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THE LAW OF NATIONS AS NATIONAL LAW: "POLITICAL QUESTIONS"

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I.

In articles appearing in earlier issues of this *Review,* the present writer sketched briefly an ancient and salutary feature of Anglo-American legal tradition, explored in some detail its influence upon the formation and implementing of our national Constitution, and sought by survey or sampling to appraise its progress in national judicial administration. Among other things, the survey or sampling indicated a continuing and significant judicial recourse to the law of nations in an expanding case law of external affairs.[1]

Two important limitations upon the judicial recourse thus indicated were beyond the scope of the earlier articles, though it is clear enough that either may circumscribe such recourse substantially. According to the first—the so-called doctrine of "political questions"—the courts may neither reconsider nor review the decision of a coordinate department of the Government made in the exercise of its constitutional authority. A competent and relevant decision having been made, the courts are limited to ascertainment and conformity. Ac-

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1. See Dickinson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 792 (1952-53).

cording to the second—the so-called doctrine of "acts of state"—the courts may not sit in judgment upon acts of the government of a foreign state done within its own territory. Where the doctrine is considered applicable, the aggrieved is remitted to such remedies as may be available in courts of the foreign state or to interposition by the diplomatic agencies of his own.

The present study will be concerned with the first of these two limitations and will be subject further to two limitations of its own. In the first place, for reasons sufficiently evident, it will be restricted to the so-called "political question" in the case law of external affairs. It will probably be agreed that the "political question" has had its most comprehensive development in the case law of external affairs and that it should be possible to select a sequence of topics from within this area likely to prove fairly representative of the whole. In the second place, the study will be concerned primarily with the "political question" in case law of the United States Supreme Court. The Supreme Court has the final word in these matters, needless to say, and within the range of topics here selected, it has had perhaps as many as fifty occasions for a more or less significant consideration of the problem in its varying aspects. There is subject matter here, it is believed, which is ripe for a fresh appraisal.[2]

The lawyer who reflects upon an expanding practitioners' interest may even conclude that the subject matter has been permitted to become overripe. There is a literature, now somewhat dated, which includes some things provocative, more that is merely informative and much that is likely to impress a practitioner as having become incautiously confused. An advocate or counselor will be helped but little, for example, by a suggestion that the "political question" is one characterized by lack of applicable legal principle, or by a debate on the relevance of expediency and something called "judicial self-limitation," or by conclusions content to stress the "practical considerations" or to condemn an accepted description as "one of the least satisfactory terms known to the law." [3] In the present study there will be conscious effort to exploit a course somewhere between the vagrant uncertainties which have characterized a substantial part of the existing literature and the

2. In the present study, the writer has had invaluable assistance from Mr. Richard L. Bond, Class of 1956, University of Pennsylvania Law School.

3. See Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Dickinson, *International Political Questions in the National Courts*, 19 AM. J. INT'L L. 157 (1925); POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936); Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (Cahn ed. 1954).

one outstanding example of recondite and reflective scholarship which the literature affords.[4] In short, the practitioner's approach to precedent will be kept constantly to the fore.

II.

There are reasons at once logical and chronological for beginning with the cases which have been concerned in one way or another with an international territorial dispute. In the case law of the Supreme Court, that means beginning with *Foster & Elam v. Neilson.*[5] Spain had ceded Louisiana to France by the Treaty of Ildefonso of 1800, and France in turn had ceded the same territory to the United States by the Treaty of Paris of 1803. Boundaries were ill-defined or undefined in these treaties, and in the result the delimitation of Spanish Florida from Louisiana east of the Mississippi became the subject of a major boundary controversy between Spain and the United States. The President was consistently firm in asserting United States sovereignty over the disputed area, and the Congress legislated for the area on a number of occasions. Relying nevertheless upon a grant of land in the area which had been made by the Spanish government while the controversy was pending, and of necessity upon the Spanish government's interpretation of the boundary treaty, Foster and Elam sued in the district court of the United States to recover land from a defendant in possession. Their suit was dismissed, and on writ of error the Supreme Court affirmed. While conceding that the treaty admitted of either interpretation, the Court chose to regard as controlling the interpretation which had been adopted by the executive and legislative departments of the Government of the United States.

"The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided," observed Chief Justice Marshall, "and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established." [6] From this premise the Chief Justice went on to dispose of the issue in restrained eloquence carefully related to the facts of the case:

> "If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of

4. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933). For a thoughtful discussion of some later trends, see Note, *Judicial Deference to the State Department on International Legal Issues,* 97 U. PA. L. REV. 79 (1948).

5. 27 U.S. (2 Pet.) 253 (1829).

6. *Id.* at 307.

> dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature." [7]

While the validity of the solution found in *Foster & Elam v. Neilson* has never been seriously questioned,[8] the case as precedent has been the subject of some misuse and not a little misunderstanding. It was not that there was a "lack of legal principles" or that the issue was "too high" for judicial disposition. The court had parties properly before it, and their dispute was one to which, in other circumstances, the law of nations and treaties might have been judicially applied. It was not that the methodical techniques of adjudication should yield to a felt need for unity and speed or that, a coordinate and competent department having become committed, the judiciary should substitute self-limitation for an independent approach which might embarrass the Government in the conduct of foreign relations. The actual controversy with Spain had been moot for nearly a decade following the Spanish cession of Florida to the United States. Consciously and correctly, the Court regarded the question as one to be resolved with a proper regard for the constitutional distribution of powers. The same residual question had been long since and for many years before the executive and the legislative departments; and these departments had taken a firm and consistent position, the former in exercise of its exclusive responsibility for the conduct of foreign relations, the latter pursuant to its unquestioned power to make all needful rules and regulations respecting territory of the United States. There was nothing particularly implausible or out of line with the facts in the position which the political departments had thus taken.[9] For the judiciary at this stage and in these circumstances to intrude an independent and perhaps different view would have been an unwarranted interference with decisions properly made elsewhere and with respect to which the judiciary had no superior authority. The separation of powers is not an insulation of powers. There are principles of distribution,

7. *Id.* at 309.

8. The case was considered controlling on like facts in Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838), Chief Justice Taney remarking that were it a new question, the Court would adopt the principles affirmed in the earlier decision. *Id.* at 522.

9. See United States v. Arredondo, 31 U.S. (6 Pet.) 691, 711 (1832); BROOKS, DIPLOMACY AND THE BORDERLANDS 34-35 *passim* (1939); COX, THE WEST FLORIDA CONTROVERSY, 1798-1813, cc. 13-16 *passim; cf.* Keene v. M'Donough, 33 U.S. (8 Pet.) 308 (1834); see also United States v. Rice, 16 U.S. (4 Wheat.) 246 (1819).

and there are also overlappings and a significant interdependence. Where there are overlappings and the political departments have established properly a relevant priority of decision, the judicial responsibility is limited to ascertainment and conformity.

Next of the leading cases in this line, though neither so illuminating nor satisfactory a precedent as the case just considered, is *Williams v. Suffolk Insurance Co.*[10] A citizen of Connecticut had sued an insurance company of Massachusetts in a federal court to recover for losses resulting from the seizure of sealing ships in the Falkland Islands by the government of Buenos Ayres. On division of opinion, two questions were certified to the Supreme Court. Their form and content suggest that presentation of the case in the trial court may have left something to be desired. Much condensed, the first was whether it was competent for the trial court to make its own inquiry and an independent decision as to the sovereignty of the Falklands, the American Government having disputed the sovereignty of Buenos Ayres and its authority to regulate sealing there, or whether the action of the executive was binding and conclusive on the court. Similarly condensed, the second was whether the loss was one for which the insured should recover, the seizure being considered contrary to the law of nations and the master having acted in a bona fide belief that he was bound to continue sealing as a matter of duty to his principals and in vindication of rights claimed by the American Government, or whether after warning the master should have abandoned the voyage.

Responding to these questions, it was the opinion of the Supreme Court, first, that the executive denial of the sovereignty of Buenos Ayres in the Falklands was binding on the judiciary; and secondly, that in the circumstances stated in the question certified the insured was entitled to recover. There is a much quoted passage in Justice M'Lean's opinion on the first question in which he said:

> "And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities

10. 38 U.S. (13 Pet.) 415 (1839). See also Justice Story's opinion in the court below, 29 Fed. Cas. 1402, No. 17738 (C.C.D. Mass. 1838); *cf.* Tartar Chemical Co. v. United States, 116 Fed. 726 (C.C.S.D.N.Y. 1902), *rev'd on other grounds,* 127 Fed. 944 (2d Cir. 1903).

