaf*,[116] the Court of Appeals for the Second Circuit was the first court to consider the new non-recognition policy.[117] The court held that non-recognition of the Khomeini government of the Islamic Republic of Iran was not an appropriate criterion by which to decide whether a corporation wholly-owned by that government could have access to U.S. courts.[118] The court stated that acts of the U.S. government "suggest that the Executive Branch has evinced an implicit willingness to permit . . . Iran to avail itself of a federal forum."[119] Such acts included being a party to the Algerian Accords by which the United States and Iran settled the hostage crisis; being a party to the Iran-U.S. Claims Tribunal at the Hague, which as of the date of the case, continued to adjudicate disputes between the two countries; and not abrogating a 1955 treaty of friendship.[120] Individually, none of these acts would suffice, but taken together, they demonstrate the necessary "willingness" on the part of the United States.[121] The court, however, was finally convinced when the United States submitted a Statement of Interest in the form of an amicus brief on appeal, stating the position of the executive that the Iranians should be allowed access to the U.S. court to pursue their suit.[122]

Interestingly, the court did not actually state which of these ele-

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114. Note that in the statement *supra* note 83, the U.S. representative to the United Nations referred to the MPLA as the "current Angolan Government." The *Angola Chronology* is replete with references to U.S. government contacts with the pre-recognition MPLA-dominated Angolan Government. *See, e.g., Angola Chronology, supra* note 83 at 18 (entry for June 20, 1978); *Angola Chronology, supra* note 83 at 19 (entry for Jan. 26, 1983).

115. Indeed, the court did state that "this could in itself be considered a grant of standing to litigate any claim arising out of that transaction in the courts of the United States." *Ronair*, 544 F. Supp. at 863. The United States could hardly be said to speak with "one voice" if the State Department had said that it would not be in the best interests of the United States to allow Angola to litigate in the United States while the Commerce Department was sanctioning contracts.

116. 860 F.2d 551, 554 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).

117. *Id.* at 554.

118. *Id.*

119. *Id.* at 555.

120. *Id.*

121. *Id.*

122. *Id.*

ments was dispositive, nor whether one would have sufficed without the other, though it noted the Statement of Interest last. Furthermore, the court seemed to assume that if the Statement had been filed with the lower court judge (who had dismissed National Petrochemical's case with prejudice),[123] he might have ruled otherwise.[124] Taken together these two facts seem to indicate that it was the Statement of Interest that was and always would have been dispositive. The court also stated that this ruling was consistent with preserving the President's preeminence in foreign affairs. The President "must have the latitude to permit a foreign nation access to U.S. courts, even if that nation is not formally recognized by the U.S. government."[125] This would seem to indicate that Presidential expressions were dispositive. In the penultimate paragraph of the opinion, however, the court presents the various elements as acting in a continuum, demonstrative acts flowing naturally, almost predictably into assertions of national preference.[126]

The court also brushed aside appellee's contention that this ruling would encourage arbitrary and unpredictable government pronouncements on the status of foreign governments,[127] stating that this was not such a case.[128] However, the court indicated that there could be circumstances under which the government's actions could be seen as arbitrary. Examples of such behavior would be prohibiting a recognized government from bringing a suit, or allowing some suits by an unrecognized government and not allowing others.[129] One interesting point is that the court never attempted to explain why the United States entered its amicus brief. It is difficult to fathom how the court can determine that the United States is not acting arbitrarily if it does not attempt to understand why the United States took a position in the case.

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123. *Id.* at 553.

124. *See id.* at 555.

125. *Id.* The tone of this passage may reflect discomfort with the abandonment of the recognition/non-recognition dichotomy. Also, the court's use of words is careless. There was no doubt that Iran existed as a "nation" and was recognized as such. *See* Iran Handicraft & Carpet v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987), *aff'd without opinion*, 868 F.2d 1267 (2d Cir. 1988), discussed *supra* notes 50-52 and accompanying text.

126. *National Petrochemical*, 860 F.2d at 555-56.

127. *Id.*

128. *Id.* at 556.

129. *Id.* In the denouement to the story, National Petrochemical's suit was eventually dismissed by the district court. National Petrochemical Co. v. M/T Stolt Sheaf, 722 F. Supp. 54 (S.D.N.Y. 1989). National Petrochemical was suing, ironically, a Liberian shipper for conversion after National Petrochemical's failed attempt to export certain chemicals from the United States to Iran in contravention of U.S. law. *Id.* The court dismissed the case because of this illegality. *Id.* at 55.

