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Statutory Reform in Claims against Foreign States: The Belman-Lowenfeld Proposal

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Notes

STATUTORY REFORM IN CLAIMS AGAINST FOREIGN STATES: THE BELMAN-LOWENFELD PROPOSAL

I. INTRODUCTION

The executive branch of the United States Government has indicated recently that it is re-examining its dominant judicatory role in the field of sovereign immunity of foreign states. Studies undertaken in 1966 by the State Department resulted in the preparation of draft legislation on sovereign immunity that the Department has been studying for possible presentation to Congress. The proposed Belman-Lowenfeld legislation would completely remove the State Department from any role in deciding sovereign immunity cases.[1] The proposal itself would subject foreign states to the jurisdiction of United States federal courts for activities carried on or having a direct effect in the United States in the same manner that private persons or corporations are currently answerable for such activities. The legislation would make foreign states amenable to process in two types of cases: first, those based on express or implied contracts entered into, to be performed, or arising out of transactions in the United States; and, secondly, those based upon personal injury, death, or damage to property caused by an act or omission of any officer, agent, or employee of the foreign state while acting within the scope of his office, agency, or employment within the United States. Additionally, the proposed statute would facilitate obtaining jurisdiction over foreign states in actions falling within the parameters of the two categories outlined above since it separates jurisdiction from personal service and attachment of property. Consequently, the

1. Belman, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. AM. SOC. INT'L L. 182, 185-86; Leigh, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. AM. SOC. INT'L L. 187; Lowenfeld, *Claims Against Foreign States--A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901 (1969). Monroe Leigh is a practicing member of the District of Columbia Bar. Belman and Lowenfeld have both served as Deputy Legal Advisers for the State Department since 1964. Lowenfeld was designated to oversee the preparation of the original study for the Department which led to the preparation of the draft legislation. For a version of the legislation which is currently in the possession of the Legal Adviser see Lowenfeld, *supra*, at 936-38.

statute, in effect, eliminates completely the executive branch from the current system of adjudicating claims against foreign states.[2]

When the proposed statute was announced at the annual meeting of the American Society of International Law in 1969, there was a difference of opinion on whether the legislation presented constitutional problems in its delegation of power from the executive to the judicial branch.[3] Neither the text of the Constitution nor the current case law provides a clear solution to this problem. This note will examine the development and the current problems of sovereign immunity law in the United States. Next, a view of the role of the legislative branch, as well as the proposed statute, will be shown. Thereafter, a consideration of possible solutions will be undertaken in an effort to determine what resolution is most consistent with the underlying foreign affairs policies of the United States executive and judiciary.

The proposed statute makes no provision for an executive suggestion of immunity, although presently the courts consider such a suggestion conclusive. Consequently, this note will examine whether such a provision, either written into the statute or as an implied exception to it, is required by the constitutional power of the executive over foreign affairs. The answer to this question will depend on whether the executive must have the ability to make such a suggestion in order to exercise his constitutional executive power, particularly over foreign affairs. An analysis of the case law on sovereign immunity will be presented in order to determine whether the power to grant immunity to a foreign sovereign presently is recognized as a constitutional executive power. Finally, an analysis of the executive's role in foreign affairs will be attempted in order to determine whether the power to grant immunity is one that the executive must possess in order to fulfill his constitutional role in foreign affairs.

II. DEVELOPMENT

The dominant factor in the development of the law of sovereign immunity has been a conscious effort on the part of the judicial

2. All other types of claims, and particularly those relating to political acts of foreign states or to activities occurring outside the jurisdiction of the United States, would be barred. Lowenfeld, *supra* note 1, at 903, 936-38.

3. "Dr. Miriam L. Rooney asked the panel whether it could foresee any constitutional problems in the statutes' delegation of power from the Executive to the Judicial Branch. Professor Cardozo replied in the affirmative, while Mr. Belman replied, 'no.' " Lillich, *Comments,* 1969 PROC. AM. SOC. INT'L L. 194, 201.

branch to protect the executive from being embarrassed before other sovereigns in the conduct of foreign relations.[4] In the process, several different rules have developed governing the grant of sovereign immunity and the scope of judicial proceedings once a suggestion of immunity has been made by the executive.

Until 1952, the United States adhered to the so-called "absolute" theory of sovereign immunity. That is, any foreign sovereign was immune from private suit in the courts of the United States. The traditional rule was enunciated by Chief Justice Marshall in *The Schooner Exchange v. McFaddon.*[5] In that case, a libel against a warship in the possession and control of the Emperor of France was dismissed, the Court reasoning that national ships of war that entered the ports of a friendly power were exempted from the exercise of jurisdiction because of an implied license to pass through a sovereign's territory.[6] The Court pointed out, however, that a sovereign was capable at any time of destroying this exemption and subjecting the vessels of a foreign sovereign to the jurisdiction of its courts.[7] More than one hundred years passed before immunity was granted to a non-military vessel of a foreign state. In *Berizzi Brothers Co. v. S.S. Pesaro,*[8] the Supreme Court was faced with the issue whether a ship owned and possessed by the Italian Government, and operated by it in the carriage of merchandise for hire, was immune from arrest under the process bond on a libel in rem by a private suitor. The Court upheld dismissal of the action on the basis that the vessel was owned by the Government of Italy:

> We think the principles [announced in *The Schooner Exchange*] are applicable alike to all ships held and used by a government for a public

4. Courts of all nations recognize the immunity of foreign sovereigns. This limitation on their jurisdiction originated in an era of personal sovereignty when the domestic ruler was above the law. Failure to grant similar treatment to a foreign prince indicated either hostility or superiority. In order to avoid any friction which might result from offending the dignity of another sovereign, the local state exempted him from its jurisdiction. The claims of individuals were sacrificed in the national interest. Note, *The Jurisdictional Immunity of Foreign Sovereigns,* 63 YALE L.J. 1148 (1954).

5. 11 U.S. (7 Cranch) 116 (1812).

6. 11 U.S. (7 Cranch) at 140-41. The Court, however, premised its reasoning on the fact that "[t]he perfect equality and absolute independence of sovereigns have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation." *Id.* at 136.

7. 11 U.S. (7 Cranch) at 144.

8. 271 U.S. 562 (1926).

> purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are.[9]

Notwithstanding its noteworthy holding, the importance of the *Pesaro* case for purposes of this note lies in the reasoning employed to arrive at the holding. The Court did not rest the outcome on foreign policy grounds, but rather indicated that it was the public nature of the act—*jure imperii*— that was determinative.[10] Moreover, in the case itself, the State Department argued that immunity should not be granted to a commercial vessel in a claim arising out of a commercial transaction, but the Department of Justice disagreed and declined to suggest immunity to the Court.[11]

In *Ex parte Republic of Peru*, [12] the question of the immunity of government-owned merchant vessels was presented again to the Supreme Court. In this case, the Republic of Peru was the sole owner of the merchant vessel, and the Court affirmed its earlier holdings that vessels owned by foreign governments were immune from suit in the courts of the United States. The Court, however, did not rely solely on past precedent or international law to support its decision, but instead based its holding on a suggestion transmitted to the district court by the State Department, which, in effect, asked the court to grant immunity.[13] In holding that the suggestion by the State Department was conclusive, Mr. Chief Justice Stone opined in a now famous statement:

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9. 271 U.S. at 574.

10. For a discussion of the *jure imperii* and *jure gestionis* aspects of the *Pesaro* case, see Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 224 (1951).

11. The Pesaro, 277 F. 473, 479-80 n.3 (S.D.N.Y. 1921); 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 429-30, 438-39 (1941); Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 84-86 (1968); Lowenfeld, *supra* note 1, at 904.

12. 318 U.S. 578 (1943).

13. There was a formal recognition by the State Department of the Peruvian claim of immunity. Then, on May 5, 1942, the State Department wrote the Attorney General and requested him to tell the court that the State Department "accepts as true the statements of the Ambassador concerning the steamship, *Ucayali*, and recognizes and allows the claim of immunity." On June 29, 1942, the letter was submitted to the court and the Attorney General prayed that the claim of immunity recognized by the State Department be given full force and effect, and that the vessel be declared immune from the jurisdiction and process of the court. The Ucayali, 47 F. Supp. 203, 205(E.D. La. 1942).

> The principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' *United States v. Lee*, 106 U.S. 196 (1882).[14]

In *Republic of Mexico v. Hoffman*,[15] on the other hand, the suggestion that was filed by the State Department in the district court merely accepted as true Mexico's contention that the vessel was its property. The suggestion otherwise refrained from recognizing Mexico's claim of immunity since possession by Mexico was lacking.[16] The Supreme Court, again speaking through Chief Justice Stone, affirmed the lower courts' opinions that had determined that the Mexican vessel was not immune from jurisdiction and consequently was subject to suit.[17] The Court reasoned that it was not for the courts to deny immunity that the Government had decided to allow, or to allow immunity on new grounds that the Government had not deemed

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14. 318 U.S. at 588. The importance of the quotation from the *Lee* case will be discussed in the section dealing with the constitutional underpinnings of the proposed congressional enactment, pp. 407-13 *infra*.

15. 324 U.S. 30 (1945).