> which belong to him, it is obligatory on the people and government of the Union." [11]

It is difficult to see in retrospect how there could have been doubt about the answer to the first question certified. In its "political" aspect, *Williams v. Suffolk Insurance Co.* differed significantly from *Foster & Elam v. Neilson* in only two respects: first, the United States was not claiming the territory which it denied to Buenos Ayres; and secondly, absent any occasion for legislative consideration, the question had been made "political" solely by a course of executive action in the conduct of foreign relations. These would appear to have been differences supporting no distinction. It is a little surprising that counsel for the insurer should have pressed an opposing argument. The Court again resolved a "political question" with what appears to have been a proper regard for prior action by a competent coordinate department.

The answer to the second question is another matter. The second question, indeed, was an extraordinary hodgepodge of anticipations with respect to the answer to the first, and uncertainties with respect to the relevance of the actual situation in the Falkland Islands. It was only after the seizure of the insured ship that the United States sent a sloop of war to break up the establishment of the government of Buenos Ayres in the Islands. Counsel and court, in their concern about a de jure sovereignty, appear to have given all too little attention to the relevance of a de facto situation.[12]

The Guano Islands Act of 1856 [13] was to set the stage for the next noteworthy case in the Supreme Court in which territorial authority and the "political question" would have the Court's attention. The Act of 1856 provided that when any citizen of the United States shall discover a deposit of guano on an island "not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government," and shall take peaceable possession thereof, the

11. 38 U.S. (13 Pet.) at 420 citing Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829), and Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838). "If this were not the rule," Justice M'Lean continued, "cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcileable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character."

12. See GOEBEL, THE STRUGGLE FOR THE FALKLAND ISLANDS 432-59 (1927); *cf.* Keene v. M'Donough, 33 U.S. (8 Pet.) 308 (1834); United States v. Rice, 16 U.S. (4 Wheat.) 246 (1819); the judicial approach to duration of war and the interpretation of exclusion clauses in a life insurance contract in Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948).

13. Act of Aug. 18, 1856, c. 164, 11 STAT. 119.

island may "at the discretion of the President . . . be considered as appertaining to the United States." Section 6 of the act provided that any crime committed on an island so acquired should be punished as if committed on a merchant ship of the United States on the high seas.

In reliance upon this statute there was a claim of discovery and occupation in 1857 with respect to the Island of Navassa off the coast of Haiti. Haiti disputed the claim and protested bitterly, but was dissuaded from interfering by a show of superior force. In 1859, application of the statute in favor of the discoverer's assignee was proclaimed by the Secretary of State. Years later, pursuant to section 6, an indictment for murder on Navassa was tried in a federal court in Maryland. On motion in arrest of judgment after verdict, it was argued that the Act of 1856 was unconstitutional. The argument was rejected and the defendant sentenced to death. On writ of error the case became *Jones v. United States*[14] in the Supreme Court, where judgments of conviction in this and two companion cases were affirmed without dissent. Said Justice Gray for the Court: "our conclusion is that the Guano Islands Act . . . is constitutional and valid; that the Island of Navassa must be considered as appertaining to the United States; that the Circuit Court of the United States for the District of Maryland had jurisdiction to try this indictment; and that there is no error in the proceedings." [15]

Summarizing thus, Justice Gray identified with considerable precision four propositions which the United States had been obliged to establish if the convictions were to be affirmed: first, that the Guano Islands Act was constitutional and valid; second, that pursuant to the Act, the Island of Navassa had been considered as appertaining to the United States; third, that the federal court in Maryland had jurisdiction to try the indictment; and fourth, that there had been no reversible error in the trial proceedings. Since the opinion appears to have been composed with slight attention to plan or organization, and since it is encumbered with a good deal of random comment and yet more random citation inspired by precedents in the several "political" lines, it becomes important to consider the particular relevance of a "political question" in a case of this kind. Be it noted that the case was by the Government against a subject to convict the subject of a crime carrying the extreme penalty. Assuredly in such a case the subject was entitled to nothing less than painstaking judicial scrutiny of both the statute and its application.

14. 137 U.S. 202 (1890).
15. *Id.* at 224.

It is clear that there was nothing properly called "political" which could stand in the way of an independent judicial determination of the constitutionality of the statute. Either Congress had the power under the Constitution to enact such a statute, or it did not. Noting that "by the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest," the opinion concluded that "this principle affords ample warrant for the legislation of Congress concerning guano islands." [16]

Nor was there anything "political" which might preclude, initially and generally, an independent judicial determination of the question whether Navassa had been considered as appertaining to the United States pursuant to the legislation of Congress. Either it had, or it had not. The indictment contained all necessary allegations, of course, but mere allegation, "if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment." [17] So the Court went beyond the memorial of discovery and the original proclamation issuing from the Department of State, which had been put in evidence at the trial, and considered published diplomatic correspondence and other government papers relevant to the acquisition of Navassa. From these sources it was satisfied that the Island had been considered as appertaining as the statute provided.

It was in the course of the Court's review of the statute's application that a question truly "political" was ultimately and somewhat incidentally intruded. The statute applied in terms to an island "not within the lawful jurisdiction of any other government." Haiti had claimed that Navassa was within its lawful jurisdiction and had persisted in its claim right down to the time of Jones' indictment.[18] The executive department of the Government of the United States had as consistently denied Haiti's claim and on at least one occasion the President had sent a naval vessel to Navassa. Citing *Williams v. Suffolk Insurance Co.*, Justice Gray said:

> "If the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire,

16. *Id.* at 212; see Dickinson, *supra* note 1, at 817-19.

17. 137 U.S. at 216.

18. The following is from the N.Y. Times, Nov. 3, 1889, p. 1, col. 6: "The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the Black Republic has jurisdiction over Navassa, and the action of Counsel Waring [counsel for Jones] is to determine the question of jurisdiction."

> nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question." [19]

This was the "political question" in *Jones v. United States* and the only question which could be denominated "political." Certainly there was nothing comparably "political" in the question of the trial court's jurisdiction or in the question of error in its proceedings. A better organized opinion might have made all this quite clear. To those who have labored to make sense of the opinion as reported, it will come as no surprise that it has been a good deal cited and quoted in support of inferences or conclusions which it does not support at all. The case is a precedent of importance in the territorial line, but it is one to be used critically and with more than a modicum of caution.

If discussion of a "political question" was somewhat confused and disproportionate in the opinion in *Jones v. United States,* it is just possible that it reflected a mounting sensitivity to some litigious rumblings arising out of the Government's extravagant pretensions to jurisdiction in the North Pacific.[20] Here was business in the making which was well-nigh certain to be surcharged with a "political" potential. Russia by the Treaty of 1867 had ceded its North American possessions to the United States within limits defined as including most of the Behring Sea. Section 1954 of the Revised Statutes had extended laws of the United States relating to customs, commerce and navigation "over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia." Section 1956 forbade the killing of fur seal "within the limits of Alaska territory, or in the waters thereof." An Act of Congress of 1889 declared that Revised Statutes, section 1956, included and applied to "all the dominion of the United States in the waters of Behring Sea" and made it the duty of the President to proceed with enforcement. There had been gravest doubts as to what if anything Russia had been in a position to cede outside the customary marginal belt; but the fur seal were threatened with extinction and the executive acted boldly. British

19. 137 U.S. at 221. Elsewhere, in a passage more often quoted, Justice Gray remarked: "Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Id.* at 212. The intended relevance of this passage is not clear.

20. An appeal in what was to be the test case had been docketed in the Supreme Court in 1888 but subsequently dismissed on appellant's motion. Leave to petition for prohibition in the same case was argued some two months after announcement of the decision in *Jones v. United States.* Leave was granted at the same term. *In re* Cooper, 138 U.S. 404 (1891).

ships were seized and forfeited for sealing beyond the three-mile limit in the seasons 1886, 1887 and 1889. The seizures precipitated at once a major diplomatic controversy.

Among British ships seized in the season of 1887 was one taken in the Behring Sea fifty-nine miles from the nearest land. Forfeiture followed and so began the test case of *In re Cooper*.[21] The case reached the Supreme Court on petition for prohibition to the district court.[22] The Attorney General of Canada presented a suggestion in support of the petition with the knowledge and approval of the British government. For the petitioner it was argued that under the law of nations and municipal law, the United States had no jurisdiction to seize a British vessel beyond the three-mile limit, that the relevant statutes were in terms open to construction in harmony with this principle, and that an executive construction to the contrary could not be controlling.[23] While the Government's argument is not reported, it is apparent that it disputed petitioner's construction of the statutes and again, as in its earlier argument against leave to petition, urged conclusive effect for prior "political" decisions.[24]

The Court's position was one of more than ordinary difficulty. For the first time in its experience with cases involving an international territorial dispute, it found itself squarely in the middle of a pending diplomatic controversy. Relevant legislative action had been a little less than explicit, perhaps purposely so. The decision could hardly go for the Government on the Government's theory. That would have permitted the executive to come to the judiciary for the forfeiture of a privately owned ship in reliance upon its own interpretation of the legislative action, and there contend successfully that the judiciary must take the executive interpretation in toto and without further scrutiny because the executive had advanced the same interpretation in the conduct of foreign relations. The decision might have been advantageously delayed. On the day that it was handed down, a treaty was signed in Washington referring the entire matter to arbitration, and within the ensuing calendar year the arbitral tribunal resolved the principal points submitted in favor of Great Britain.[25] The decision might have been, and we may now see that it should have been,

21. 143 U.S. 472 (1892).