In the *Liberia* case, the court found that relevant circumstances were similar to those in *National Petrochemical*, rendering it reasonable to follow *National Petrochemical*.[130] It is difficult to see the similarities. In explaining the *Liberia* holding, the judge did not mention ongoing relations between Liberia and the United States, nor did he cite any existing treaty. The only real similarity is the Statement of Interest from the government stating that the litigants should be allowed to pursue their claims.[131]

One important difference is that in the *National Petrochemical* case, the court explicitly noted that the United States had severed diplomatic relations with Iran.[132] By contrast, there were ongoing relations between Liberia and the United States—the Liberian ambassador, sent to the United States in 1986, had kept her accreditation despite the change in government in Liberia.[133] Additionally, the United States had apparently never taken any other action to indicate disapproval of the Sawyer government in Liberia. In fact, the United States supported the peace process which led to the election of Sawyer.[134]

In the past, litigants raised questions about the standing of a government to sue in U.S. courts when the United States had taken actions or made statements indicating non-recognition of a government. The issue of recognition was properly raised in the period before the United States recognized Soviet rule;[135] when the United States was dealing with an Angolan state and government that it had never recognized;[136] when the United States was in a Cold War with Cuba;[137] and when the United States had suspended diplomatic relations with Iran.[138] In the *Liberia* case, however, there was simply no reason to assume that the United States did *not* recognize the Interim Government of Liberia, and the court could have found in its favor simply upon the continuation of diplomatic relations with that state and with-

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130. Liberia v. Bickford, 787 F. Supp. 397, 401 (S.D.N.Y. 1992).

131. *Compare id.* at 400 ("[I]n the present case, it would be consistent with the foreign policy interests of the United States for this Court to confer standing upon the Interim Government . . . .") *with National Petrochemical*, 860 F.2d at 555 ("[I]t is the position of the Executive Branch that the Iranian Government and its instrumentality should be afforded access to our courts . . . .").

132. *National Petrochemical*, 860 F.2d at 554.

133. *Liberia*, 787 F. Supp. at 399.

134. *Id.*

135. *See supra* text accompanying notes 42-43.

136. *See supra* text accompanying notes 82-83.

137. *See supra* text accompanying notes 44-49.

138. *See supra* text accompanying notes 116-118.

out soliciting the Department of State's opinion on jurisdiction.[139] After the *Sabbatino* holding in which the Supreme Court held that the severance of diplomatic relations did not preclude a recognized government from suing in a U.S. forum,[140] it would require an untenable leap of logic to entertain the notion that a government with which the United States maintains diplomatic relations did not have standing to sue in a U.S. forum.

As judicial doctrine, the cases say very little. While all purport to rely on objective factors by which the court can gauge the attitude of the government, they were all, in the final analysis, determined by the Statement of Interest of the United States, declaring that the foreign government should be allowed to litigate *in the instant case*. Intuitively, this is logical. Where the United States acts as if it wants a certain situation to exist, it will usually also say so. The question that the courts have not answered, and probably will not answer until faced with it, is what they will do when the executive does one thing and says another. It is not inconceivable that the government might one day manifest positive behavior toward a regime and later state that it is not in the best interests of the United States to allow the regime to sue in its fora. This is the arbitrariness that the *National Petrochemical* court mentioned but rejected as not occurring in that case.[141]

There is another glaring difference between the *National Petrochemical* and *Liberia* cases. The Khomeini regime was in firm control of the country and governed more or less with the consent of the governed. The same cannot be said for the Interim Government of Liberia. War continued to rage in that country well after this case was decided. The obvious result is that rather than adding greater logic to recognition practice, the United States has quite obviously gone even further to reject well-developed international recognition standards: that the new regime govern with the consent of the governed and that it have control over its territory and population.[142]

There is an apparent contradiction between the two preceding criticisms. On the one hand, the *Liberia* court is criticized for making an inquiry with the State Department into Liberia's juridical status when none was required—Liberia should have been granted standing because there was simply no reason to assume that the United States *did not*

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139. The court focused exclusively on the State Department's "views on standing." *See Liberia*, 797 F. Supp. at 400.

140. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412 (1964).

141. National Petrochemical Co. v. M/T Stolt Sheaf, 860 F.2d 551, 556 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).

142. *See supra* notes 60-63 and accompanying text.

recognize the Sawyer government. On the other hand, the court is criticized for granting the Sawyer government standing despite the fact that the government was not in actual control of Liberia. The contradictions, however, go to the heart of the problematic nature of judicial practice discussed in this Note: when faced with these kinds of situations, courts are avoiding their right and duty to formulate a principled and intellectually rigorous approach to the problem in favor of simply turning to the State Department for instructions.