16. Republic of Mexico v. Hoffman, 143 F.2d 854 (9th Cir. 1944).

17. In United States v. Guaranty Trust Co., 304 U.S. 126, 134 (1938), Chief Justice Stone gave clear indications of his conception of the doctrine of sovereign immunity as being essentially a "principle of comity." The issue in that case involved the amenability of a foreign sovereign, suing as plaintiff, to the bar imposed by local statutes of limitations. While upholding the immunity of domestic sovereigns to local statutes of limitations because of public policy as "complete," Chief Justice Stone held that the extension of a similar immunity to sovereigns suing as plaintiffs was not justified because very different considerations apply where the sovereign avails itself of the privilege, likewise extended by comity, of suing in the courts of the United States. The significance of Chief Justice Stone's reasoning is apparent when viewed in the context of the opinion of the court of appeals, which he reversed, and which had held that the principle of sovereign immunity was "axiomatic" in American law and "so sweeping in character" as to extend to all classes of action, in rem or in personam, under "principles and practices of international law." The court of appeals further reasoned that, otherwise, the "perfect equality" upon which the admission of states to membership in the international community was based would be destroyed. United States v. Guaranty Trust Co., 91 F. 2d 898, 900-03 (2d Cir. 1937). For an excellent criticism of Chief Justice Stone's rationale, see Jessup, *The Litvinov Assignment and the Guaranty Trust Company Case*, 32 AM. J. INT'L.L. 542, 543 (1938).

proper. It added that recognition by the courts of an immunity upon principles that the political branch of the Government had not sanctioned might be embarrassing to the executive.[18]

By 1952 it was clear, therefore, that the doctrine of absolute immunity as enunciated in *The Schooner Exchange* had been eroded in favor of granting to the State Department a substantial amount of leeway, both in determining the doctrine of immunity to be applied in domestic courts and in deciding particular cases.[19] In that year in a statement entitled, "Change of Policy on Sovereign Immunity of Foreign Governments," or the so-called "Tate letter," announced that "hereafter" the State Department would follow the restrictive theory of immunity in considering requests of foreign governments for immunity from suit.[20] The Department stated, "[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[21] Although the Department disclaimed any power to control the courts, the letter expressed the hope that the courts would follow the policy enunciated therein.[22] Though this piece of executive legislation left several areas unclear,[23] it seemed apparent that accurate application of the new policy would depend less on political judgment regarding the effect of litigation on foreign relations than on a close examination of the particular facts bearing on the classification of the activity on which the claim was based.

As a result of the pronouncements in the Tate letter, writers speculated that because of the *Hoffman* rationale, the letter would be

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18. 324 U.S. at 35-36.

19. Lowenfeld, *supra* note 1, at 905.

20. Letter from Acting Legal Adviser, Jack B. Tate, to Department of Justice, May 19, 1952, in 26 DEP'T STATE BULL. 984 (1952).

21. *Id.*

22. The first acceptance by the Supreme Court of the guidelines established in the Tate letter is found in National City Bank v. Republic of China, 348 U.S. 356 (1955). In that case, a permissive counterclaim by a foreign sovereign plaintiff was allowed when the State Department failed to enter a suggestion of immunity.

23. There seemed to be three areas which were left unresolved by pronouncements in the Tate letter: (1) the Tate letter made no attempt to define the distinction between the activity of a state *jure imperii* and the activity of a state *jure gestionis*; (2) because of the views taken in the *Ex parte Peru* and *Hoffman* cases, it was unclear who should make the determination called for in the *jure gestionis–jure imperii* distinction; and (3) even where the activity on which the claim was based was clearly one not entitled to immunity under the restrictive theory, it was not clear how a suit against a foreign sovereign was to be initiated. For a more detailed analysis of these problem areas, see Lowenfeld, *supra* note 1, at 907-08.

treated as authoritative by the judiciary.[24] These speculations were confirmed by the Second Circuit's decision in *Victory Transport Inc. v. Comisario General.*[25] In that case, the court reasoned that since the Department had made clear through the Tate letter that its policy was limited to the restrictive theory of immunity, the court must apply the public-private dichotomy to the facts in issue. With the State Department's failure to provide a test by which to delineate private and public acts, the court proceeded to fashion its own standard for implementing the distinction.[26] The court held that if a claim of immunity was not allowed by the Department, then immunity should be denied unless it was plain that the activity in question fell within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive.[27] The court noted the following categories:

(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity; and,
(5) public loans.[28]

As a result, since the activity of defendant in *Victory Transport*, a branch of the Spanish Ministry of Commerce, was not a strictly public or political act, but was rather in the nature of a private commercial act, the court held that immunity should be denied.[29]

The pre-eminence of the executive as authoritative law-maker in sovereign immunity cases, however, is demonstrated by the fact that while courts consider themselves bound by expressions of executive

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24. *E.g.,* Cheatham & Maier, *supra* note 11, at 86.

25. 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).

26. This decision has been referred to as "the most recent authoritative statement of the sovereign immunity doctrine in the United States, and it certainly represents the furtherest step thus far away from the doctrine of absolute immunity." Lowenfeld, *The Sabbatino Amendment–International Law Meets Civil Procedure,* 59 AM. J. INT'L L. 899, 907 (1965).

27. 336 F.2d at 360.

28. 336 F.2d at 360. Note that the court found support for its indicia of *jure imperii* in Lalive, *L'Immunité de Jurisdiction des Etats et des Organisations Internationales,* 3 RECUEIL DES COURS 205, 285-86 (1953).

29. This holding followed closely the case of New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955), in which the State Department declined to suggest immunity because the act in question was not purely governmental in character.

policy, the State Department retains its freedom to determine immunity on a case by case basis.[30] In at least four cases,[31] the judiciary has taken note of either overriding political considerations or a suggestion of immunity by the State Department and has allowed a claim of immunity which, under the principles of the Tate letter later clarified in *Victory Transport*, would otherwise have been refused.

Illustrative of these cases is *Isbrandtsen Tankers, Inc. v. President of India.*[32] In that case plaintiff, Isbrandtsen Tankers, sued the President of India in a federal district court for losses from unreasonable delays in unloading grain vessels. In the charter party India had agreed to settle all disputes in the New York district court. After India filed an answer to the complaint, the State Department sent a formal suggestion of immunity to the district court. Plaintiff averred that the court retained jurisdiction over the controversy despite the Department's suggestion, reasoning that defendant had waived its immunity both by the charter party and by a general appearance in court. The district court found that the formal written suggestion of immunity precluded any further inquiry by the court and dismissed the case. On appeal, the United States Court of Appeals for the Second Circuit affirmed on the ground that courts are bound by a State Department suggestion of immunity, notwithstanding the commercial nature of the transaction, a contractual waiver of immunity and the foreign sovereign's general appearance in court. Although from the foregoing it is clear that an executive suggestion will be authoritative to the judiciary because of the *Hoffman* decision, there has been growing concern over the State Department's role, as well as conflict over the application of the so-called Tate letter doctrine.

III. THE BELMAN-LOWENFELD PROPOSAL

A. *The Role of the Legislative Branch*

Certain members of the State Department who were dissatisfied with the *Hoffman* rule and the Tate letter doctrine concluded that the

30. Cheatham & Maier, *supra* note 11, at 86.

31. Isbrandtsen Tankers Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971), *noted in* 5 VAND. J. TRANSNAT'L L. 264 (1971); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied,* 385 U.S. 822 (1966); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 683 (S.D.N.Y. 1955).

32. 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971).

Department was the wrong branch to perform the essentially judicial task necessary for the implementation of these doctrines. Belman's explanation for the Department's penchant toward a legislative solution stressed the fact that since the official adoption of the restrictive theory in the Tate letter, the foreign relations criterion had been almost completely eliminated from consideration by the courts. As a result, continued determination of sovereign immunity problems by the executive not only would be unnecessary but also would constitute legal judgments that could be decided more satisfactorily by using judicial procedures.[33]

The role of Congress in this field has rarely been the subject of extensive inquiries by the practicing bench and bar or textwriters. Until Belman announced the proposal at the meeting of the American Society of International Law in 1969, no concrete proposals for specific legislation had ever been prepared or submitted to Congress for consideration.[34] Whenever references were made by courts or scholars to the role that Congress could play in this area, they usually were enunciated in such general or speculative terms that they hardly afforded a basis for expecting any meaningful legislative reform to solve the problems of sovereign immunity. In general, the remarks made by attorneys and textwriters had been limited to relatively obvious declarations that in the event that Congress should enact legislation on the matter, the courts naturally would be governed thereby.[35]

Nothwithstanding the dominant role played by the executive and the judiciary, Congress should be responsible for its inconspicuous role in the area of sovereign immunity. Despite its far-reaching legislative prerogative, it has failed to show any interest in the problems of

33. Belman, *supra* note 1, at 184. *Accord,* Lowenfeld, *supra* note 1, at 918-19.

34. T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 319-21 (1970).

35. The statements made by the Supreme Court in the *Pesaro* case, pointing out that its decision to extend absolute immunity to the trading vessels of foreign states was premised upon the absence of any treaty or statute "evincing a different purpose," tends to illustrate the typical attitude toward possible congressional contributions in this field. 271 U.S. at 574. In the past, several authorities urged legislative enactment as the ideal solution. *See, e.g.*, Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution,* 27 MICH. L. REV. 751, 773-75 (1929); Note, *The Jurisdictional Immunity of Foreign Sovereigns,* 63 YALE L.J. 1148, 1171 (1954); Note, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments,* 58 YALE L.J. 176, 182 (1948).

immunity or even to initiate any studies to resolve these problems. The legislature has the power to define the jurisdiction of federal courts and can even subject foreign states to their jurisdiction. Regardless of the passive attitude displayed in the past by Congress toward sovereign immunity problems, should the draft Belman-Lowenfeld legislation be enacted it would have dramatic consequences for the American law of sovereign immunity.