22. See note 20 *supra*.

23. Petitioner's counsel are reported as insisting that "the right of the executive to deal with persons and property can never, under the Constitution of the United States, be a political question." 143 U.S. at 489.

24. See note 20 *supra*.

25. The comprehensive and classical account of this arbitration is in 1 MOORE, INTERNATIONAL ARBITRATIONS 755 (1898).

in favor of petitioner Cooper. An applicable standard of interpretation had been formulated long before by Chief Justice Marshall when he said that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." [26] It is not apparent that prohibition to the district court in *Cooper's* case need have discomfited the Government substantially more than reversal of a decree of condemnation in prize [27] or of a decree of forfeiture under the customs laws.[28] Indeed it might have helped to clear the air and shorten the way to such adjustments as were eventually to be achieved.[29]

It is matter of record that the Supreme Court took none of these courses. Instead it approved an opinion which, after some amiable comment upon the respective contentions, announced an inglorious retreat. On the one hand, if the President were justified in assuming after the Act of 1889 that it was his duty to adhere to the course previously pursued, it would follow that the Court could not review his action to decide whether he was right or wrong.[30] On the other hand, the Court was not to be understood as "under-rating the weight of the argument" that private rights depending upon statute or treaty are for judicial determination where the question at issue has not been determined by the political departments "in the form of a law specifically settling it, or authorizing the executive to do so." [31] At this point and without more the Court retreated over "narrower grounds." So narrow were the grounds, indeed, that it must have retreated in single file! It was held that the petitioner had lost his right of appeal, and with it the case for prohibition, by neglect to include in the findings of fact "the exact locality of the offence and seizure." [32] The precedent has been variously appraised. It is suggested that it is significant chiefly as an instance of lost judicial opportunity.

Following *In re Cooper,* there have been only two noteworthy cases in the Supreme Court in which the controlling effect of a "political" decision with respect to territorial acquisition or authority was put in issue. In one the principle formulated by Chief Justice Marshall in *Foster & Elam v. Neilson* was clearly applicable. In the other it was clearly inapplicable. With these our review of the principal precedents in the territorial line may be concluded.

26. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
27. The Paquete Habana, 175 U.S. 677 (1900).
28. Cook v. United States, 288 U.S. 102 (1933).
29. *Cf.* WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 174 (1922).
30. 143 U.S. at 503, citing *Foster & Elam v. Neilson,* and later cases in the territorial line.
31. *Ibid.*
32. *Id.* at 513.

Wilson v. Shaw[33] was a taxpayer's suit to enjoin the Secretary of the Treasury from paying out money or incurring financial obligation for the construction of the Panama Canal. A demurrer was sustained and the Supreme Court affirmed. The point was pressed that the Canal Zone had not been acquired by treaty with Colombia pursuant to the Spooner Act of 1902.[34] To this the Court replied that further acts of Congress, subsequent to executive recognition of Panama and ratification of the treaty with Panama ceding the Canal Zone to the United States, were "a full ratification by Congress of what has been done by the Executive." "Their concurrent action," said Justice Brewer, "is conclusive upon the courts. We have no supervising control over the political branch of the Government in its action within the limits of the Constitution." [35]

Vermilya-Brown Co. v. Connell[36] was an employees' suit for overtime against employing contractors engaged in construction at the military base which the United States had leased from Great Britain in Bermuda. The Fair Labor Standards Act upon which the employees relied was applicable in "any territory or possession of the United States." Was the Bermuda leasehold a "possession"? In a letter to defendants' attorneys the Department of State had advised that "this Government has not made any claim that the bases in Bermuda are territories or possessions." The district court concluded that whether the bases were "possessions" depended upon whether they were within the sovereign jurisdiction of the United States, a "political question" to be determined by the legislative and executive departments rather than the courts, and accordingly granted defendants' motion for summary judgment.[37] The circuit court of appeals thought it "a matter

33. 204 U.S. 24 (1907).

34. Act of June 28, 1902, c. 1302, 32 STAT. 481. Section 2 of the act provided: "That the President is hereby authorized to acquire from the Republic of Colombia . . . perpetual control of a strip of land, the territory of the Republic of Colombia . . . and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal . . ." Section 4 provided: "That should the President be unable to obtain for the United States a satisfactory title to the property of the New Panama Canal Company and the control of the necessary territory of the Republic of Colombia . . . then the President, having first obtained for the United States perpetual control by treaty of the necessary territory from Costa Rica and Nicaragua . . . shall through the said Isthmian Canal Commission cause to be excavated and constructed a ship canal . . . by way of lake Nicaragua. . . ."

35. 204 U.S. at 32. For a view of the problems which arose in the struggle to build a transoceanic canal and an introduction to the history of their solution, see generally, from a voluminous literature: MCCAIN, THE UNITED STATES AND THE REPUBLIC OF PANAMA (1937); MINER, THE FIGHT FOR THE PANAMA ROUTE (1940); PARKS, COLOMBIA AND THE UNITED STATES, 1765-1934 (1935); Dennis, *The Panama Situation in the Light of International Law,* 43 AM. L. REG. (N.S.) 265 (1904).

36. 335 U.S. 377 (1948).

37. 73 F. Supp. 860 (S.D.N.Y. 1946).

of interpretation of an Act in issue between two groups of private parties," not a "political question," and going directly to the issue of interpretation reversed and remanded.[38] The conclusion reached in the circuit court of appeals was considered "unfortunate" in the Department of State. The Department's Legal Adviser wrote the Attorney General that such a holding was not calculated to "improve our relations" with Great Britain and that it might be "detrimental to our relations with other foreign countries." [39] Upon the Attorney General's initiative, the United States as amicus curiae supported a petition for certiorari and, when the petition was granted, filed a brief urging reversal. The Supreme Court affirmed notwithstanding. "Recognizing that the determination of sovereignty over an area is for the legislative and executive departments," said Justice Reed for the majority, "does not debar courts from examining the status resulting from prior action." [40] The Court was prepared to predicate its views upon the postulate that sovereignty of the leasehold remained in Great Britain, but whether it was a "possession" within the statute was a question of statutory interpretation and not of legislative power.

It may be noted at this point that the principal precedents in the territorial line, excepting only *Williams v. Suffolk Insurance Co.*, have been concerned with the effect of "political" action in which both the executive and the legislative departments participated. It may be noted further that the same precedents, excepting only *Vermilya-Brown Co. v. Connell,* have been concerned with the effect of "political" action which in both participating departments was effectively prior in time. It may be noted finally that it was only in *Cooper's* case and *Vermilya-Brown* that there was a significant issue of statutory interpretation. In *Cooper's* case the Court evaded the issue, while in *Vermilya-Brown* it met the issue squarely. In *Vermilya-Brown,* it may be added, the executive interpretation came late, by way of interdepartmental protest rather than international negotiation, and after the case was in the courts. A judicial response perhaps less than considerate but otherwise strictly correct might have reminded that the case was being tried in the courts and not before an executive department.

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38. 164 F.2d 924 (2d Cir. 1947).

39. 335 U.S. at 401 n.12.

40. *Id.* at 380. The decision was by vote of five to four, the dissenting opinion by Justice Jackson. While Justice Jackson argued that the question was "political" and that the Court should defer to the executive (*Id.* at 401, 405, 409) the burden of his dissent was on the issue of interpretation. Note that the Court again assumed interpretive responsibility with respect to the territorial coverage of statutes in Foley Bros. v. Filardo, 336 U.S. 281 (1949) and United States v. Spelar, 338 U.S. 217 (1949); see Notes, 97 U. PA. L. REV. 866 (1949); 34 CORNELL L.Q. 647 (1949); 44 ILL. L. REV. 247 (1949).

III.

Proceeding from precedents in the territorial line to those concerned with recognition, we move into an area in which the relevant or related "political" decision is normally made by the executive alone. Moreover, by reason of the executive's sole responsibility for the actual conduct of foreign relations, it is generally one which only the executive can make.[41] Whatever part the legislative may have in it in any circumstances, it is clear that the judicial department has no part whatever. It is for the judiciary to determine relevancy and effect from case to case, but always upon the premise that the power behind the principal decision is political exclusively.[42]

Leading cases in the recognition line arose early in the nineteenth century in circumstances projected by colonial revolts in the western hemisphere. The French colony of St. Domingo was in armed revolt shortly after the century's turn, only the port of Santo Domingo remaining in French control. A French decree prohibited trade with the rebels. An American vessel loaded cargo in a rebel port notwithstanding, was captured by a French privateer on the high seas, and was thereafter sold in a Spanish port under authority of one claiming to be an agent of the French government of St. Domingo. Condemnation was subsequently decreed by a French tribunal sitting at the port of Santo Domingo. When the purchaser brought the cargo into South Carolina, it was libeled on behalf of former owners who were successful in the district court and ultimately in the Supreme Court.[43] In one aspect of the case the jurisdiction of the French tribunal at Santo Domingo was thought to depend upon whether it was sitting as an instance court or as a court of prize. In support of the contention that it was sitting in the latter capacity, it was argued that "the colony, having declared itself a sovereign state, and having thus far maintained

41. Commenting on recognition of the Soviet Government in 1933 and the simultaneous execution of the so-called Litvinov Assignment, in United States v. Belmont, 301 U.S. 324 (1937), Justice Sutherland remarked: "Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government." *Id.* at 330.