### *B. Statements of Interest*

Statements of Interest clearly played a decisive role in the *Liberia* and *National Petrochemical* decisions. In *Ronair*, of course, the Statement of Interest actually came in the form of a letter from the State Department to Angola's counsel, but it had the same effect.[143]

The Statements of Interest were purportedly brought to the courts' attention pursuant to 28 U.S.C. § 517 which states:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.[144]

Historically, the United States has intervened in cases that directly effect the operations of U.S. agencies.[145] However, where the foreign affairs of the United States are concerned, the courts have interpreted this statute loosely. In none of the cases discussed in this Note is there evidence that the court asked the Department of State to point to the nature of the governmental interest that merited the government's comments. The cases demonstrate that the courts were all too anxious to receive directions from the State Department.[146]

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143. *See* Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858, 861 (D.Del. 1982).

144. 28 U.S.C. § 517 (1988).

145. *See, e.g.*, Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976) (permitting the United States to represent an individual who had cooperated earlier as a witness in a related suit); Black Spotted Horse v. Else, 767 F.2d 516 (8th Cir. 1985) (involving a suit against a federal corrections officer); and Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1960) (involving a tort action against a federal judge).

146. In *Liberia*, the Court requested the Statement of Interest from the State

One of the effects of these Statements of Interest is that they have permitted the executive branch to determine the jurisdiction of the federal courts. According to Article III of the U.S. Constitution, the jurisdiction of the federal courts is determined by the Congress.[147] The executive's role is limited to its presentment and veto powers. With these recent decisions, the courts have taken their traditional deference to the executive on foreign affairs and expanded it to the point where the executive can determine the prevailing party in an action simply by denying standing to one party or another.[148] As noted earlier, the courts do not seem to know what they would do if faced with this dilemma.

Additionally, the Statements of Interest tend to dilute the effect of the announced intention to refrain from formally recognizing new regimes. What is a Statement of Interest conferring standing if not a recognition of the regime? Such a practice effectively returns foreign relations back to where they were before the Carter administration announcement, though now with the Legal Advisor to the Department of State making recognition decisions rather than the President. This type of recognition can also be used in the unseemly and "insulting" manner in which formal recognition was supposedly used in the past: to apply pressure to new governments.

Finally, the courts' liberal construction of 28 U.S.C. § 517 raises significant separation of powers issues. It is not clear why the courts have turned these statements into an executive authority to instruct the courts on the limits of their jurisdiction. The doctrine that non-recognized countries cannot sue in the United States was created by the ju-

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Department. Liberia v. Bickford, 787 F. Supp. 397, 400 (S.D.N.Y. 1992). In *National Petrochemical*, the government entered the litigation during the appeal, submitting an amicus brief that was obviously decisive. *National Petrochemical*, 860 F.2d at 553. Finally, the *Ronair* court took its directions from a letter written by the State Department to Angola's counsel. *Ronair*, 544 F. Supp. at 861.

147. U.S. CONST. art. III, § 1.

148. The judiciary has also occasionally relied on the political question doctrine to avoid adjudicating many such cases. *See, e.g.*, Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), in which a federal district court dismissed a challenge by 110 members of Congress to an action by President Reagan which they claimed violated the War Powers Act. The court held that it was a political question and feared "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 340 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

*But see* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). In his dissenting opinion, Justice Brennan wrote that the Court should have invoked the political question doctrine to avoid judicial review of the act of a foreign state. *Id.* at 788 (Brennan, J., dissenting). See *infra* part IV.C. for an extensive discussion of the Act of State Doctrine. See *infra* notes 161-166 and accompanying text for a discussion of the *First National* case.

diciary[149] and reflected a reasonable judicial decision to respect executive prerogatives. However, there was never any direct connection between the decision not to recognize a government and any pending or current litigation. Similarly, the courts could certainly create a new doctrine to respond to the executive policy of not declaring the recognition of a new government. They have, however, avoided this task in favor of asking the Department of State to resolve the problems posed by particular current litigation. The new doctrine is: let the State Department decide the case.[150] There is, however, precedent for this extreme form of judicial deference to the executive.

### *C. Act of State Doctrine*

Under the Act of State Doctrine, "courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[151] The Supreme Court has described that doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution."[152] The continuing vitality of the doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[153] In short, it was a judicially created doctrine.

In *Sabbatino*, the Department of State expressly refused to comment on the substance of the case,[154] but stated that its silence did not indicate that the executive approved of the possibility that the Court would inquire into the legality of the foreign state's act.[155] The Court did not make such an inquiry, but interestingly, the Court also did not comment on the propriety of a possible declaration by the executive on the application or non-application of the Act of State Doctrine.[156]

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149. LOUIS L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 124 (1933).