B. *Problems and Criticisms*

The basic criticism of the current practice is that it classifies parties rather than transactions in determining whether the controversy may be litigated in a United States court. When parties, including foreign governments, have acted in a way that would subject them to suit—either by entering into a contract or by retaining agents whose performance may result in tort liability—they should be held responsible for the legal consequences of their actions, regardless of the fact that one is a foreign sovereign. To permit either party to escape this legal liability is basically unfair.[36] Furthermore, the existing practice in sovereign immunity cases fails to take into account the extent of state trading in the modern world. Some scholars argue that the State Department cannot enunciate a legal policy concerning state trading because it is involved heavily in the political and diplomatic factors of each case.[37] As a result, state trading enterprises of foreign governments often are awarded an immunity by the State Department that their private American competitors do not enjoy either in the United States or abroad.[38] This argument is based on the

36. It has been argued that subsection (b) of the proposed statute remedies this problem by stating the types of transactions in which a sovereign may incur legal liability. Lowenfeld, *supra* note 1, at 915. The effect of this provision on foreign relations is discussed at pp. *infra.*

37. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?,* 48 CORNELL L. REV. 461, 472 (1963); Cheatham & Maier, *supra* note 11, at 86; Timberg, *Sovereign Immunity, State Trading, Socialism, and Self-Deception,* 56 N.Y.U.L. REV. 109, 116-19 (1961); Comment, 60 MICH. L. REV. 1142, 1145 (1962).

38. "The evolution away from the absolute doctrine of immunity as expressed in the *Schooner Exchange* case . . . has been substantially broadened, as was necessitated by the changing conditions of the political and commercial world." Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 304, 204 N.Y.S.2d 971, 977 (Sup. Ct. 1960); Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade,* 7 INT. & COMP. L.Q. 452 (1958).

assumption that in the great majority of cases the State Department does not follow the restrictive theory of the Tate letter, but instead bases determinations of immunity on political factors.

A closely related criticism of the existing practice is that the decision of whether an activity is public or private is basically a legal one and the State Department is not the best institution to make such a decision or to apply such a distinction.[39] If the Department is in fact making a "legal" decision, as it does whenever it attempts to apply the restrictive theory,[40] such a decision could better be made by the courts. In addition, the distinction between public and private acts, which an application of the restrictive theory makes mandatory, has been criticized as unworkable.[41] The classic illustration of the problem is a suit on a contract to purchase shoes for a foreign army. Since this example is merely illustrative, an attempt to resolve the question is beyond the scope of this note.

There are a number of procedural problems that are presented by the present sovereign immunity practice, although some predate the Tate letter and its restrictive theory. Because an ambassador or other diplomatic person may not be served with process,[42] it is difficult to obtain jurisdiction over the foreign sovereign. Additionally, execution is not permitted on the property of a sovereign[43] and, therefore, it is

39. Belman, *supra* note 1; Lowenfeld, *supra* note 1; Timberg, *supra* note 37; Casenote, 8 HARV. INT'L L.J. 388 (1967).

40. Ocean Transp. Co. v. Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967); Petition of Petrol Shipping Corp., 37 F.R.D. 437 (S.D.N.Y. 1965), *aff'd,* 360 F.2d 103 (2d Cir.), *cert. denied,* 385 U.S. 931 (1966); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864(1966); Comment, *supra* note 37, at 1145.

41. Belman, *supra* note 1; Lowenfeld, *supra* note 1; Timberg, *supra* note 37; Comment, *supra* note 37.

42. Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965). Section (c) of the proposed statute permits such service. This practice is criticized by the panel, Lillich, *supra* note 3. The conflicting result which the procedural problems of sovereign immunity may reach with the policies of the Hickenlooper amendment are discussed in Maier, *Sovereign Immunity and Act of State: Correlative or Conflicting Policies,* 35 U. CIN. L. REV. 556 (1965). For a discussion of the procedural problems in the sovereign immunity area, see Comment, *Sovereign Immunity—The Restrictive Theory and Surrounding Jurisdictional Issues,* 15 CATH. U.L. REV. 234 (1966).

43. *See* New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955) (good example of the problems of getting an unwilling foreign sovereign into court). *Contra,* Banco Nacional v. Steckel, 134 So. 2d 23 (Fla. Dist. Ct. App. 1961); Gonzales v. Industrial Bank of Cuba, 33 Misc. 2d 283, 227 N.Y.S.2d 456, *aff'd,* 12 N.Y.2d 33, 186 N.E.2d 410, 234 N.Y.S.2d 210

difficult to enforce a judgment once obtained. Furthermore, problems of waiver of immunity[44] and the proper method for claiming immunity[45] have arisen.

C. *The Belman-Lowenfeld Proposal*

In response to these criticisms, the State Department drafted the Belman-Lowenfeld legislation. Basically, the draft legislation envisions three major changes in the current law of sovereign immunity. First, instead of basing the exercise of jurisdiction upon the public-private distinction of the restrictive theory of immunity, the proposed legislation would, in effect, create a new basis of jurisdiction by the courts. In essence, foreign governments would be subject to suits in specified types of contract and tort claims in a manner quite similar to that in which the United States Government is presently liable.[46] In the field of contracts, the claims allowable against foreign states would include those arising from breach of contract or from transactions performed in or having a reasonable relation to the United States. Tort claims would be allowed only for negligent or non-intentional torts; moreover, the act in question would have to have been performed in the United States, or if outside, to have been committed in conjunction with activities carried on within the United States.[47] Belman has justified this policy on the grounds that:

(1962). The proposed statute would not change the practice, evidenced by both the State Department and the courts (New York at least), that allows attachment where the action sued upon is of a commercial nature, regardless of the defendant's sovereign status. *See generally* Note, *The American Law of Sovereign Immunity Since the Tate Letter,* 4 VA. J. INT'L L. 75 (1964).

44. National City Bank v. Republic of China, 348 U.S. 356 (1955); Victory Transp. Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961); Petition of Petrol Shipping Corp., 37 F.R.D. 437 (S.D.N.Y. 1965); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).

45. Compania Espanola de Navegacion Maritima v. The Navemar, 303 U.S. 68 (1938); *Ex parte* Muir, 254 U.S. 522 (1921); Punete v. Spanish National State, 116 F.2d 43 (2d Cir. 1940).

46. Belman, *supra* note 1, at 185.

47. *Id.* The limitation of suits to negligent torts caused Lillich to observe that "[n]o effective means of bringing suits for intentional torts has been provided." *See* Lillich, *supra* note 3, at 195. Lowenfeld's draft provides simply for "a claim for personal injury or death or damage to property caused by an act or omission of any officer . . . of such foreign state." Construing this language broadly, such language could encompass unintentional torts to the extent that they are not

> [h]olding a foreign government responsible for its contracts and negligent torts is consistent with the position our government has undertaken with regard to its own immunity. . . . Governments enter into contracts advertently, and it is not unreasonable to expect them to live up to their promises. . . . Torts are not generally the result of conscious action, certainly not of government policy. But like the rest of us, governments can insure against possible liability or else have the wherewithal to insure themselves.[48]

The second major change contemplated by the proposed legislation would introduce a much broader concept of jurisdiction for cases involving foreign states. Accordingly, if a foreign state were "doing business" in the United States, such activity would be sufficient to vest federal courts with jurisdiction over the contract or the tort arising from such business activity. In other words, personal jurisdiction would attach by virtue of the "act" committed by the foreign sovereign, and the need to attach property of foreign states to secure in rem or quasi in rem jurisdiction would be eliminated.[49] This change, therefore, would make foreign states liable virtually to the same extent as foreign corporations.

Thirdly, and perhaps most significantly, the proposed legislation would eliminate completely the present decision-making role of the State Department in the adjudication of sovereign immunity cases. Additionally, jurisdiction over claims against foreign states would be exclusively reserved to the federal courts. Since there would be simplified procedures available for commencing suits and for serving notice on foreign states, the tendency of plaintiffs to attach property

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specifically precluded by the immunity section of the proposed law. This section provides that foreign states would still retain full immunity from suits "based on" or "calling into question" legislation, decrees, or orders of that state, or a claim arising from an act or omission of an officer or agent performed in the execution of a public law or of a discretionary function or duty. Lowenfeld, *supra* note 1, at 928, 936-38.

48. Belman, *supra* note 1, at 185. Compare the similar proposal for legislation, advocated sixteen years earlier, in Note, *The Jurisdictional Immunity of Foreign Sovereigns, supra* note 35, at 1165-72.

49. Belman, *supra* note 1, at 185-86. Under the new procedure proposed by the draft law, service of process could be effected by mailing it to the foreign state's embassy or other authorized representative in the United States. The purpose of such service, however, would be largely to provide notice of the proceeding to the foreign state and not to vest the courts with jurisdiction. Lowenfeld, *supra* note 1, at 936-38. Such notice would satisfy the due process requirements of the fifth amendment of the Constitution and, thus, foreclose collateral attack on that ground.

for jurisdictional purposes would be removed. Linked with the provision specifically foreclosing seizure of property for purposes of execution, the proposed law would obviate any need for the executive to intervene in the judicial process.[50] Not surprisingly, however, the draft statute grants immunity for four specific governmental actions.[51]

Although it may not actually constitute a substantive change in current American law, another important consequence of the proposed legislation is the provision upholding the absolute immunity of foreign states from execution. Belman and Lowenfeld have rationalized this provision by stressing the importance of foreign policy considerations. In their opinion, the seizure of property for satisfying judgments not only causes "unnecessary and undesirable provocation" in international relations but also is "severely detrimental" to the activities of the state whose property is taken.[52]

Potentially, however, the State Department's proposal on execution immunity re-establishes the absolute theory of sovereign immunity with possibly harsher consequences for private litigants than were endured when absolute immunity was applied only for jurisdictional purposes. The private plaintiff suing a foreign state is placed at a great disadvantage by a clause that provides absolute immunity from execution. The absolute discretion afforded a sovereign defendant in deciding whether to comply with the judgment reasonably could lead to situations in which the plaintiff may be compelled to accept a settlement of his claim on terms far less favorable than would be the case if he were able to resort to the normal procedures provided by

50. Lowenfeld, *supra* note 1, at 930. Another great advantage for the proposed legislation would be, according to Lowenfeld, the elimination of the quasi-judicial hearing held by the State Department to determine whether a suggestion of immunity should be sent to the courts. *Id.* at 912-13.