42. On the relevance and legal effect of recognition, particularly in matters of private right, see JAFFE, *op. cit. supra* note 4; LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 145 (1947); Brown, *The Recognition of New Governments,* 26 AM. J. INT'L L. 336 (1932); Brown, *The Recognition of New States and New Governments,* 30 AM. J. INT'L L. 689 (1936); Brown, *The Legal Effects of Recognition,* 44 AM. J. INT'L L. 617 (1950); Doukas, *The Non-Recognition Law of the United States,* 35 MICH. L. REV. 1071, 1086 (1937); Hudson, *Recognition of Foreign Governments and Its Effect on Private Rights,* 1 MO. L. REV. 312 (1936); Stevenson, *Effect of Recognition on the Application of Private International Law Norms,* 51 COLUM. L. REV. 710 (1951); Notes, *Effects on Private Litigation of Failure to Recognize New Foreign Governments,* 19 U. CHI. L. REV. 73 (1951); *The Legal Effects of Non-Recognition of Governments,* 36 MINN. L. REV. 769 (1952).

43. Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808).

its sovereignty by arms, must be considered and treated by other nations as sovereign in fact." [44] To this Chief Justice Marshall replied:

> "It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting." [45]

Chief Justice Marshall's reminder that exclusive power to recognize the independence of a foreign colony in revolt was lodged elsewhere than in the courts was both timely and indubitably correct. In whatever measure the law of nations might concern itself with such business, its practices or precepts were for the guidance of another than the judicial arm. The same was true presumably of the power to recognize belligerency in similar circumstances.[46] It is not so clear that the principle had a decisive relevance when it came to interpreting the neutrality statutes. It was soon so concluded, however, and in a case in which the "political question" of external relations and the "politics" of internal bickering became oddly intermingled.

After the French had been driven out of St. Domingo, the rival rebel leaders Pétion and Christophe fought each other. One Hoyt fitted out a ship in the United States to aid Pétion. In so doing, if he fitted out "with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace," he violated the Neutrality Act of 1794.[47] On instructions from President Madison, Gelston as collector of customs of the district of New York seized the ship for alleged violation and initiated forfeiture proceedings in the federal court. The forfeiture suit was dismissed and a certificate of reasonable cause denied. Hoyt then sued Gelston for trespass in the state court,

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44. *Id.* at 271.

45. *Id.* at 272. *Rose v. Himely* was one of a group of cases concerned with French forfeitures of American ships for trading with the St. Domingo rebels. It was decided by majority vote without majority reasoning. The reasons given for denying the jurisdiction of the French tribunal were soon repudiated. See Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808), 10 U.S. (6 Cranch) 281 (1810); Dickinson, *Jurisdiction at the Maritime Frontier,* 40 HARV. L. REV. 1, 6-9 (1926). This left Chief Justice Marshall's response to the argument for judicial recognition of *de facto* sovereignty as about the only contribution of enduring consequence which the case can be said to have made. See United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634, 643 (1818).

46. See LAUTERPACHT, *op. cit. supra* note 42, at 175; Garner, *Recognition of Belligerency,* 32 AM. J. INT'L L. 106 (1938).

47. Act of June 5, 1794, c. 50, 1 STAT. 381.

where judgment went for Hoyt. On writ of error the Supreme Court of the United States affirmed for two reasons, either of which was considered decisive.[48] The first was technical: dismissal and denial of a certificate in the federal court were conclusive as to the tortious character of the seizure. The second went to the applicability of the neutrality legislation: absent anything to show that either Pétion or Christophe had been recognized by the United States or France as a "foreign prince or state," there could be no case under the statute. Said Justice Story for the Court:

> "No doctrine is better established, than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of Rose v. Himely . . . and to that decision on this point we adhere." [49]

The principle thus formulated was much more pertinently applied by Chief Justice Taney, a generation later, in a case arising out of the Texans' war for independence. The suit began in the federal court in Texas as one for specific performance of a contract to convey Texas lands. The contract had been concluded in Ohio in 1836 in consideration of an advance of funds to enable the defendant to arm and equip volunteers for Texas in its war with Mexico. The contract was made a few months after Texas declared its independence but about six months before United States' recognition. Plaintiffs argued that Texas at the time was independent in fact—"a fact not depending upon any question of recognition by other and different nations." Defendant countered successfully in reliance upon *Rose v. Himely* and *Gelston v. Hoyt*. Whether in violation of the neutrality laws or not, the contract was clearly illegal as one to promote revolt in a nation with which the United States was at peace. Whether Texas was independent was a political question to be determined by the department responsible for

48. Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818).

49. *Id.* at 324. There was nothing to show that Congress had intended to restrict its legislation to situations involving a recognized "foreign prince or state." The executive had proceeded on a more liberal reading of the statute and was considerably embarrassed in its conduct of foreign relations by the restrictive judicial interpretation. While *Gelston v. Hoyt* was still in the courts, Congress amended the law in accord with the executive interpretation by inserting after "foreign prince or state" the words "or of any colony, district or people." Act of March 3, 1817, c. 58, 3 STAT. 370; Act of April 20, 1818, c. 88, 3 STAT. 447. Years later, in a case governed by the amended text, the statute was held applicable to recognized insurgents though neither their belligerency nor statehood had been acknowledged. The Three Friends, 166 U.S. 1 (1897).

foreign relations.[50] Elaborating upon the latter point, Chief Justice Taney said:

> "It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department." [51]

It will be observed that these early cases in the recognition line were concerned with the recognition of new states, "in the revolutions which may occur in the world," and that the Supreme Court was consistently emphatic that the decision to grant or to withhold must be considered exclusively "political." Deductions from that premise may have been less convincing in one case than in another, but the premise itself was assuredly well based in the constitutional distribution of powers. The same premise has been controlling in cases concerned with the recognition of new governments, as governments have been made or unmade in revolution, and notwithstanding an asserted continuity of the state itself in contemplation of law.[52] "The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it." [53] To this end recognition is timely, it appears, if it comes at any time before final judgment.[54] Until recognized, the successor foreign government has no standing in court.[55] As Justice Stone remarked, in one of the Russian cases: "What government is to be regarded here as representative of a

50. Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).

51. *Id.* at 50-51.

52. See LAUTERPACHT, *op. cit. supra* note 42, at 87; Brown, *The Recognition of New Governments,* 26 AM. J. INT'L L. 336 (1932).

53. The Sapphire, 78 U.S. (11 Wall.) 164, 168 (1871).

54. Republic of China v. Merchants' Fire Assurance Corp., 30 F.2d 278 (9th Cir. 1929).

55. See Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938); *Research in International Law, Draft Convention on Competence of Courts in Regard to Foreign States, Art. 3,* 26 AM. J. INT'L L. 451, 503 (Supp. 1932); Doukas, *supra* note 42, at 1081; Note, *The Legal Effects of Non-Recognition of Governments,* 36 MINN. L. REV. 769 (1952).

foreign state is a political rather than a judicial question, and it is to be determined by the political department of the government." [56]

Other recognition cases in the Supreme Court have been concerned chiefly with legal effect and particularly with the question of a retroactive legal effect. Recognition of a new state born in revolutionary separation from a friendly state does not legalize retroactively a prior private contract which was illegal because made in aid of the revolution.[57] Nor does recognition of the revolutionary government of a continuing state retroactively lift the bar of a local limitations statute which has run in consequence of inaction on the part of the preceding governmental regime.[58] On the other hand, recognition of a revolutionary government has been held to clear the way retroactively for application of the "act of state" doctrine. It was so held initially in cases involving foreign governmental acts having an immediate effect inside the territory of the foreign state only.[59] The same reasoning prevailed later with respect to foreign governmental acts intended to expropriate the assets of nationals abroad. In the result, the purpose having been sufficiently indicated in executive agreements related to the act of recognition and the resumption of diplomatic relations, it was concluded that recognition should operate retroactively to make effective the earlier Soviet decrees purporting to nationalize Russian assets in the United States. Such in one aspect was the import of the *Belmont* and *Pink* cases.[60] It was said in the *Pink* case that the executive decision to settle claims and take the Litvinov Assignment of nationalized Russian assets in this country was "part and parcel of the new policy of recognition." "We would usurp the executive function," concluded Justice Douglas for the majority, "if we held that that decision was not final and conclusive in the courts." [61]

56. Guaranty Trust Co. v. United States, *supra* note 55, at 137.

57. Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).

58. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Jessup, *The Litvinov Assignment and the Guaranty Trust Company Case,* 32 AM. J. INT'L L. 542 (1938); Note, 90 U. PA. L. REV. 607 (1942).

59. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897); *cf.* Civil Air Transport, Inc. v. Central Air Transport Corp. [1953] A.C. 70 (1952), 101 U. PA. L. REV. 1078 (1953).

60. United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). As regards recognition and its effect, the Court's reference in each case was to Underhill v. Hernandez, *supra* note 59, and Oetjen v. Central Leather Co., *supra* note 59. For comment see Borchard, *Extraterritorial Confiscations,* 36 AM. J. INT'L L. 275 (1942); Jessup, *The Litvinov Assignment and the Pink Case,* 36 AM. J. INT'L. L. 282 (1942); Notes, *The Pink Case, the Recognition of Russia and the Litvinov Assignment,* 30 GEO. L.J. 663 (1942); *United States v. Pink—A Reappraisal,* 48 COLUM. L. REV. 890 (1948).

61. 315 U.S. at 227, 230. What further objectives might the executive exploit, and with what retroactive effects, by the device of integration with a policy of recognition? The question is interesting and important but beyond the scope of the present study.

Of precedents in the recognition line thus established in cases before the Supreme Court it may be said, in general, that they have not been numerous, that most of them have turned upon the relatively obvious delimitations of executive and judicial power, and that to date they have contributed little to illuminate the more difficult problems of relevance and effect. As we learned in the years prior to recognition of a government in Communist Russia, and as we are learning again in the presence of an unrecognized government in Communist China, there are matters for the courts in which the executive's "political" decision is relevant and decisive and others in which its relevance is so remote as to be without present legal effect. Lower federal and state courts have had to struggle with a multiplicity of these matters, and they have had to find their way with a minimum of guidance from the nation's highest tribunal.

On what would seem to have become rather elementary propositions, the highest tribunal has left no surviving doubts. The executive grants or withholds recognition of new states or new governments in the world by virtue of its separate and unique responsibility for the conduct of foreign relations. On a question of recognition or no recognition, the courts have only to ascertain and conform. This same controlling "political" authority, it may be added, includes of necessity the power to decide who are foreign chiefs of state, heads of government or diplomatic representatives. It may include also, perhaps more as a matter of convenience than necessity, the ascertainment from foreign sources of essential facts with respect to such foreign governmental instrumentalities as aircraft, surface vehicles or ships. At this point we may turn conveniently to the problem of the "political question" in cases concerned with claims to sovereign immunity.

IV.

There have been some special reasons for the agitation in recent years of a novel "political question" in the case law of sovereign immunity. In the first place, to a degree perhaps unequaled and certainly unexceeded elsewhere in the case law of external affairs, there have been from the beginning overlappings and a potentially troublesome interdependence involving all three of the principal departments of government. The legislative has contributed something and has been at all times in a position to contribute more; the executive has been encouraged to cultivate a role of expanding importance; and over the years the judiciary has had an impressive volume of case business. In the second place, a substantial segment of the litigation with respect to sovereign immunity has concerned ships and has been prosecuted

in the admiralty courts where the proceeding in rem gives the complaining litigant a unique procedural advantage. If the libelant is in position to claim a lien, he libels the ship and thus compels the foreign government to come forward with the claim to immunity, if it has one, or to persuade someone to whom the court will listen to interpose in its behalf. In the course of such case business, there has developed a special and, it would seem, a somewhat misunderstood procedure. In the third place, in its recent phase, this same procedural development has produced proposals for abdication of the judiciary's historic and constitutional role which are as extraordinary as may be found anywhere in the troubled history of the separation of governmental powers. Emanating from a high source, the proposals have spread a strange confusion with respect to judicial power and the corresponding judicial responsibility.[62]

The claim of sovereign immunity under the law of nations had its initial and, as it proved, its classical consideration in American case law in the famous opinion of Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*.[63] An American merchantman had been taken by the French under Napoleon's decrees, commissioned a French man-of-war, and later brought into the port of Philadelphia where it was libeled to restore possession to the ousted American owners. There followed a succession of procedural notices to which no intervening claimant responded; but presently the United States Attorney appeared and, at the direction of the executive department of the National Government, as it was understood, filed something called a "suggestion." [64] The suggestion consisted of a statement of legal conclusion to the effect that French public vessels were exempt from arrest in United States ports, a statement of alleged facts with respect to the vessel here libeled, and a prayer that the libel be dismissed. The district court dismissed; the circuit court reversed; and on appeal the Supreme Court reversed the circuit court and affirmed the district court's decree. Drawing upon analogies with the immunities traditionally accorded foreign sovereigns, diplomats and troops, Chief Justice Marshall concluded

62. In general, on the interdependence of governmental powers in matters of sovereign immunity, particularly in litigation concerning foreign ships, and the current confusion with respect to delimitations of judicial and executive responsibility, consult Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1 (1940); Lyons, *The Conclusiveness of the "Suggestion" and Certificate of the American State Department*, 1947 BRIT. Y.B. INT'L L. 116; Notes, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, 58 YALE L.J. 176 (1948); *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148 (1954); see also *Research in International Law, Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 451 (Supp. 1932).

63. 11 U.S. (7 Cranch) 116 (1812).

64. On the suggestion as a procedural device, see Lyons, *supra* note 62.

that it was a principle of public law, in harmony with the usages and received obligations of the civilized world, "that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." [65] The principle and its application having been approved, it was thought to follow of necessity that "the fact might be disclosed to the Court by the suggestion of the Attorney for the United States." [66]

Of *The Schooner Exchange* it is to be remarked that it was taken up as a case of first impression and major importance, that it was ably and fully argued, the argument in support of the Government's suggestion being presented by District Attorney Dallas and Attorney General Pinckney, and that neither counsel nor Court regarded the suggestion as in any respect an overriding or conclusive exercise of executive power. While the suggestion was accorded much weight, no doubt, the case was one for judicial determination. It was so determined and promptly became a leading case on sovereign immunity not only in the United States but elsewhere throughout much of the civilized world.

In the wake of *The Schooner Exchange,* and in the course of the ensuing one hundred years, there accumulated in the United States a substantial body of case law on sovereign immunity. Some part of it had to do with ships. In the period of the first World War and after, an extensive requisitioning of private ships and a vastly expanded participation of public-owned ships in the ordinary carrying trade produced numerous and difficult questions. The principal question was whether traditional doctrine should cloak with immunity an expanding government enterprise or whether distinction and limitation should be approved. While the principal maritime countries responded in divers ways, a trend toward limitation was soon clearly indicated. In the United States the response of the Supreme Court was along two lines: in the first place, the procedure whereby claims to immunity might be presented for judicial determination was channeled with some attempt at precision and firmness; and in the second place, on the substantive question, in a curious demonstration of judicial myopia, the Court rejected distinction and resolved in favor of immunity unlimited.

The firming up of procedure came in the case of *Ex parte Muir.*[67] A privately owned British ship had been libeled in a case of collision. Appearing as amici curiae, counsel for the British Embassy presented a suggestion that the ship had been requisitioned and was being em-

65. 11 U.S. (7 Cr.) at 145.
66. *Id.* at 147.
67. 254 U.S. 522 (1921).

ployed in transport service by the British government and that in consequence it should be considered immune. When the suggestion was rejected, the master applied to the Supreme Court for prohibition and mandamus. The Court ruled that the claim to immunity had been improperly presented and denied the writs. It was said that correct procedure required either an appearance by the British government, or an appearance by its accredited representative, or an appropriate suggestion communicated by the executive department of the Government of the United States. "The reasons underlying that practice," said Justice Van Devanter for the Court, "are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due it, and tends to promote harmony of action and uniformity of decision." [68]

As instances in which a correct procedure had been previously followed, Justice Van Devanter cited *The Schooner Exchange* and two other early American cases in which a suggestion of immunity had been communicated by the executive department.[69] There was nothing in the reasoning or the rulings of these cases which excluded communication of a suggestion by others or in some other way; and in other cases, as it appears, courts had been tolerant of a varying practice. In now making executive communication exclusive, the Court in *Ex parte Muir* and decisions soon to follow was consciously or unconsciously announcing a reform of procedure.[70] Claims to public status and immunity were multiplying as never before, and it may well be concluded that the reform was a desirable one. It is not apparent, however, that it required the verbal trappings of import attributed to earlier precedent and present disclosure in authoritative revelation. The new rule of procedure would have been equally efficacious and less vulnerable to misunderstanding if it had been introduced in its true character.