150. See *infra* note 171 and accompanying text discussing the problem of allowing low level government officials to make decisions that could effect the outcome of litigation.

151. Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (refusing to allow an American citizen to sue a Venezuelan military commander in a U.S. court).

152. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

153. *Id.* at 427-28.

154. *Id.* at 420 n.19.

155. *Id.* at 436. The defendant raised the issue when it claimed that Cuba originally expropriated the commodity (sugar) illegally, and that a U.S. court should not give credit to this act. The Cuban government said this fell under the Act of State Doctrine. *Id.* at 413.

156. In fact, the Court pointed to this as proof that the United States did not intend to close its courts to Cuba. *See id.* at 411.

The *Sabbatino* Court noted that an exception to the Act of State Doctrine had been proposed a few years earlier in a federal appeals court.[157] In a series of cases involving a Jewish plaintiff whose property was confiscated by Germany's Nazi Government, the Second Circuit held that the acts of the German government would be immune from action in U.S. courts, unless the Department of State ordered otherwise.[158] The State Department eventually issued such an order in the form of a press release, and an exception to Act of State Doctrine, known as the "Bernstein exception," was born.[159] The *Sabbatino* Court did not address the constitutional validity of the Bernstein exception,[160] but the Supreme Court eventually addressed the issue in 1972.

In *First National City Bank v. Banco Nacional de Cuba*,[161] the Department of State advised the Court "that . . . where the Executive publicly advises the Court that the Act of State Doctrine need not be applied, the Court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other question before it."[162] Justice Rehnquist, writing a plurality opinion for the Court,[163] stated that the Court should heed the direction of the executive in this matter.[164] The plurality adopted the Bernstein exception, noting that doing so was compatible with its desire to act consistently with the executive's judgments about U.S. national inter-

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157. *Id.* at 419.

158. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947) and Bernstein v. N.V. Nederlandsche-Amerikaanschestoomyaart-maatschappij (Chemical Bank & Trust Co., Third Party Defendant), 173 F.2d 71 (2d Cir. 1949).

159. Bernstein v. N.V. Nederlandsche-Amerikaanschestoomyaart-maatschappij (Chemical Bank & Trust Co., Third Party Defendant), 210 F.2d 375, 376 (2d Cir. 1954). The letter stated in pertinent part:

> The policy of the Executive, with respect to the claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

160. *Sabbatino*, 376 U.S. at 436.

161. 406 U.S. 759 (1972).

162. *Id.* at 764.

163. Chief Justice Burger and Justice White joined Justice Rehnquist. *Id.* at 760. Justice Douglas filed an opinion concurring in the result. *Id.* at 770. Justice Powell also filed an opinion concurring in the judgement. *Id.* at 773. Justice Brennan filed a dissenting opinion and was joined by Justices Stewart, Marshall, and Blackmun. *Id.* at 776.

164. *Id.* at 768. "[T]he Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy." *Id.* at 767.

ests.[165] Few cases purport to follow the holding of this severely divided Court, but it is still good law.[166]

It is difficult to assess the real jurisprudential value of the Bernstein exception. All of the relevant cases[167] involved expropriations that were counter to international law. It might therefore be reasonable to contend that they demonstrate a "judicial reluctance to apply the act of state doctrine"[168] in such cases. There are, however, other circumstances peculiar to the cases that should be emphasized. The original *Bernstein* case involved Nazi Germany, a government that no longer exists. All of the others involved Cuba, a country whose demonization by American political leaders has few limits.

Nevertheless, the Act of State Doctrine has clear parallels to the Carter administration announcement that the United States would no longer declare the recognition (or non-recognition) of new governments.[169] Both doctrines focus on the U.S. desire not to make pronouncements about the correctness or legality of acts that have taken place in foreign countries.[170] Yet, as demonstrated by the Bernstein exception and the Statements of Interest, the judiciary has allowed, and in some cases requested, the executive to provide answers that impinge on its jurisdiction when difficult questions arise.

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165. *Id.* at 768.

166. The Supreme Court has never overruled or clarified the holding.

Interestingly, courts applying the Bernstein exception have actually done so without the actual submission of a letter from the Department of State. The original *Bernstein* case itself turned on a State Department press release. *See supra* note 158 and accompanying text. In Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 883 (2d Cir. 1981), the U.S. Court of Appeals for the Second Circuit relied in part on communications written for the *First National* case. In Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 594 F. Supp. 1553 (S.D.N.Y. 1984), the court held that it may, "as a matter of discretion, accept the views of the State Department as communicated in any public utterance, whether it be in this case, other litigation, or as a public pronouncement" as justification for not applying the Act of State Doctrine. *Id.* at 1563-64.