51. Lowenfeld, *supra* note 1, at 937. Section (e) provides that no action shall be maintained against a foreign state "(1) based upon legislation, decrees, or orders of that state, (2) calling into question the legislation, decrees, or orders of that state, (3) based upon a claim arising out of an act or omission of an officer, agent, or employee of that state in the execution of a public law, regulation, decree, or order, or the exercise or performance of a discretionary function or duty, (4) based upon a public debt of the foreign state."

52. *Id.* at 928; Belman, *supra* note 1, at 186. One authority, arguing the contrary position, has stated that "[t]here has been no convincing showing that such a rule would lead to embarrassment." If foreign states will pay their judgments, "the courts will never be faced with the unpleasant task of ordering execution against a foreign state." Leigh, *supra* note 1, at 192.

law for the enforcement of his judgment.[53] In effect, the plaintiff who obtains a judgment that might never be recovered faces far more severe consequences than he faces from the instability that has resulted from efforts to apply the Tate letter distinction between public and private acts. Notwithstanding this shortcoming in the proposed draft, the legislation itself appears to be a step forward for American law in determining an equitable solution to the questions presented in sovereign immunity cases.

The proposed Belman-Lowenfeld draft appears to present little conflict with other foreign states in their application of the law of immunity.[54] The supreme court of Italy has enunciated its understanding of the state of the law simply by quoting the Latin maxim, "*Princips in alterius territorio privaties.*"[55] As Lowenfeld has pointed out, "it seems fair to say that the scope of possible variation within the contemporary international legal system in the area of sovereign immunity is so wide as to cast doubt on whether there are any restraints on the choice made by states."[56] Perhaps it is best to summarize that the parameters for immune activities, claims and properties are for each state to determine on its own either by statute, rule of court or foreign office policy.[57]

IV. CONSTITUTIONAL UNDERPINNINGS OF THE PROPOSED STATUTE

Proceeding under the assumption that the executive branch, through the Legal Adviser to the State Department, will submit the proposed statute to Congress for its approval, consideration will be given now to the constitutional powers that enable Congress to enact such a measure. Although there is a difference of opinion among scholars on whether the proposal presents constitutional problems,[58]

53. *See* FED. R. CIV. P. 69.

54. *See generally* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* 28 BRIT. Y.B. INT'L L. 220, 250-72 (1951).

55. "The prince is a private citizen in the territory of another." Tani v. Russian Trade Delegation in Italy, [1948] Ann. Dig. 141, 144 (No. 45) (Court of Cassation, Italy).

56. *See* Lowenfeld, *supra* note 1, at 930.

57. *But cf.* Lowenfeld, *supra* note 1, at 930-31; Lauterpacht, *supra* note 54, at 248.

58. *See* Lillich, *supra* note 3.

judging from the litigation that followed the enactment of the Hickenlooper amendment[59] it appears that constitutional challenges to the Belman-Lowenfeld Act would be raised in subsequent sovereign immunity cases. Since, in essence, the proposed legislation prescribes certain jurisdictional changes, the threshold question is whether Congress is authorized to define the jurisdiction of federal district courts. The short answer to the question is that Congress does have such power.

In general, the power of Congress to regulate the jurisdiction of the lower federal courts is derived from the power to create tribunals under article I,[60] the necessary and proper clause,[61] and the clause in article III that vests the judicial power in the Supreme Court and such inferior courts as "the Congress may from time to time ordain and establish."[62] Balanced against these provisions, however, are the phrases in article III that, in effect, provide that the judicial power will be vested in lower federal courts and will extend to nine classes of cases. The question becomes, therefore, how far does this power extend. In *Martin v. Hunter's Lessee*,[63] Justice Story, by way of dicta, declared that Congress must create inferior federal courts and vest in them all the jurisdiction that they were capable of receiving. This statement was strongly criticized by the dissent,[64] and more than thirty years passed before the dispute was settled in *Sheldon v. Sill*,[65] where the validity of section 11 of the Judiciary Act of 1789 was directly questioned.[66] The Supreme Court held unanimously that

59. 22 U.S.C. § 2370(e)(2) (1970).

60. "The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I. § 8.

61. "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

Since the Constitution outlined only the broad limits of the judicial power, leaving the details to Congress, the distribution and appropriate exercise of the judicial power must be made by laws passed by Congress. *See* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

62. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

63. 14 U.S. (1 Wheat.) 304 (1816) (dictum).

64. 14 U.S. (1 Wheat.) at 374 (dissenting opinion).

65. 49 U.S. (8 How.) 440 (1850).

66. In *Sheldon v. Sill*, the assignee of a negotiable instrument filed a suit in a circuit court even though no diversity of citizenship existed between the original

since the Constitution had not established the inferior courts or distributed to them their respective powers and since Congress had the authority to establish such courts, it could define their jurisdiction and could vest, withhold or regulate the jurisdiction of any court of its own creation in light of the nine cases enumerated in article III.[67] *Sheldon v. Sill*, and the line of cases following it,[68] articulated two elements necessary to confer jurisdiction on the lower federal courts: first, the Constitution must have given the courts the capacity to receive it; and secondly, an act of Congress must have conferred it. The decisions have concluded that the manner in which the lower federal courts acquire jurisdiction, its character, the manner of its exercise and the objects of its operation are given without check or limitation to the wisdom of Congress.[69]

On its face, the proposed legislation of Belman and Lowenfeld appears to satisfy the two requirements that were enunciated in the *Sheldon* case. First, the requirement that the Constitution must have given the courts the capacity to receive the jurisdiction has been satisfied by the specific provisions of article III, which provide that "[t]he judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[70] Additionally, Congress has found it necessary and proper to codify the provision of article III, quoted above.[71] Finally, the jurisdiction that will be granted to the inferior federal courts will be bestowed pursuant to an act of Congress in satisfaction of the second requirement. Since this is so, it is clear that federal courts may have their jurisdiction regulated by Congress. It is also clear that

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parties to the mortgage. The circuit court entertained jurisdiction despite the prohibition against such suits in § 11 and ordered a sale of the property in question. On appeal to the Supreme Court, counsel for the assignee contended that § 11 was valid because the right of a citizen of any state to sue citizens of another in the federal courts flowed directly from article III and Congress could not restrict that right.

67. 49 U.S. (8 How.) at 448.

68. *See, e.g.*, Federal Power Comm'n v. Pacific Co., 307 U.S. 156 (1939); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern Ry., 209 U.S. 24, 35 (1908).

69. Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251-52 (1867).

70. U.S. CONST. art. III, § 2.

71. "The district courts shall have original jurisdiction of all civil actions when the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and is between . . . citizens of a State, and foreign states or citizens or subjects thereof." 28 U.S.C. § 1332(a)(2) (1970).

they are empowered to entertain suits between private parties and foreign states only at the discretion of Congress.

The crucial problem presented by congressional legislation controlling the jurisdiction of sovereign immunity cases is the potential conflict with the plenary powers of the executive branch in its conduct of foreign relations. In *United States v. Curtiss-Wright Corp.*,[72] the Supreme Court examined the powers of the President in this field; Mr. Justice Sutherland noted:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an execution of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[73]

From the *Curtiss-Wright* case it is clear that if Congress is to pass legislation that infringes on the foreign relations powers of the executive, it must do so cautiously to avoid attack on the basis of its being unconstitutional.

Perhaps the best answer to this problem is to ground the constitutionality of the proposed act in the powers granted to Congress pursuant to the commerce clause of the Constitution. This answer is similar to the solution found in the legislative aftermath of the *Sabbatino* case,[74] which dealt with the act of state doctrine. The close analogy between these two doctrines is probably best illustrated by Lowenfeld's statement that sovereign immunity "is a cousin, though not a sister, of the act of state doctrine. . . ."[75] The portion of the Hickenlooper amendment[76] that was enacted after the *Sabbatino* decision provided that cases arising out of expropriations, although occurring within the jurisdiction of a foreign sovereign, should be

72. 299 U.S. 304 (1936).
73. 299 U.S. at 319-20.
74. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
75. *See* Lowenfeld, *supra* note 26, at 904.
76. 78 Stat. 1013, *as amended,* 22 U.S.C. § 2370(e)(2) (1970).

decided on their merits in direct contrast to the international rule regarding acts of states. In *Banco Nacional de Cuba v. Farr*,[77] the court not only upheld the constitutionality of the Hickenlooper amendment but also held that the amendment did not infringe upon the power of the President over foreign relations and, thus, did not violate the separation of powers doctrine. The analogy to the Hickenlooper amendment is compelling, since if Congress can enact legislation that is not only contrary to international law but also clearly a matter normally handled by the executive, Congress should reasonably be able to enact sovereign immunity legislation that does not conflict with international law and that has, in fact, been proposed by the executive.

For the purpose of this note, it is important that the *Farr* court linked the constitutionality of the Hickenlooper amendment to the commerce clause of the Constitution.[78] The application of the act of state doctrine affects foreign investments and the flow of international trade and commerce,[79] and the application of sovereign immunity has a similar effect. The power granted to Congress by article I, section 8, clause 3, of the Constitution "to regulate Commerce with foreign Nations" is broad and plenary. The "power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[80] Furthermore, the Supreme Court has held that " . . . any rule which is intended to foster, protect, and conserve commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress."[81] As a result, it cannot be seriously disputed that the proposed statute would be a valid exercise of congressional power under the commerce clause. This is especially true when the tort and contract provisions are viewed in consideration of the ability of the plaintiff to recover the benefit of the bargain in the case of a breach of contract or, in the case of a negligent tort, to recover for damages to goods in shipment.