The Supreme Court's commitment on the substantive question came in *Berizzi Bros. Co. v. S. S. Pesaro*.[71] A merchant ship owned by the Italian government and operated in the carrying trade had been libeled in rem in the district court for breach of an affreightment contract. After some earlier misadventures at the procedural hurdle, the

68. *Id.* at 533.

69. The Schooner Exchange, 11 U.S. (7 Cr.) 116 (1812); The Cassius, 2 U.S. (2 Dall.) 365 (1796); The Pizarro, 19 Fed. Cas. 786, No. 11199 (S.D.N.Y. 1852).

70. See The "Gul Djemal," 264 U.S. 90 (1924); The Sao Vicente, 260 U.S. 151 (1922); The Pesaro, 255 U.S. 216 (1921); see also Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83 (1931); Riesenfeld, *supra* note 62, at 46; 26 ILL. L. REV. 215 (1931).

71. 271 U.S. 562 (1926).

Italian Ambassador entered an appearance and claimed immunity in his government's behalf. The district court sustained the claim and the libelant appealed. Thus an issue at once novel and important was brought at last to the Court's reluctant attention.

Time and circumstance lent strong support to the argument that sovereign immunity should not be extended to government operations in a commercial as distinguished from a public or sovereign capacity. The Italian government, here interposing a claim to immunity, would have denied immunity in Italy to both its own and foreign state-owned ships similarly employed. The United States Government was claiming no immunity for its own ships so employed. Indeed, an act of Congress of 1916 had subjected ships of the United States employed solely as merchant ships to "all the laws, regulations and liabilities governing merchant vessels;" and the same broad principle, arrest or seizure excluded, had been reaffirmed in the Suits in Admiralty Act of 1920.[72] The resolutions of recent international conferences had revealed a widespread opposition to immunity for government ships in trade; and only a little less than two months before the Supreme Court's decision in the case of *The Pesaro,* this opposition had been implemented in an important convention signed at the Conference of Brussels.[73] The Department of State was on record as of opinion that government vessels employed in commerce were not entitled to the immunities accorded public vessels of war.[74] In an earlier district court opinion, obtained in the course of this same litigation, Judge Mack had explored the issue with patience and impressive learning and had concluded that immunity should be denied.[75]

All this notwithstanding, the Supreme Court rejected distinction and extended immunity. The principles of *The Schooner Exchange* were found applicable. An "agglutinative" and completely uninspired opinion concluded with approval of the proposition that "merchant ships owned and operated by a foreign government have the same immunity that warships have." [76]

The decision in *The Pesaro* was widely criticized as mistaken and unfortunate. As yet there was no question that it had been a proper case for judicial determination. It was only that it had been badly

72. 41 STAT. 525 (1920), 46 U.S.C. §741 (1952); see Note, *The Maritime Liability of the United States,* 100 U. PA. L. REV. 689 (1952).

73. 3 HUDSON, INTERNATIONAL LEGISLATION 1837 (1931); 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 463 (1941); Riesenfeld, *supra* note 62, at 57.

74. See 2 HACKWORTH, *op. cit. supra* note 73, at 437; and the Solicitor's Letter of August 2, 1921, in the Pesaro, 277 Fed. 473, 479 n.3 (S.D.N.Y. 1921).

75. The Pesaro, 277 Fed. 473 (S.D.N.Y. 1921).

76. 271 U.S. at 576.

decided.[77] In the lengthening shadows of criticism, however, the observer would soon detect more radical proposals. It would appear that some of the Justices of the Supreme Court, in a strange manifestation of judicial remorse, were in a mood to abandon the entire business to executive determination. Here was something novel indeed in the judicial approach to distribution of responsibility under the Constitution. As regards claims to sovereign immunity, at least, the exploitation of such a mood could put the executive in the business of judicial administration.

The new mood appears to have found its first clear expression in a dictum in *Compania Espanola De Navigacion Maritima, S. A. v. The Navemar.*[78] A Spanish corporation had sued in admiralty to recover possession of a merchant vessel. There had been a default decree. The Spanish Ambassador advanced a claim that the ship belonged to his government. When the Department of State declined to interpose a suggestion of immunity and referred him to the courts, the Ambassador applied for leave to intervene with a verified suggestion that the ship had been expropriated and that possession had been taken by Spanish consular officials in Argentina. The Supreme Court found the verified suggestion sufficient as a statement of contention but not as proof. It was held that the Ambassador should have been permitted to intervene as claimant if so advised.[79]

So much for the actual decision in the case of *The Navemar.* Attention may now turn to a dictum as disembodied as any likely to be encountered in the opinions of even our more articulate judges. Citing in support the same three cases to which Justice Van Devanter had referred in *Ex parte Muir* as examples of an appropriate procedure,[80] Justice Stone declared: "If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction." [81] This assertion was plainly irrelevant to any issue before the Court, and it had no support in the cases cited. An executive suggestion of immunity was filed in each of the three cases; but in *The Cassius,* with-

77. Fairly illustrative of a rather widespread reaction, see Sanborn, *The Immunity of Merchant Vessels When Owned by Foreign Governments,* 1 ST. JOHN'S L. REV. 5 (1926); Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution,* 27 MICH. L. REV. 751 (1929); 40 HARV. L. REV. 126 (1926); 36 YALE L.J. 145 (1926).

78. 303 U.S. 68 (1938).

79. For a detailed and careful review of this litigation, see Preuss, *State Immunity and the Requisition of Ships During the Spanish Civil War,* 36 AM. J. INT'L L. 37 (1942); *cf.* Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938).

80. See note 69 *supra.*

81. 303 U.S. at 74.

out ever reaching the suggestion, the suit was dismissed as improperly brought in the circuit court; in *The Schooner Exchange,* as hitherto pointed out, the suggestion provided no more than a statement of contention which was ably and fully argued and ultimately resolved by the Court; and in *The Pizarro,* a case of collision, there was neither deviation from nor limitation of the pattern of judicial disposition previously established in *The Schooner Exchange.* It appears, in truth, that the conception of executive recognition and allowance of immunity as a "political" determination, to be accepted as conclusive in the courts, originated with Justice Stone and not in anything to be derived from the earlier precedents or practices to which he made reference.

Whatever its origin, the conception was soon to have application in a decision of the highest court. In *Ex parte Peru,*[82] a Cuban corporation libeled a Peruvian steamship for breach of its undertaking to carry a cargo of sugar as agreed in the charter party. The Republic of Peru intervened as claimant, put up bond for the vessel's release, took some testimony on the merits and obtained an extension of time, reserving at each stage all defenses and particularly the defense of sovereign immunity. At the same time the Peruvian Ambassador sought and obtained the interposition of the Department of State. Apparently taking its law from *The Pesaro,* and its language from Justice Stone's dictum in *The Navemar,* the Department presently advised the Attorney General that it accepted the Ambassador's statements concerning the steamship as true and that it recognized and allowed the claim of immunity. In due course an appropriate suggestion incorporating all this was filed by the United States Attorney. Concluding that immunity had been waived, the district court refused to dismiss. Peru then moved for prohibition or mandamus in the Supreme Court and there Peru's motion was granted. The Court was not convinced that there had been a waiver. What it would have done had there been waiver without qualification there was no occasion to decide. The question to be decided was whether the jurisdiction which the district court had acquired should have been relinquished "in conformity to an overriding principle of substantive law."

> "That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. . . . Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to

82. 318 U.S. 578 (1943).

> the relief obtainable through diplomatic negotiations. . . . 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." [83]

Thus for the first time the State Department's view or understanding of a preferred practice, when interposed in a particular case by the device of suggestion, was accepted by the Court as "a conclusive determination by the political arm of the Government." [84] For authority Chief Justice Stone was obliged to rely chiefly upon his own earlier dictum in *The Navemar*. It appears, in truth, that until the Chief Justice invented it there was no such "overriding principle of substantive law" as he asserted, and that until he himself had formulated it there was no such recognition of an underlying policy. So far as the Department of State was concerned, indeed, it had been traditionally and meticulously careful to refrain from action which might constitute interference in litigation. It was one thing for the Department to have its own view of policy, or of what the law of nations might permit or require, and to utilize the device of suggestion to the end that the Attorney General might present its view for judicial consideration in a particular case. It was quite another thing to undertake the actual disposition of cases in which a foreign government had claimed immunity. It was for such business, however, that it was now invited to assume a controlling responsibility.

The development of Chief Justice Stone's novel proposition that the executive suggestion and certificate should be conclusive in the immunity cases was rounded out boldly in *Republic of Mexico v. Hoffman*.[85] There was a suit in rem for collision damages against a merchant vessel owned by the Mexican government. Mexico sought a suggestion of immunity, but the Department of State would go no further than to accept its claim of ownership as true and direct attention to two cases in which a decision had turned upon proof of possession.[86] The district court found that the vessel was in the possession of a private commercial corporation and denied immunity. The circuit court of appeals affirmed, as did the Supreme Court. There was ample authority for regarding the factor of possession as decisive, said

83. *Id.* at 588-89.