167. *See* cases *supra* note 166.

168. Monroe Leigh, *Decision: Act of state doctrine—counterclaims—"Bernstein letter,"* 79 AM. J. INT'L L. 458, 460 (1985).

169. *See supra* note 79 and accompanying text.

170. *Compare*, Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("courts of one country will not sit in judgment on the acts of the government of another, done within its own territory") *with* the Estrada Doctrine, *supra* text accompanying note 67, which provided the intellectual underpinning for the Carter Doctrine (stating that traditional recognition practice "implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments").

### D. Judicial Deference as a Troubling Phenomenon

The Bernstein exception to the Act of State Doctrine and the dispositive influence of Statements of Interest in recent recognition cases demonstrate a broad and deep judicial desire to take instruction from the executive on foreign affairs. This is rather troubling and, as one scholar suggests:

> Since no other branch has the authority to exercise the judicial power, practices that permit the Executive to exercise unilateral decision-making authority in particular court cases may be inconsistent with the constitutional plan. On its face, the Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. Furthermore, matters with foreign relations implications may involve the legal rights and duties of individuals under federal law clearly within the courts' authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts.[171]

In sustaining the power of the executive to offer a Statement of Interest in a foreign affairs case that also implicated one litigant's First Amendment rights, the Second Circuit suggested that the Department of State consider adopting a type of informal hearing procedure in order to hear all sides before intervening in a case.[172] The court recommended that the government consider seriously whether the rights of the United States are in such jeopardy as to merit executive branch action in private litigation.[173] This approach apparently did not occur to either the court or the government in *Liberia*, *Ronair*, or *National Petrochemical*.

One former State Department official noted that the Office of Legal Advisor is fully aware of the implications of involving itself in private actions.[174] Professor Bilder, who was in the Legal Advisor's office, wrote:

> The considerations that bear on the Office's decisions in these respects probably include the following: on the one hand,

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171. Jonathan I. Charney, *Judicial Deference in Foreign Relations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98, 100 (Louis Henkin et al. eds., 1990).

172. International Prods. Corp. v. Koons, 325 F.2d 403, 409 n.6 (2d Cir. 1963).

173. *Id.*

174. Richard B. Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 678 (1962).

> since decisions of the courts or administrative agencies involving foreign affairs or international law vitally affect the Department's responsibilities in the field of foreign relations, the Office has a clear duty to see that any such decisions are made by the courts only after full exposure to, and careful study of, all the various factual, policy and legal considerations involved. . . . On the other hand, the Office is reluctant to take any action which might be construed as an attempt to interfere with or intrude upon the independence of such courts and agencies and is sensitive to the possible charges that it is taking sides in a private dispute or exerting its official weight unfairly. In addition, intervention, even at the request of the court, carries the risk of at least seeming to commit the Department to a particular position internationally, and may create considerable embarrassment for the Department if the court does not accept its view.[175]

Current practice with regard to recognition decisions demonstrates that Professor Bilder's concerns are real but ignored by the judiciary and executive. In the three recent cases, *Liberia*, *Ronair*, and *National Petrochemical*, each court had the capacity to arrive at the same decision without forcing the Department of State to intervene. Yet in each case, the Department made a Statement of Interest that can be construed by the parties as tantamount to formal recognition, effectively rendering null and void the non-recognition policy for those particular governments and countries. Ultimately, and most importantly, each case gave the executive yet another significant inroad into the province of the judiciary without any critical assessment by the courts of the executive's role. The courts have invoked the doctrine of separation of powers with one breath, while helping to violate it with the next.[176]

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175. *Id.*

176. Justice Powell expressed this concern in his concurring opinion in First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring). In rejecting the "Bernstein exception" to the Act of State Doctrine, discussed at *supra* part IV.C., Justice Powell wrote: "I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine." *First National* is discussed in detail at *supra* notes 161-166 and accompanying text.

In his dissenting opinion in *First National*, Justice Brennan reviewed a case in which the Court ignored a statement by the Department of State that might otherwise have been decisive.

> In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court struck down an Ore-

The United Kingdom has taken an approach to recognition that is very similar to that of the United States with one major exception—the government will not state whether or not a state has standing to sue in U.K. courts. It leaves that decision to the courts.