Were there any doubt of Congress' power to enact the legislation pursuant to authority in the commerce clause, it would be dispelled by the grant of additional power under article I, section 8, clause 18, "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by

77. 243 F. Supp. 957 (S.D.N.Y. 1965).
78. 243 F. Supp. at 972.
79. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433-36 (1964).
80. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
81. Mulford v. Smith, 307 U.S. 38, 48 (1938).

this Constitution in the Government of the United States, or in any Department or office thereof."

Consequently, it appears unnecessary to look further for sources of congressional power. It is at least arguable, however, that the Belman-Lowenfeld proposal comes from the executive department itself, and therefore, there could be no conflict either with the foreign relations powers or the separation of powers concept within the United States Government. This appears to be a make-weight argument, however, that fails to address itself directly to the power of Congress to pass the draft legislation.

Furthermore, a solution for upholding the constitutionality of the proposal might be grounded in the power of Congress to declare war. This argument is implied from the reasoning of the *Ex parte Peru* case, which established the pre-eminence of the State Department in determining the issue of sovereign immunity. Citing *United States v. Lee*,[82] the Court in the *Peru* case reasoned that the judiciary should not act in a fashion that would embarrass the executive branch. The quotation that was used from the *Lee* case,[83] however, was preceded by a sentence that appears to be significant for upholding the validity of the instant proposal. This sentence, which discussed the English law of sovereign immunity, stated in part that "it has been uniformly held that these (sovereign immunity problems) were questions the decision of which, as it might involve peace or war, must primarily be dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of citizens by war."[84] Because of this quotation and the implicit incorporation of its meaning into the sentence that was quoted in *Ex parte Peru* and numerous other immunity cases, it could be argued that sovereign immunity cases have an impact on both the executive and legislative branches of the federal government. First, it affects the executive's foreign relations powers because of the potential embarrassment that might be suffered. Secondly, it affects the legislative branch because of the possibility of war. This second aspect, therefore, is key to the present discussion since it is Congress alone that has the constitutional power to declare war.[85] Since this is so, it is reasonable to conclude that coupled with the necessary and proper clause of article I, the

82. 106 U.S. 196 (1882).

83. *See* text accompanying note 14 *supra.*

84. 106 U.S. at 209.

85. "The Congress shall have Power . . . [t]o declare War . . . ." U.S. CONST. art. I, § 8. This argument does not attempt to distinguish the de jure right of Congress to declare war and the de facto ability of the executive to wage war.

constitutionality of the proposed statute could be grounded in the war powers of Congress and thereby not be deemed to infringe upon the executive's power to conduct foreign relations.

Finally, it may well be that the Belman-Lowenfeld proposal falls within the ambit of implied congressional power over foreign relations.[86] Further discussion of this and other theories, however, appears foreclosed in the light of the clear congressional power to enact the legislation under the commerce clause of the Constitution.

V. Constitutional Status of an Executive Suggestion of Sovereign Immunity

A. *An Examination of Existing Law*

This section will first present the bases of the executive suggestion of sovereign immunity as enunciated in the existing case law.[87] Next, cases that narrow the executive power to suggest immunity will be discussed. Finally, the effect of the *Sabbatino* case[88] and its aftermath on sovereign immunity law will be considered.

1. *The Bases for an Executive Suggestion.*—A number of theories have been advanced as bases for the doctrine of sovereign immunity. One reason for granting immunity to a foreign sovereign is comity.[89] It also has been argued that the practice of granting immunity was based originally on the inherent weakness of states comprising the international community and that there is no basis in fact for immunity today.[90] Furthermore, the doctrine has been assumed to

86. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Henkin, *The Law of the Land and Foreign Relations,* 107 U. PA. L. REV. 903, 913-22 (1959).

87. The case law and language discussed cannot be considered binding precedent because the precise issue of the constitutionality of such an executive suggestion has not been raised in the way it will be raised by the proposed statute. The decided cases are, however, indicative of the way the Court is likely to analyze this problem.

88. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd,* 307 F.2d 845 (2d Cir. 1962), *rev'd,* 376 U.S. 398 (1964).

89. Hellenic Lines Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965); Victory Transp. Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Cardozo, *Congress Versus Sabbatino: Constitutional Considerations,* 4 COLUM. J. TRANSNAT'L L. 297, 298 (1966).

90. Comment, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law,* 53 MINN. L. REV. 389, 396-97 (1968).

apply only to a "friendly sovereign" and only where there is "a common interest to be served by a grant of immunity."[91] Whatever the reason for the doctrine, some form of sovereign immunity has traditionally been recognized in international law.

The doctrine of sovereign immunity first received judicial recognition in the United States in *The Schooner Exchange v. McFadden.*[92] In that case, the United States appeared and requested that a French naval vessel, which had been driven into a United States port by rough weather, be granted immunity from the jurisdiction of United States courts. The Court held that although the United States had complete sovereign powers within its borders, by virtue of its membership in the community of nations it impliedly had immunized the property of a foreign sovereign from suit.[93] The Court stated that the United States, as a sovereign, could withdraw the immunity, "[b]ut until such [sovereign] power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."[94] The opinion did not indicate, however, the branch or branches of the government that had the power to exercise the sovereignty of the United States in order to revoke the implied consent. It appears that there has been only one case in which the Court addressed itself to this problem. In *Berizzi Bros. Co. v. S.S. Pesaro,*[95] the Court granted immunity to a merchant ship owned by the Italian Government despite an executive assertion that immunity was not necessary. It applied the reasoning of *The Schooner Exchange* and stated:

> The decision in the *Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles they must be held to have the same immunity as war ships, *in the absence of a treaty or statute evincing a different purpose.*[96]

Presumably, this dicta implies that a grant of immunity by the domestic sovereign can be withdrawn by a "treaty or statute." Consequently, either the executive and the Senate, or the whole Congress, has the constitutional power to exercise sovereignty in such a way as to revoke the implied grant of immunity.

91. Cardozo, *supra* note 37, at 468.
92. 11 U.S. (7 Cranch) 116 (1812).
93. 11 U.S. (7 Cranch) at 144.
94. 11 U.S. (7 Cranch) at 146.
95. 271 U.S. 562 (1926).
96. 271 U.S. at 574 (emphasis added).

The next comprehensive discussion of the idea that courts should accept an executive suggestion of immunity as binding occurred in 1943. In *Ex parte Republic of Peru*,[97] the Court granted immunity to a vessel acting in the service of the Peruvian Government on the strength of a State Department statement that it "accepts as true the statements of the Ambassador concerning the steamship *Ucayali* and recognizes and allows the claim of immunity."[98] Relying on an earlier statement that "it is the duty of the courts to release the vessel" under these circumstances,[99] the Court stated:

> When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.
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> . . .
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> More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.
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> . . .
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> This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.[100]

The Court grounded judicial recognition of an executive suggestion of immunity on three bases: first, that this was the appropriate sphere of action for the executive as a political branch of the government; secondly, that such questions were likely to affect foreign relations; and finally, that the national interest would be better served if such suggestions were considered binding by the courts. There was no implication, however, that this was a constitutional power of the executive that could not be abrogated by Congress. Instead, the

97. 318 U.S. 578 (1943).

98. 318 U.S. at 582.

99. Compania Espanola de Navegacion Maritima v. The Navemar, 303 U.S. 68 (1938).

100. 318 U.S. at 587-89. This statement was repeated in Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

decision appeared to be based on the practical realities of international politics.[101]

This conclusion was further solidified by language used in two cases decided in 1955. In the first case, *National City Bank v. Republic of China*,[102] the Supreme Court was faced with a situation in which there had been no State Department suggestion concerning immunity. In holding that a foreign sovereign was not immune from a counterclaim to the extent of a set-off, the Court stated: "[T]he privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court."[103] In following a State Department suggestion that property of a foreign sovereign was immune from attachment, a district court in the same year stated that "[I]t has long been established that the Court's proper function is to enforce the political decisions of our Department of State on such matters. This course entails no abrogation of judicial power; it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs."[104] Interestingly, since the court did not find a constitutional source for the executive power to suggest immunity, but rather denominated it as a "self-imposed restraint," it appears that such a restraint could also be removed by the court.

Whatever the source of power for the suggestion, courts have not been willing to inquire into the reasons for a State Department suggestion of immunity. In the case of *Rich v. Naviera Vacuba, S.A.*,[105] the district court refused to deny effect to a suggestion of immunity even though the suggestion was, in the court's view, obviously not based on the restrictive theory of the Tate letter.[106] In the same case on appeal, the Fourth Circuit refused to hear plaintiff's contention that the title of the foreign sovereign was defective. The court stated: "We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion."[107] Since the constitutional separation of

101. An analysis of the need of the executive to have conclusive control over immunity questions in order to operate effectively in foreign affairs appears at pp. 422-30 *infra*.

102. 348 U.S. 356 (1955).

103. 348 U.S. at 359.

104. New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 686 (S.D.N.Y. 1955).

105. 197 F. Supp. 710 (E.D. Va. 1961).

106. 197 F. Supp. at 724.

107. Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961).

powers renders decision-making concerning immunity exclusively an executive function, the authority of the executive may then be based on article II of the Constitution.[108]

Two recent cases support the reasoning that the executive suggestion must be conclusive in order to avoid "embarrassing" the executive.[109] Both were cases in which the executive had made no suggestion to grant or deny immunity, and both held that the courts should deny immunity where the State Department had indicated, either directly or indirectly, that immunity need not be accorded.[110] Consequently, if a grant of immunity is required to avoid embarrassment, the executive can so declare; if it is not required, there is no reason to deny a litigant his day in court. Although not grounded in an express constitutional mandate, this conclusion is based on the sound policy that the executive should not be unduly hampered in the conduct of foreign affairs.