84. *Id.* at 589.

85. 324 U.S. 30 (1945).

86. Compania Espanola De Navigacion Maritima, S. A. v. The Navemar, 303 U.S. 68 (1938); Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938).

the Chief Justice, but more important, and "controlling in the present circumstances," was consistent executive refusal to recognize a claim to immunity in cases of this kind. Here the Chief Justice found opportunity to add further implications to the dogma of "political" conclusiveness, while at the same time supporting his argument with whatever might be attributed to a confident third assertion.[87] "It is therefore not for the courts to deny an immunity which our government has seen fit to allow," he said, "or to allow an immunity on new grounds which the government has not seen fit to recognize." [88]

> "We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize." [89]

So it has developed that in certain matters of sovereign immunity, the misconception of a procedural device has provided excuse for retreat from an historic judicial role. The retreat may well give rise to serious constitutional misgivings.[90] Our best informed professional critic asks pointedly: "Has the Supreme Court Abdicated One of Its Functions?" [91] The answer is that it has, indeed, and that in so doing it has embarrassed the Department of State with responsibilities for which that agency of the Government is quite unprepared and which it cannot properly assume. From an initial acquiescence in the ruling

87. Again misinterpreting *The Schooner Exchange,* the Chief Justice cited in support his own unsupported dictum in *The Navemar* and the application made of the dictum in his own opinion for the Court in *Ex Parte Peru.* 324 U.S. at 34-35. The present writer has no way of knowing who researched the earlier precedents for the learned Chief Justice at any stage of this extraordinary development. Or were they researched? Perhaps there is a clue in the Butcher's lines from "The Beaver's Lesson" in Lewis Carroll's The Hunting of the Snark:

> 'Tis the song of the Jubjub! The proof is complete,
> If only I've stated it thrice.

88. 324 U.S. at 35. The Chief Justice footnoted that "This salutary principle was not followed in Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562." *Id.* at 35 n.1.

89. *Id.* at 38; see also Justice Frankfurter, concurring, *id.* at 41-42.

90. *Cf.* the Court's ultimate repudiation of its overreachings in the relations of nation and state after *Swift v. Tyson.* See Dickinson, *supra* note 1, at 797-801. Is an underreaching in the relations of the national departments of Government comparably objectionable? *Cf.* remarks of Chief Justice Fuller in the *Cooper* case. 143 U.S. at 503.

91. Jessup, *Has the Supreme Court Abdicated One of Its Functions?,* 40 AM. J. INT'L L. 168 (1946). Initially the present writer was unprepared to accept "judicial abdication" as a fair description of what happened in *Republic of Mexico v. Hoffman.* Dickinson & Andrews, *A Decade of Admiralty in the Supreme Court of the United States,* 36 CALIF. L. REV. 169, 215 (1948). However, further study of the problem in its more embracing context has been completely convincing. Professor Jessup was admirably restrained. The present writer's earlier reaction is recanted herewith.

of *The Pesaro* and utilization of the verbalisms of *The Navemar* and *Ex parte Peru,* the Department has since moved on to a reconsideration of its policy with respect to the immunities of state-owned ships in trade. In the result, it no longer respects the doctrine of *The Pesaro,* but accepts, as in accord with an approved international practice, "the restrictive theory of sovereign immunity." [92] The executive's proper role might be further clarified if the Department would now abandon as well the verbalisms of *The Navemar* and *Ex parte Peru.* Fortunately it has not attempted to hold hearings or conduct trials, as another critic has suggested that it should, in order that the private litigant may be assured of his "day in court." [93]

On the judicial side it remains to urge upon the Supreme Court, at the first appropriate occasion, an unqualified repudiation of *The Pesaro* and at the same time, or as soon as may be, a like repudiation of the deviation first forecast in dictum in *The Navemar.* It is not apparent that anything less can clear up the confusion prevailing in the lower and local courts. Increasingly of late judges have been prompted to seek executive advice, not simply as to the status of a foreign government or its agents, nor even as to the executive view of a relevant foreign policy, but essentially and at times quite bluntly as to how a particular case should be decided.[94] It is constitutionally correct and traditionally proper, of course, that courts seek executive advice as to the status of a foreign government or its agents whenever there remains a pertinent doubt after the resources of judicial notice have been exhausted. It is also constitutionally correct and traditionally proper that courts take judicial notice of a foreign policy, such as that

92. "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments," Letter From Acting Legal Adviser, Department of State, to Acting Attorney General, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952). Among other reasons for a change of policy, it is said that ". . . the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." The Letter continues: "It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations." *Id.* at 985. See Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L L. 93 (1953).

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

94. See New York & Cuba Mail Steamship Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Hungarian People's Republic v. Cecil Associates, 118 F. Supp. 954 (S.D.N.Y. 1953). There are other interesting instances of somewhat earlier vintage among the cases discussed or cited in Cardozo, *supra* note 93; Deák, *The Plea of Sovereign Immunity and the New York Court of Appeals,* 40 COLUM. L. REV. 453 (1940); Kuhn, *The Extension of Sovereign Immunity to Government-Owned Commercial Corporations,* 39 AM. J. INT'L L. 772 (1945); Lyons, *supra* note 62, at 132-45.

recently announced by the Department of State with respect to claims of sovereign immunity, and that they give decisive effect to such a policy when satisfied as to its import and that it is properly applicable in the particular case. Finally, it is constitutionally correct and traditionally proper that courts be informed by the executive, through the device of the suggestion initiated in the Department of State and communicated by the Attorney General, of the questions of foreign policy which may have arisen from the protests of foreign governments or otherwise concerning pending litigation, of the alleged factual bases of such protests, and of the executive view of any aspect of a policy which may be deemed relevant. Such a suggestion is an approved basis for the Attorney General's intervention. It goes without saying that it will generally be accorded much weight by the court. With a proper regard for the distribution of powers among the departments of the Government, however, it is suggested that the executive power should spend its force at this point. There is an overlapping and interdependence of executive and judicial powers, to be sure, but to concede as much is assuredly not to concede that the administration of justice at this point becomes other than a judicial responsibility.

V.

A fourth line of cases, noteworthy for its contribution to judicial discussion of "political questions" at the highest level, has been concerned with the exclusion and expulsion of aliens. Here, in some resemblance to matters of recognition, the relevant practices and precepts of the law of nations have been restricted in scope and generally permissive in effect. Here, in patent contrast to matters of recognition, it has been consistently assumed and frequently emphasized that what the United States may choose to do as a nation is for the legislative department of the National Government to determine. Absent a substantial question of constitutionality or statutory interpretation, the judicial department has only to secure to litigants a proper application of the statutory scheme which the legislature has enacted. All this is so commonplace that one may wonder why it has seemed relevant to talk of "political questions" at all.

Relevance of the "political" appears to have been suggested initially by two considerations: first, as elsewhere in so much of foreign relations law, the national power has been presented as an essential incident or attribute of national sovereignty; and secondly, should the power be abused in legislative action of concern to other nations—assuming that even a restricted and permissive international practice

may have set somewhere and in some circumstances limitations which the nation ought to respect—it is not for the judicial department to denounce the error of legislative ways on a question of international responsibility. The legislative action controls the courts. Remedies are to be sought elsewhere.

It is perhaps significant that the leading case on exclusion of aliens was one of impressive hardship and one that, had it been of concern to a foreign nation of greater power, might well have provided the basis for a successful claim of international responsibility. A Chinese laborer had resided lawfully in the United States for some twelve years, had visited China carrying a statutory certificate which entitled him to return to the United States, and had been denied reentry under a later statute which became effective while he was en route returning and about a week's sailing out of San Francisco. The later statute was attacked as in violation of existing treaties and of rights vested under the earlier legislation. Both contentions were rejected in the famous *Chinese Exclusion Case*.[95] It was held that the later statute was a constitutional exercise of legislative power, that so far as it conflicted with existing treaties it operated to abrogate them as part of the municipal law of the United States, and that the right conferred by certificate issued in pursuance of previous laws could be taken away by the later enactment. Said Justice Field for a unanimous Court:

> "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . .
>
> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. . . . Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination." [96]

95. 130 U.S. 581 (1889).

96. *Id.* at 603, 609.