## V. Recognition Practice in the United Kingdom

Perhaps not surprisingly, the law and practice of recognition in the United Kingdom has developed along doctrinal lines similar to that in the United States.[177] Prior to 1980, the law of the United Kingdom clearly described the legal status of an unrecognized government:

> A foreign government which has not been recognized by the United Kingdom government as either de jure or de facto government has no locus standi in the English courts. Thus it cannot institute an action in the courts. . . . The English courts will not give effect to the acts of an unrecognized government . . . ."[178]

Case law also has amplified the intent of this statement in a fashion now familiar to readers of this Note. The judiciary felt an obligation not to compromise the executive's conduct, stating that the judiciary and executive must speak with "one voice".[179] The opinion of the Government of the United Kingdom regarding the status or existence of a state or government was conclusive.[180]

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gon escheat statute as an unconstitutional invasion of the National Government's power over external affairs, despite advice from the Executive that the law did not unduly interfere with the conduct of our foreign policy. Paraphrasing from what my Brother Stewart said there, *id.*, at 443 (concurring opinion), we must conclude here:

> "Resolution of so fundamental [an] issue [as the basic division of functions between the Executive and the Judicial Branches] cannot vary from day to day with the shifting winds at the State Department. Today, we are told, [judicial review of a foreign act of state] does not conflict with the national interest. Tomorrow it may."

*Id.* at 792 (Brennan, J., dissenting).

177. *See* Jaffe, *supra* note 149, at 124.

178. 18 Halsbury's Laws of England, ¶ 1431 (4th ed. 1977). The editors of the Halsbury's are also aware of the similarities in the practices of the United Kingdom and the United States. In the notes immediately following the statement of the law, they cite many U.S. cases.

179. The Arantzazu Mendi, S.S. v. Government of the Republic of Spain, [1931] App. Cas. 256, 264 (per Lord Atkin).

180. Carl Zeiss Stiftung v. Rayner & Keeler Ltd., [1967] 1 App. Cas. 853, 901.

Like the United States, the United Kingdom has adopted a new policy regarding the recognition of foreign governments. In two Parliamentary answers in April and May of 1980, the United Kingdom announced a policy strikingly similar to that of the United States.

> [W]e have decided that we shall no longer accord recognition to governments.
>
> . . .
>
> Where an unconstitutional change of regime takes place in a recognized state, governments of other states must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the government of the state concerned.
>
> . . .
>
> [W]e shall continue to decide in the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.
>
> In future cases . . . our attitude will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal government to government basis.[181]

Like the United States, the United Kingdom found that "recognized" new regimes often perceived recognition as a sign of approval.[182] One commentator has noted that the effect of the change would be similar to that proposed in this Note. Courts which are faced with the question of recognizing acts of an entity alleged to be sovereign will make decisions based on evidence and interpretation.[183] The commentator added that it will be "less a matter of executive direction."[184] This is the essential difference between British and American practice.

### *A. The* Ciskei *Case*

An early case which noted this new policy was *Gur Corp. v. Trust*

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181. H.L. Debates, vol. 48, cols. 1121-1122, 28 Apr. 1980; H.C. Debates, vol. 983, Written Answers, cols. 277-279, 25 Apr. 1980 and H.C. Debates, vol. 985, Written Answers, col. 385, 23 May 1980 (as quoted in Somalia v. Woodhouse Drake & Carey, S.A., 3 W.L.R. 744, 751-52 (Q.B.D. 1992)).

182. *Somalia*, 3 W.L.R. at 752.

183. Dixon, *supra* note 81, at 558.

184. *Id.* at 557.

*Bank of Africa, Ltd.*[185] In *Gur*, the plaintiffs had contracted to construct a hospital and two schools in the Republic of Ciskei, a homeland set up as an independent state by the Republic of South Africa.[186] After the deal went afoul, Gur brought suit against several parties including the Republic of Ciskei.[187]

The new policy was not dispositive in this case because the question really regarded recognition of a new state, not a new government; however, the case is instructive because of the attitude of the Foreign and Commonwealth Office (Foreign Office). The Judge himself raised the issue of Ciskei's standing to sue or be sued in an English court.[188] He and one of the parties submitted questions to the Foreign Office regarding the status of Ciskei.[189] The answers reflected that Her Majesty's Government did not recognize Ciskei as an independent state,[190] and that it had no dealings with its government.[191]

They also asked the Foreign Office if it would "be contrary to the policy or attitudes of Her Majesty's Government for the English courts to recognise" the Government of Ciskei for the purposes of being sued or suing in the respect of its commercial obligations.[192] The Foreign Office answered that the court would have to determine the answer to that question itself with regard to British policy regarding recognition and with regard to the government's statement about its own relations with Republic of Ciskei.[193] They wrote that "it would not be appropriate for the Foreign and Commonwealth Office to answer [this] question."[194] In other words, the Government was giving meaning to the statement that "our attitude will be left to be inferred from the nature of the dealings" with a particular government.[195] The courts would have to decide the jurisdictional issue for themselves based on objective

185. 3 W.L.R. 583, 587 (Q.B.D. 1986).
186. *Id.* at 585.
187. *Id.*
188. *Id.* at 595.
189. *Id.* at 587.
190. *Id.* at 588.
191. *Id.*
192. *Id.* at 597.
193. *Id.*
194. *Id.* In the end, the Court of Appeal decided that Ciskei did have standing as an instrumentality of another recognized state with which the British government had relations, South Africa. *Id.* at 602.