Potentially, the question whether an executive suggestion will be honored by a state court presents the clearest situation in which the courts will have to find a constitutional basis for the executive suggestion. It appears that the federal courts may be required by the Supreme Court to adhere to such a suggestion for non-constitutional reasons, but to require the state courts to do so would necessitate a constitutional mandate. Unfortunately, no case has been found where the Court reversed a state court decision in which the state court denied effect to an executive suggestion because of a lack of constitutional executive power to make such a determination. Although there are state court decisions honoring such a suggestion,[111] they have been decided on the same policy grounds as the federal court cases,[112] and the question of a constitutional basis for the suggestion was not considered.

Courts of a few states, most notably New York, have implied that they are not unwilling to question the practical effect of a suggestion

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108. U.S. CONST. art. II.

109. Victory Transp. Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Ocean Transp. Co. v. Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967).

110. 336 F.2d at 358; 269 F. Supp. at 705.

111. Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966); Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959). This idea was given at least lip service in United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944); Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960).

112. *See* cases cited note 111 *supra.*

of immunity made by the executive.[113] The most serious problems have concerned, first, what constitutes a waiver of immunity; secondly, whether the property in question actually belongs to a foreign sovereign; and finally, whether there could be an execution on expropriated property that was in the possession of a foreign sovereign.

In *Stephen v. Zivnostenska Banka*,[114] a New York state court was able to avoid a suggestion of immunity. Plaintiff was suing for assets of a Czechoslovakian bank that had been nationalized.[115] Although the State Department had sent a letter stating that it "recognizes and allows the claim of the Czechoslovak Government that such property in the United States is immune from execution or other action analogous to execution,"[116] the Appellate Division held that the property in question did not belong to the Czechoslovak Government and permitted execution on the property. The court reasoned:

> [T]he suggestion of immunity . . . was not intended to be a determination by the Department of any controversy . . . as to the ownership of any securities involved in the case . . . . It follows that the Department had no intention of suggesting that any property not owned by the Government of Czechoslovakia was immune. . . .[117]

It appears clear, however, that if the suggestion of immunity by the State Department had been based on a constitutional mandate, then a state court should not be able to avoid it with what are essentially legal niceties. Additionally, the "embarrassment" to the executive would have been the same whether the property was subject to execution because there was no sovereign immunity, or because it was held to have been owned by someone other than the Czechoslovak Government. Consequently, this case illustrates the potential foreign relations problems that are caused when a party questions the ownership of nationalized property.

The same criticisms can be made of the cases that have found an implied waiver of immunity by a foreign government. In *United States*

113. *See* Note, *supra* note 43, at 86-90; Comment, *supra* note 37, at 1146.

114. Stephen v. Zivnostenska Banka, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961).

115. The assets were located in New York and the suit was brought there. A lower court judgment had appointed a receiver for the assets of the nationalized bank and thereby effectively tied up the assets.

116. 15 App. Div. 2d at 115, 222 N.Y.S.2d at 134.

117. 15 App. Div. 2d at 117, 222 N.Y.S.2d at 135.

of Mexico v. Schmuck,[118] the State Department recognized the claim of immunity by Mexico "in the absence of evidence of such consent in the present instance . . . ."[119] In that case, a commercial contract provided that any disputes arising under the contract were to be determined by the laws of the state of New York.[120] The New York Court of Appeals held that the contract provision was an implied waiver of sovereign immunity. Nevertheless, the problems caused in relations between the United States and Mexico by this adjudication would have been the same whether the suit was permitted because of a denial of immunity, or because it was permitted by an implied "waiver" that the Mexican Government obviously did not wish to be effective.[121] A similar New York case held that commencement of a suit in the courts of that state was a waiver of immunity on a counterclaim in excess of a set-off arising out of the same transaction.[122] While these holdings are not conclusive of the issue, they do cast doubt on the notion that the basis for judicial deference to an executive suggestion is found in an express constitutional mandate.

In conclusion, courts have traditionally acceded to a suggestion of immunity primarily on the basis of policy considerations rather than on constitutional grounds. The courts avoid restricting the flexibility of the executive in the international political arena. The language of existing cases, however, does not seem to establish a constitutional mandate for giving binding effect to an executive suggestion. Whether executive conclusiveness is required in order to carry out the executive's constitutional duties will be discussed in section B, below.

2. *Sabbatino and Its Aftermath.*—Although *Banco Nacional de Cuba v. Sabbatino*[123] centered on the act of state doctrine, the Court also discussed the constitutional basis of that doctrine in a way that sheds light on the role of the executive vis-à-vis the courts in foreign affairs. In the *Sabbatino* case, sugar belonging to an American-owned Cuban corporation was nationalized by the Cuban Government after it

118. United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).

119. *Id.* at 270, 56 N.E.2d at 579.

120. *Id.* at 268, 56 N.E.2d at 579.

121. *See* note 44 *supra.*

122. Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960). The only Supreme Court holding since the Tate letter permitted a counterclaim against a foreign sovereign to the extent of a set-off, which was all the counterclaim demanded. National City Bank v. Republic of China, 348 U.S. 356 (1955).

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

had been loaded onto German shipping vessels by the American buyer. The sugar was shipped to New York, where the assignee of the Cuban Government delivered the bills of lading to the buyer without receiving payment. The district court held that it could determine title to the proceeds of the payment due from the buyer even though to do so would require it to examine the validity of the foreign act of state.[124] The court of appeals affirmed, taking note of two letters sent to the court from the State Department that implied that the Department did not object to the failure to apply the act of state doctrine.[125] The Supreme Court reversed and held that the act of state doctrine did apply.[126] In determining that it was improper for the judiciary to examine the validity of a foreign act of state, the Court reasoned:

> [I]t cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.
>
> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[127]

Consequently, to the extent that a sovereign immunity question tends to have as much effect on the conduct of foreign relations as an act of state question, this language strongly implies that sovereign immunity is a matter that the constitutional structure of the United States Government leaves to the non-judicial branches. The case does not

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124. The *Sabbatino* district court held that since (1) the expropriation was not reasonably related to a public purpose, (2) the expropriation act classified United States nationals differently from others, (3) the nationalization failed to provide adequate compensation, and (4) the United States Government had declared the taking to be violative of international law, it was necessary to conclude that the act of state was in violation of international law and was not subject to the act of state doctrine. 193 F. Supp. 375, 386 (S.D.N.Y. 1961).

125. 307 F.2d 845 (2d Cir. 1962).

126. 376 U.S. 398 (1964).

127. 376 U.S. at 423.

attempt to allocate the non-judicial powers to specific branches of the government. This was done, however, by the Hickenlooper amendment.[128] After providing that the courts of the United States shall not apply the act of state doctrine to give effect to a foreign confiscation that was in violation of the principles of international law, the amendment stated:

> This subparagraph shall not be applicable . . . in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf. . . .[129]

This provision, in effect, inverts the presumption. Previously, the act of state doctrine would be applied unless the executive suggested otherwise (the *Bernstein* exception): under the Hickenlooper amendment, the doctrine will not be applied unless the executive suggests it.[130]

It has been argued that the Hickenlooper amendment is an infringement by Congress of the executive's prerogative to decide to what extent the demands of comity require the United States to give effect to the acts of friendly foreign governments.[131] Since the executive, acting through the State Department, has the constitutional responsibility for the conduct of foreign affairs, it has been argued that the executive possesses the ability to control public actions such as court cases that would effect those relations.[132] It has been suggested that the Hickenlooper amendment invades the constitutional domain of the executive by requiring him to speak when he prefers to remain silent, and thereby hampers his conduct of foreign affairs.[133] The suggestion also has been made that the amendment would be unconstitutional without the provision that grants the executive power to withdraw a case on act of state grounds.[134]

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128. 78 Stat. 1013, *as amended,* 22 U.S.C. § 2370(e)(2) (1970).

129. 78 Stat. 1013, *as amended*, 22 U.S.C. § 2370(e)(2) (1970).

130. Cardozo, *supra* note 89, at 300. *See generally, e.g.,* Collinson, *Sabbatino: The Treatment of International Law in United States Courts,* 3 COLUM. J. TRANSNAT'L L. 27 (1964).

131. Cardozo, *supra* note 89, at 297.

132. Cardozo, *supra* note 37, at 482. This article was written prior to the final decision of the Supreme Court and the subsequent enactment of the Hickenlooper amendment.

133. Cardozo, *supra* note 89, at 300.

134. Maier, *supra* note 42.

B. *The Constitutional Necessity of Conclusive Executive Power to Suggest Immunity*

This section will examine the question whether the executive must have the power to control the immunity determination in order to fulfill his constitutional role in foreign affairs. The discussion will focus on whether sovereign immunity is the type of decision over which the executive must have power under an implied "necessary and proper" clause.[135]

1. *The Constitutional Executive Power over Foreign Affairs.*[136]*—United States v. Curtiss-Wright Corp.*[137] is the leading case concerning the power of the executive over foreign affairs. In that case the President, acting pursuant to specific authorization by Congress, was challenged on his prohibition of the sale of arms to an unsettled South American country. In upholding the President's action, the Court found, first, that his power was an attribute of sovereignty possessed by the federal government:

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality . . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family.[138]

Furthermore, the Court found that the powers necessary to operate effectively in the international arena were powers necessary to the federal government, and that the President alone had the power to operate as the international representative of the nation.[139] The Court based its holding not merely on the legislative delegation of power to the President, but also on "the very delicate, plenary and exclusive

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135. Maier, *supra* note 42.

136. *See generally* E. CORWIN, THE PRESIDENT 170-226 (1957).

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

138. 299 U.S. at 318. This opinion has been criticized for its statement that sovereignty passed from Great Britain to the Government of the United States, since that ignores the existence of the Articles of Confederation. However, as a good constitutional holding that the United States does in fact have these powers of sovereignty, it is now unquestioned.