One scholar criticized this decision stating that the court violated the U.K.'s Act of State Doctrine. Had the court adhered to that doctrine, it would have been precluded from effectively declaring null and void the South African Act creating Ciskei as a separate entity. *See* Dixon, *supra* note 81.

195. *See supra* note 181 and accompanying text.

evidence because the Foreign Office would not determine the jurisdiction of the courts of the United Kingdom.

### *B. The* Somalia *Case*

*Somalia v. Woodhouse Drake & Carey, S.A.*[196] is the first case which really deals with the effect of the 1980 policy change. Its facts are also surprisingly similar to those of the *Liberia* case.

In January 1991, as an uprising was taking place in her country, the Somali ambassador to the United Nations, an appointee of the government of Mohammed Siad Barre,[197] purchased a shipment of rice to be sent to Somalia.[198] Upon arrival at Mogadishu, the Somali capital, the ship's captain refused to enter port because of the fighting that raged in the capital.[199] A judge ordered the cargo sold and the proceeds placed with the court.[200]

Meanwhile, the government of Siad Barre was overthrown by an alphabet soup coalition of clan-based insurgent forces.[201] Various parts of the country were in the hands of these guerrilla movements and control over Mogadishu was being contested by two rival factions of the United Somali Congress; one led by General Mohammed Farah Aidid and another led by Ali Mahdi Mohammed.[202] At a conference in Djibouti bringing together neighboring states, international organizations, other interested parties[203] and most, but not all of the Somali factions (General Aidid did not attend), Mr. Mahdi was named provisional President of the Somali Republic.[204] An Interim Government also was named and given a mandate to restore peace and democracy in Somalia.[205] A Mr. Qalib was named Prime Minister, but perhaps reflecting the uncertainty of the times, he based himself in a hotel in Riyadh, Saudi Arabia.[206]

In the name of the Interim Government, Mr. Qalib retained coun-

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196. 3 W.L.R. 744, 755 (Q.B.D. 1992).
197. *Id.* at 746.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. The United Kingdom did not have a representative, though it might be said to have been represented by the European Economic Community representative in attendance. *See id.* at 747.
204. *Id.*
205. *Id.* at 747-48.
206. *Id.* at 748.

sel in the United Kingdom to intervene in the case in order to secure the proceeds of the sale of the rice.[207] The former ambassador to the United Nations also tried to intervene in the name of her now defunct government.[208] The ambassador's request was not granted as her government no longer existed.[209] It was clear, however, that the money belonged to the Republic of Somalia;[210] the only question was whether the Interim Government could properly be held to be the government of that country and have the capacity to hire lawyers to represent the Republic in a court in the United Kingdom.[211]

As in the *Gur*[212] case, several inquiries were made of the Foreign Office regarding the nature of British relations with Somalia and the Interim Government.[213] In the first answer, the government explained that Somalia was a country riven by civil war and that two significant factions, including one that controlled the capital, did not recognize the Interim Government.[214] In subsequent letters, the government continued to state that there was no government in the country, even referring to the Interim Government as a mere faction.[215] The government also reaffirmed the stated policy of not recognizing governments.[216]

Counsel for the Interim Government argued that the Interim Government should be recognized because it was set up by the Djibouti agreement.[217] The court answered that since the Djibouti agreement

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207. *Id.*

208. *Id.* at 749.

209. *Id.* at 749-50 ("[I]t is clear that she has no diplomatic status in the United Kingdom and has no recognition from Her Majesty's Government as a representative of the Republic of Somalia in this country."). This is one difference between this case and the *Liberia* case. This Note has commented earlier that the Liberian ambassador who represented the Doe government, also represented the Sawyer government. *See supra* notes 17, 18 and accompanying text. In the *Somalia* case, the issue of the ambassador did not bear the same significance that this Note argues that it should have borne in the *Liberia* decision. *See supra* notes 132-140 and accompanying text.

210. *Somalia*, 3 W.L.R. at 750.

211. *Id.* at 751.

212. Gur Corp. v. Trust Bank of Africa Ltd., 3 W.L.R. 583 (Q.B.D. 1986). *See supra* part V.A.

213. *Id.* at 753-55.

214. *Id.* at 753.