139. "In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation." 299 U.S. at 319.

power of the President as the sole organ of the federal government in the field of international relations . . . ."[140] As a result, the specific problem becomes whether the President must have the power to conclusively suggest immunity of a foreign sovereign in order to perform this function as the "sole organ" in foreign relations, and whether the Court is willing to make such a necessity a constitutional requirement upon enactment of the Belman-Lowenfeld proposal.[141]

2. *Necessity of Executive Control in Immunity Problems.*—Three facts typically are present in situations in which sovereign immunity questions arise: first, a foreign sovereign or its property is involved in the litigation; secondly, the issues presented tend to affect an existing, and sometimes delicate, diplomatic situation; and finally, property rights typically are involved rather than fundamental personal liberties.

By definition, a claim for sovereign immunity involves either a foreign sovereign, an agency of the sovereign, or a state-owned corporation. Consequently, determinations of immunity have a potential effect on international relations. Similarly, at least one writer has observed a tendency of the State Department to apply the restrictive theory of the Tate letter to friendly nations, but not to Communist and other governments with whom relations are less warm.[142] This observation indicates that the State Department decides questions of immunity by examining its potential effects on United States foreign relations and implies that such decisions necessarily involve determinations of whether foreign sovereigns will be called into United States courts.

Furthermore, decisions whether to grant immunity typically are made in the context of state-to-state relations and necessarily affect those relations. Two of the major sovereign immunity cases in United States courts, *Ex Parte Republic of Peru* and *Republic of Mexico v.*

140. 299 U.S. at 320.

141. The view has been advanced, both in case law and by writers in this area, that the basis of granting sovereign immunity is "comity." *See generally* Hellenic Lines Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966); Cardozo, *supra* note 37. Due to the nature of the executive role in foreign affairs, it has been argued that the executive should have control over all matters of "comity." The same suggestion has been made for matters connected with the act of state doctrine. Cardozo, *supra* note 89. However, labeling decisions as "comity" problems does not explain why this should be an executive decision rather than a judicial one.

142. Comment, *supra* note 37, at 1144.

Hoffman,[143] have stated directly that when the State Department suggests immunity, "[t]he national interests will best be served when controversies growing out of judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings."[144] Courts have recognized that determinations of immunity affect foreign relations, or at least have that potential. This recognition is the basis for the current policy of giving conclusive effect to an executive suggestion of immunity.[145] The situation presented by the *Rich* case is illustrative. With a United States commercial airliner in Havana airport and Congress and the U.S. press enraged over the hijacking, it was imperative for the conduct of relations with Cuba that the State Department be able to command the release of the hijacked Cuban vessel held in Norfolk, Virginia.

A third important fact that customarily exists in sovereign immunity cases is the American claimants' assertion of property rights. Although these rights enjoy constitutional protection,[146] they have not received the strict protection that has been afforded to fundamental personal rights. Nevertheless, an analysis of the cases indicates that the Supreme Court has been more willing to permit the executive to do what it must in order to operate effectively in foreign affairs when only property rights are being infringed than when political and criminal procedural rights are involved.[147]

Having established the typical fact situation, it is necessary to examine why the executive needs to have the power to control sovereign immunity determinations. The factors that go into the decision to grant or deny immunity are potentially different if the

143. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Republic of Peru 318 U.S. 578 (1943).

144. 324 U.S. at 34.

145. *See* cases cited note 143 *supra*. The courts have often stated that they must give effect to a State Department suggestion of immunity to "avoid embarrassment" of the executive in foreign affairs. *E.g.*, Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 358 (2d Cir. 1964); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). If suggestions of immunity did not have at least a potential effect on foreign relations, there would be no tendency to embarrass the executive if they were not honored.

146. U.S. CONST. amends. V, XIV.

147. *Compare* United States v. Pink, 315 U.S. 203 (1942) *with* New York Times Co. v. United States, 403 U.S. 713 (1971) *and* Reid v. Covert, 354 U.S. 1 (1957).

executive rather than the judiciary makes the decision. Presumably, both the executive and the courts consider the policy of the restrictive theory of immunity and attempt to apply the distinction between acts *jure imperii* and *jure gestionis* as set forth in the Tate letter. The courts should make their decisions whether to grant immunity solely on the basis of this distinction and any other clarifications of the distinction that cases have provided.[148] The problem arises in identifying what other considerations the State Department is likely to use in arriving at its final decision.[149]

When the international political situation dictates, the State Department has not hesitated to ignore the policy of the Tate letter and make its decision to grant immunity on other factors.[150] As was noted previously, at least one writer has come to the conclusion that the State Department tends to apply the restrictive theory of immunity to friendly nations and to grant immunity to Communist nations almost absolutely.[151] Such determinations obviously involve the realities of the international situation at the time the decisions are made. This fact has been implicitly recognized by the courts in giving binding effect to executive decisions, and explicitly recognized at least once.[152]

Another factor that is reported to affect the State Department's determination of immunity is the interest of the Justice Department.[153] The Justice Department defends actions against the United States brought in foreign countries. In doing so, it follows United States policy to pay its liabilities and rarely invokes sovereign immunity. The Justice Department, then, favors a restrictive view of immunity in the hope that other nations will reciprocate, especially when they are defendants, thereby rendering themselves as amenable to suit as the United States.[154]

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148. *E.g.*, Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964).

149. The occasional application of the Tate letter by the State Department is discussed at pp. 398-400 *supra*.

150. *See* sources cited note 37 *supra;* Cheatham & Maier, *supra* note 11, at 87; Fensterwald, *United States Policies Toward State Trading*, 24 LAW & CONTEMP. PROB. 369, 388 (1959).

151. *See* cases cited note 109 *supra*.

152. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 725 (E.D. Va.), *aff'd*, 295 F.2d 24, 26 (4th Cir. 1961). *See Ex parte* Republic of Peru, 318 U.S. 578 (1943); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

153. Timberg, *supra* note 37, at 115; Comment, *supra* note 37, at 1147.

154. *See, e.g.*, Lowenfeld, *supra* note 1.

Consequently, the fundamental question to be resolved is whether the consideration of these non-legal factors by the State Department is necessary and appropriate to the proper conduct of foreign affairs. It appears that such consideration is both necessary and appropriate. Because the executive, acting through the State Department, is charged with the constitutional responsibility of conducting the foreign relations of the United States, it should be able to control, within limits, those activities within the United States that affect foreign affairs. To the extent that the Department considers the political realities of the international situation in sovereign immunity cases, and coordinates its foreign relations activities with other departments of the government, it is carrying out that constitutional responsibility. The fact that the State Department considers political factors other than the legal distinctions such as those involved in the Tate doctrine makes it clear that it, and not the judiciary, is the body that should make these determinations which are essentially based on foreign policy.

A second major question is whether a judicial "embarrassment" of the executive in foreign affairs is constitutionally permissible. A judicial denial of immunity in situations in which the executive wishes immunity to be granted violates the general reason for the courts' granting conclusiveness to executive suggestions. That is, to do otherwise would risk "embarrassment of the executive in the conduct of foreign affairs."[155] Therefore, if the courts deny immunity when the executive wishes to have it granted, the risk of "embarrassment" will be great.

The Constitution provides that the executive be the "sole organ" of the United States concerned with foreign affairs. Traditionally, the courts have recognized that the realities of international politics require that the executive have power to exercise control over judicial determinations of sovereign immunity in order to operate effectively, or at least "avoid embarrassment," in foreign affairs.[156] The interference with the executive's conduct of foreign affairs would be equally great whether done simply by the courts or by the courts under a jurisdiction-granting statute passed by Congress. As a result, the practical effect of international politics and foreign affairs, which has caused the courts to give conclusive effect to an executive suggestion of immunity in the past, will motivate them to recognize and give effect to such a suggestion in the future, regardless of a

155. *See, e.g.*, cases cited notes 143 & 145 *supra.*

156. *See* cases cited notes 143 & 145 *supra.*

congressional authorization to ignore the suggestion.[157] In effect, the proposed Belman-Lowenfeld statute may force the courts to reach the same result on the same policy grounds but to couch their decision in terms of constitutional executive power rather than "embarrassment of the executive."

The final question that must be answered in determining the functional necessity of an executive power to suggest immunity concerns the consequences to the executive's conduct of foreign relations if he does not have this power.[158] Proponents of the draft legislation have stated that the statute simply attempts to force foreign sovereigns to account properly for their contracts and torts.[159] They contend that the tort liability is part of the cost reasonably to be anticipated in the maintenance of embassies or consular establishments, or the operation of commercial and other enterprises that require agents in the United States. Similarly, they argue that if a foreign government desires to conduct commercial and other operations that require it to contract for goods and services, it must do so with the understanding that it incurs legal obligations which will be enforced in United States courts.[160] The proponents conclude that courts acting under the proposed legislation will not affect foreign affairs since foreign sovereigns will not be answerable for political acts in their own countries in United States courts.[161] There are two problems with this argument. First, the hypothesized fact situation does not cover all the instances in which sovereign immunity has been raised as a defense. Specifically, it does not cover situations, such as the one in *Rich v. Naviera Vacuba, S.A.*,[162] in

157. The proper role of the courts in adjudicating the hypothetical controversy in view of their position in the constitutional system of separation of powers will be discussed at pp. 429-30 *infra.*

158. This discussion assumes that foreign sovereigns are aware that the executive lacks the power to grant sovereign immunity.

159. Lowenfeld, *supra* note 1, at 919-21.

160. "Correspondingly, when a foreign government decides to maintain an embassy, operate a purchasing mission or keep foreign exchange reserves in the United States—all activities that the United States encourages as a matter of national policy—it can reasonably expect to answer for the acts of its agents connected with these activities, whether the problem be an automobile accident, a contract claim, or the payment of rent." Lowenfeld, *supra* note 1, at 920.

161. "The important point is that if foreign governments are held liable in the same manner as other enterprises doing business in this country, they need not fear that they will become answerable in United States courts for activities not connected with this country." Lowenfeld, *supra* note 1, at 921.

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

which property of a hostile sovereign is libelled or attached by a United States court. Nevertheless, this type of emergency is most likely to cause the greatest disruption of the foreign relations of the United States. Secondly, the hypothetical does not account for the case in which a foreign sovereign has expropriated, without adequate compensation, property belonging to United States nationals and the property enters the United States in the possession of the foreign sovereign. Because of the conflicting national interests in that situation, the best hope for compensation for all those whose property has been taken is through negotiation—yet the cloud of a judicial seizure of the property would impede negotiations.[163] Consequently, in these situations judicial determinations of sovereign immunity claims would affect the ability of the executive to perform its constitutional role in foreign affairs.

The more fundamental criticism of this argument is that a determination of immunity affects foreign relations even in the hypothetical situation presented at the outset of this discussion.[164] In the final analysis, the decision to grant or to deny immunity will be viewed as an act of the sovereign of the United States when that decision is made with a background of tense international politics and state-to-state diplomatic relations.[165] Since the State Department has the responsibility of the sovereign in the international political arena, it should have the power to fulfill properly that responsibility.

The power to make a binding suggestion of immunity to the courts of the United States should be held to be a power of the executive because it is necessary for the proper exercise of his constitutional foreign affairs powers. The executive is charged with the conduct of foreign affairs. The situations in which claims of sovereign immunity typically arise have a potentially great effect on foreign affairs. In addition, the property rights involved have traditionally been held to be subservient to the power of the executive to operate effectively in foreign affairs. In determining a question of immunity the executive considers many international political factors that are unavailable to the courts but are relevant to a decision that can potentially alter foreign relations. Finally, a judicial denial of immunity when the executive desires it to be granted would greatly hinder the executive's

163. For a discussion of the fact situations in which the policies of the Hickenlooper amendment and the present practice in sovereign immunity cases conflict, see Maier, *supra* note 42.

164. See discussion of this point in text accompanying note 145 *supra*.

165. *E.g.*, Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

exercise of his constitutional foreign affairs power. Interestingly, this problem is not solved by the Belman-Lowenfeld proposal as currently drafted, since there is no provision for the executive to suggest immunity even in the atmosphere of a tense international situation.

3. *The Role of the Courts in Sovereign Immunity—Now and Under the Belman-Lowenfeld Proposal.*—This section will discuss briefly the attitude that United States courts have taken toward the propriety of their examining the question of sovereign immunity when confronted with a separation of powers objection to such an examination. Thereafter, this note will examine the question whether the courts can look behind an executive determination of the necessity of granting immunity.

One of the first statements to the effect that the courts are not the proper place to raise questions of sovereign immunity was in *Wulfsohn v. Russian Socialist Federated Soviet Republic.*[166] In granting de facto recognition to the Soviet Government before the United States had granted formal diplomatic representation, the New York court granted immunity. The court opined:

> The question [of sovereign immunity] is a political one, not confided to the courts but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war.[167]

This idea later was revised and given explicit statement in *National City Bank v. Republic of China.*[168] In that case, the Court permitted a counterclaim to be asserted against a foreign sovereign to the amount of a set-off. On the issue of immunity, the Court reasoned: "The status of the Republic of China in our courts is a matter for determination by the executive and is outside the competence of this Court."[169] A district court case handed down the same year granted immunity that had been suggested by the State Department and stated: "[I]t has long been established that the Court's proper function is to enforce the political decisions of our Department of State on such matters."[170]

The idea was further relied upon in *Rich v. Naviera Vacuba, S.A.*[171] The Fourth Circuit affirmed a grant of immunity on the basis

166. 234 N.Y. 372, 138 N.E. 24 (1923).

167. *Id.* at 376, 138 N.E. at 26.

168. 348 U.S. 356 (1955).

169. 348 U.S. at 358.

170. New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

171. 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961).

of a State Department suggestion that immunity be granted. In response to plaintiff's attempt to contest the title of the goods claimed by the Cuban sovereign, the court held: "We think that the doctrine of separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusions."[172]

It appears from these cases that a possible resolution of the situation would be to hold that the courts cannot examine an executive decision that a grant of immunity is proper under the terms of the proposed statute. This would avoid the necessity of a judicial determination of whether the power of Congress or the executive is supreme in this area.[173] Consequently, the courts could resolve the dispute by refusing to look behind the "political" decision of the State Department that immunity was applicable in a particular case. Such a resolution would leave the executive with the power to obtain effective immunity for a foreign sovereign. If this solution were adopted by the courts after the proposed statute was enacted, the effect would be to reverse the current presumption that immunity will be denied unless suggested by the executive. If the State Department were to point to the statute to refuse requests of immunity in all but the most extreme circumstances, then most of the instances in which immunity is claimed would be decided by the courts, not by the Department. The State Department, however, should have the power to intervene in the exceptional case that required a certain result purely for reasons of international politics. In the final analysis, this proposed resolution would not be a bad result.[174]

VI. CONCLUSION

Perhaps the most important contribution of the Belman-Lowenfeld draft legislation is that Congress will be in a position to take its first positive step in settling the conflicting theories that have been applied

172. 295 F.2d at 26.

173. Admittedly, such a result would beg the question and effectively decide the power issue. But, given the preference of institutions to avoid conflict with other institutions over non-specific powers, it is not an unlikely result.

174. Although the conclusion indicates that the executive has the power to suggest immunity regardless of the terms of the proposed statute, it is recommended that this power be recognized by the Congress and that a clause be added to the draft legislation similar to that which was added to the Hickenlooper amendment discussed in the text accompanying note 129 *supra*.

by the courts and the executive in resolving sovereign immunity cases. Since there appears to be no international standard in this field, the statute does not conflict with that body of law.

Hopefully, before the proposal is submitted to Congress, the State Department will reconsider its views on absolute attachment immunity and subsequently provide a more satisfactory means for the execution of judgments. The threshold problem that this legislation poses is whether Congress has the constitutional authority to enact the statute. One possible solution is to ground congressional authority in the commerce clause of the Constitution. Additional authority may arguably be found in the power to regulate the jurisdiction of federal courts and the power to declare war.

Nevertheless, there may be problems with the traditional power of the executive to make a binding suggestion of immunity when a foreign sovereign is sued in the United States. The courts traditionally have based the executive power to suggest immunity on policy grounds rather than on constitutional mandate. Given the constitutional role of the executive as the sole organ of foreign relations, however, it may be necessary that the executive have pre-emptive power despite the terms of the statute. Since the immunity cases indicate that the power is essential to enable the executive to carry out his foreign affairs power, executive control of immunity then assumes the status of a constitutional mandate. This conclusion is supported by the cases that hold an executive determination to be conclusive.

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APPENDIX

THE PROPOSED STATUTE[175]

AN ACT

To Permit Suit Against Foreign States, Their Agencies And Instrumentalities In Contract And In Tort.

be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That Title 28 of the United States Code is amended by adding the following new section:

175. This statement of the draft proposal is taken from Lowenfeld, *supra* note 1, at 936.

Section 0000. Action against Foreign States, their Agencies and Instrumentalities.

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action, regardless of the amount in controversy, against a foreign state, or an agency or instrumentality of a foreign state.

(b) Action may be brought pursuant to subsection (a) against a foreign state, or an agency or instrumentality of a foreign state only upon

(1) an express or implied contract entered into, to be performed, or arising out of transactions in the United States; or

(2) a claim for personal injury or death or damage to property caused by an act or omission of any officer, agent, or employee of such foreign state while acting within the scope of his office, agency, or employment within the United States, its territories or possessions,

under circumstances where the foreign state, agency, or instrumentality, if a private person, would be subject to suit in accordance with the law of the place where the action is brought.

(c) (1) Service of process may be made in such action by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the embassy of the foreign state duly accredited to the Government of the United States, or to such other officer or agency of the foreign state as is authorized under the laws of that state to receive service of process. Proof of service shall include a receipt signed by or on behalf of the addressee or other evidence of delivery to the addressee, satisfactory to the court.

(2) A foreign state, or an agency or instrumentality of such state, shall serve an answer within sixty (60) days after service of process in the manner described in paragraph (1) of this subsection.

(d) (1) No attachment, injunction, garnishment, or other similar process, mesne, or final, shall be issued against a foreign state, its agencies, or instrumentalities, nor shall the property of a foreign state or that of its agencies or instrumentalities, be subjected to execution of final judgment unless that state, agency or instrumentality has expressly consented to such execution.

(2) As used in this section, an agency or instrumentality of a foreign state shall not include any corporation, partnership, or other entity having a stated capital or limited liability regardless of the ownership or control of such entity by the foreign state and no claim of foreign state immunity shall be allowed in an action against such corporation, partnership, or other entity.

(e) Nothing in this section shall authorize the maintenance of an action without consent against a foreign state, or an agency or instrumentality of that state

(1) based upon legislation, decrees, or orders of that state,

(2) calling into question the legislation, decrees, or orders of that state,

(3) based upon a claim arising out of an act or omission of an officer, agent, or employee of that state in the execution of a public law, regulation, decree, or order, or the exercise or performance of a discretionary function or duty,

(4) based upon a public debt of the foreign state.

(f) (1) Nothing in this section shall prevent a foreign state, or any agency or instrumentality of a foreign state, from consenting to be sued in the United States upon claims in addition to those authorized herein.

(2) Nothing in this section shall prevent a foreign state, or any agency or instrumentality of a foreign state, from consenting to execution of final judgment, either generally, or upon particular claims.

(g) Actions under this section may be brought in the Federal district court for the District of Columbia or

(1) in the case of an action of the kind described in subsection (b) (1), in the judicial district where the contract was entered into or where it was to be performed; and

(2) in the case of an action of the kind described in subsection (b) (2), in the judicial district in which the act or omission took place.