215. *Id.* at 754. In one letter that was written after the Djibouti conference, the Foreign Office wrote: "[I]t is very difficult to judge, for the purposes of your case, who is the Government of Somalia." *Id.* at 753. The British Government apparently did not feel that the conference changed anything. *See id.* at 753-54.

216. *Id.* at 753 ("The question of whether to recognize the purported 'interim government' in Mogadishu thus does not arise for us.").

217. *Id.* at 756.

did not represent a constitutional transfer of power, the only way the Interim Government could be seen as a legitimate government was by demonstrating that it was "exercising administrative control" over the country.[218]

The court also rejected the argument that the Interim Government was legitimate by virtue of the fact that it was recognized by other countries and by the United Nations.[219] The court, noting that it is "difficult to separate recognition of a state from the recognition of the government of that state," stated that the Interim Government was unable to fulfill one of the Montevideo Convention's[220] requirements for the definition of a state, "capacity to enter into relations with other states."[221] The court conceded that international recognition is a relevant factor,[222] but it emphasized as more important its lack of constitutional creation and lack of administrative control.[223] Furthermore, international recognition of the Interim Government seemed tenuous at best.[224]

Eventually, the court decided upon a series of criteria by which to determine if an entity purporting to be a government should be granted *locus standi* in an English court.

> [T]he factors to be taken into account in deciding whether a government exists as the government of a state are: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.[225]

Based on these criteria, the court held that the Interim Government did not qualify as a government of Somalia and that it had no authority to

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218. *Id.* ("[A] loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.")

219. *Id.*

220. *Supra* note 69, 49 Stat. at 3097.

221. *Somalia*, 3 W.L.R. at 756. *See also* Montevideo Convention, *supra* note 69, art. 1., 49 Stat. at 3100.

222. *Somalia*, 3 W.L.R. at 756.

223. *Id.*

224. *Id.* at 757.

225. *Id.*

hire an English law firm to act on behalf of the Republic of Somalia in an English court of law.[226]

This formulation is infinitely more satisfying and conceptually acceptable than that of the American courts. In the first place, and most importantly, the court gives due regard to the opinions of the British Government without depending on a decision by the government regarding a jurisdictional matter. If the Foreign Office had stated that it was maintaining relations with Mr. Qalib, or that he was firmly in control of the country, the court would likely have granted standing to the Interim Government.[227] The *Liberia* court did not appear to be interested in anything but the State Department's opinion on standing.[228]

By the same token, the court made it clear that it would not accept the statements of the Foreign Office as dispositive.

> Once the question for the court becomes one of making its own assessment of the evidence, making findings of fact on all the relevant evidence placed before it and drawing the appropriate legal conclusion, and is no longer a question of simply reflecting government policy, letters from the Foreign and Commonwealth Office become merely part of the evidence in the case.[229]

The court also gave due regard to the objective facts of the Somali situation. The country was torn apart and not under the control of any government. As we have seen, control by a government is an essential element of statehood.[230]

Using these criteria, the *Liberia* case might not have turned out

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226. *Id.*

227. Where Her Majesty's Government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of government may be paramount. . . . But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist.

*Id.* at 755 (citations omitted).

228. Liberia v. Bickford, 787 F. Supp. 397, 400 (S.D.N.Y. 1992). The court may well have asked about the nature of U.S. relations with Liberia, choosing not to discuss this in its opinion. Even if this is so, it further demonstrates the court's undue concentration on the wrong issue—whether the State Department thought the Interim Government should be granted standing.

229. *Somalia*, 3 W.L.R. at 754.

230. *See* Montevideo Convention, *supra* note 69, 49 Stat. at 3097 and accompanying text.

any differently. The United States would still have been able to express its support for the Interim Government, which the court might still have felt duty-bound to accept. On the other hand, the court would have been forced to note the uncertain political situation in Liberia and the government's continued lack of administrative control. The court would have been forced to give a more considered holding. Under any circumstance, it could have avoided inviting executive fiat in a judicial matter.

## VI. CONCLUSION

The new non-recognition doctrine has given the courts an opportunity to formulate a decisional process that can be sensitive to the foreign policy requirements of the United States while ensuring some predictability in its procedures. True, the situation is not dire; it has been a long time since a U.S. court *denied* standing to any national party in a reported case. Still, the judiciary's reaction to the new situation is slightly distressing. Rather than applying a measure of intellectual rigor in the interests of continued respect for the courts' jurisdiction, the courts have turned to the State Department for orders. They have justified this dependence by citing a longstanding judicial deference to the executive in foreign policy matters, with little thought to when this deference is appropriate and when it is not appropriate.

*Michael E. Field*