It is familiar learning that later cases concerned with the exclusion of aliens have reaffirmed and applied the basic premises of the *Chinese Exclusion Case*.[97] Exclusion has been called "a fundamental act of sovereignty." [98] The power is in Congress. The Congress may vest administration in executive officials. The procedure pursuant to which executive officials are authorized to administer has been said to be as much of procedural due process as the alien is entitled to claim of right. Said Justice Minton for the majority in *Knauff v. Shaughnessy:* "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." [99]

Since the nation may exclude aliens pretty much as it pleases, it has been thought to follow that it may prescribe the conditions upon which they are permitted to enter and to remain and the circumstances which may require their expulsion or deportation. As in exclusion cases, it has been agreed that the power to expel is an incident of national sovereignty, that its exercise is determined and regulated by the national legislative department, and that administration may be vested in the executive without routine judicial review. The judiciary intrudes no opinion, it may be added, as to the propriety vis-a-vis other nations of a course of action thus determined and implemented by the "political" departments of government.[100]

At the same time it should be emphasized that in matters of expulsion there are national constitutional limitations which have a more

97. See Shaughnessy v. Mezei, 345 U.S. 206 (1953); Knauff v. Shaughnessy, 338 U.S. 537 (1950); Nishimura Ekiu v. United States, 142 U.S. 651 (1892). With the *Mezei* case, *cf.* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); see also 51 MICH. L. REV. 1231 (1953); 28 N.Y.U.L. REV. 893, 1042 (1953); 27 So. CALIF. L. REV. 315 (1954); Note, 3 UTAH L. REV. 349 (1953).

98. Knauff v. Shaughnessy, *supra* note 97, at 542.

99. *Id.* at 543. For a devastating critique of the recent exclusion cases and of the assumed distinction between exclusion and expulsion, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1386-96 (1953). Due process requires a fair hearing, of course, where the claim is to right of reëntry as a natural born citizen. Kwock Jan Fat v. White, 253 U.S. 454 (1920).

100. See Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Galvan v. Press, 347 U.S. 522 (1954); The Japanese Immigrant Case, 189 U.S. 86 (1903); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

Expulsion is not punishment for crime and the prohibition of ex post facto laws has been held inapplicable. Bagajewitz v. Adams, 228 U.S. 585 (1913). In Mahler v. Eby, 264 U.S. 32 (1924), citing Fong Yue Ting v. United States, *supra,* Chief Justice Taft again rejected the argument that expulsion is punishment and remarked: "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments." 264 U.S. at 39. In the same opinion, rejecting the argument that the legislative power had been improperly delegated, Chief Justice Taft observed: "The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise

obvious relevance. The alien within the country is after all a "person" within the range of important safeguards of individual liberty. Thus the legislative department may not prescribe ruthlessly in disregard of the constitutional limitations with which criminal prosecutions are circumscribed.[101] Nor may the executive charged with administration proceed in arbitrary disregard of its statutory mandate or of the fundamentals of procedural due process.[102] It results somewhat oddly that the judicial department, in administering the restraints of a national constitution, may conceivably save the nation from an international responsibility with respect to which it is in no position otherwise to express an effective opinion.[103]

Of the later cases on expulsion, *Harisiades v. Shaughnessy*[104] merits more than a passing citation. The aliens had been brought to the United States in their youth, had resided legally in the United States for more than thirty years and had married and had children born United States citizens. Under the Alien Registration Act of 1940, they were ordered deported for having had memberships in the Communist Party which the Party purported to have terminated prior to the enactment of the statute. The Supreme Court sustained the deportations. Present interest is chiefly in an emphasis upon the "political" which runs throughout much of the majority opinion. On the one hand, curiously enough, the discussion of the nation's power to expel suggests a possible propriety in independent judicial consideration. This suggestion is in conflict, of course, with a consistent emphasis upon impropriety which dates back at least to the *Chinese Exclusion Case*. This part of the opinion by Justice Jackson concludes:

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it without congressional authority, Congress can not exercise it effectively save through the executive." *Id.* at 40.

See Boudin, *The Settler Within Our Gates,* 26 N.Y.U.L. REV. 266, 451, 634 (1954); Hart, *supra* note 99; Note, *The Alien and the Constitution,* 20 U. CHI. L. REV. 547, 551 (1953); see also Notes, *Protecting Deportable Aliens from Physical Persecution: Section 243(h) of the Immigration and Nationality Act of 1952,* 62 YALE L.J. 845 (1953); *Denial of Exit Permits to Aliens During National Emergency,* 103 U. PA. L. REV. 797 (1955).

101. Wong Wing v. United States, 163 U.S. 228 (1896).

102. Vajtauer v. Commissioner, 273 U.S. 103 (1927); Tisi v. Todd, 264 U.S. 131 (1924); The Japanese Immigrant Case, 189 U.S. 86 (1903). On executive discretion to deny bail, see Carlson v. Landon, 342 U.S. 524 (1952); and on the relevance of the Administrative Procedure Act, see Marcello v. Bonds, 349 U.S. 302 (1955). Due process requires judicial determination, of course, where expulsion is resisted in reliance upon a claim to citizenship by birth. Ng Fung Ho. v. White, 259 U.S. 276 (1922).

103. Illustrative of international responsibility for arbitrary expulsion, see the Hollander Case, 2 FOREIGN REL. U.S. 775 (1895); Boffolo Case, Venezuelan Arbitrations 696 (1903); BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 57 (1915).

104. 342 U.S. 580 (1952), 21 GEO. WASH. L. REV. 104.

> "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it." [105]

On the other hand, in its discussion of procedural due process in exercise of the power, the opinion labors the dominant position in these matters of "the political branches of government" and the elusive "line of separation" between "political" and judicial power. It is clear enough upon attentive reading that Justice Jackson had no thought of putting the question of procedural due process beyond the reach of judicial consideration; but it seems equally clear, recalling the place and import of the "political question" in our national law, that his language was unfortunately chosen. As to due process in expulsion, harshly as the power had been exercised, he concluded that there was no basis in the present state of the world for judicial intervention "to call a halt upon the political branches of the Government." [106]

There is some clarification of both thought and expression in the opinion by Justice Frankfurter in the more recent case of *Galvan v. Press*.[107] The case arose under the Internal Security Act of 1950 requiring deportation of aliens who had been members of the Communist Party at any time after entry and dispensing with the earlier statute's requirement of proof in each case that the Party advocated violent overthrow of the Government. Again, on the facts, expulsion was impressively harsh; and again the deportation order was sustained. For the majority Justice Frankfurter remarked that, in the light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, much could be said for the view, "were we writing on a clean slate," that due process "qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens."

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect

105. 342 U.S. at 587-88.

106. *Id.* at 588; *cf.* language from Chief Justice Taft's opinion in Mahler v. Eby, 264 U.S. 32 (1924), quoted in note 100 *supra;* and Justice Jackson's dissent in Shaughnessy v. Mezei, 345 U.S. 206, 218 (1953).

107. 347 U.S. 522 (1954), 7 ALA. L. REV. 127.

> the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." [108]

The preceding discussion of cases concerned with the exclusion and expulsion of aliens was introduced with generalities to the effect that among the nations international practice concedes wide ranging powers and that within the nation, under the Constitution, the exercise of these powers is a legislative responsibility. Three further observations of a general nature may now be added. For one, while it is axiomatic that the Court intrudes no opinion as to the wisdom or unwisdom of a course of action determined and implemented by Congress, it is not apparent that this is judicial deference to "political" power in any sense unique or different from a like deference to competent legislative action in other areas. It might contribute something to a greater clarity of thought and expression if justices could be persuaded at this point to talk simply of the "legislative" power. For another, whatever may be settled eventually with respect to the alien seeking entry, it is clear that the resident alien at least has constitutional rights which neither legislative action nor executive administration may impair. When the judiciary interposes to safeguard these rights, there is no doubt that it may give thought to such imponderables as the tensions of foreign relations or the range of a power assumed necessary for survival. Here again, however, and with stronger reason, it may be urged that judicial talk of the "political" is likely to be both superfluous and confusing. It should be enough to consider what procedural due process or other constitutional principles or safeguards may require in the circumstances. Finally, if residual limitations imposed by international practice are exceeded or treaties violated, the nation will presumably be responsible internationally, but there can be no national judicial intervention. Here precedent has established long since that the question is "political" in national law.

VI.

The concluding topic in the sequence of topics here considered will be treaties. Three preliminary comments appear to be pertinent. In the first place, as is well known, relevant provisions of the Constitution are express and their coverage is fairly comprehensive. Negotiations are the responsibility of the President, of course, as the sole organ of communication with other nations. The power to make treaties is vested in the President by and with the advice and consent of the Senate

108. 347 U.S. at 530-31.

"provided two-thirds of the Senators present concur." Corresponding powers are denied the states. The judicial power extends to all cases arising under treaties; and treaties made under "the authority of the United States" are part of the supreme law of the land. In the second place, these very explicit provisions make it clear that the treaty power is comprehensively and exclusively national. In contrast with the foreign relations case law of some other areas, there have been few occasions for recourse to implied powers. Subject to the more fundamental limitations upon government which are basic in the American system, and to such limitations as are express, the power extends to "all proper subjects of negotiation" with foreign governments.[109] In the third place, a treaty under the Constitution may be both an international compact and internal law; and with respect to treaties the Constitution provides in terms for a concurrence of executive, legislative and judicial powers. Here is an area in which experience should have illuminated and indeed has illuminated, in some respects uniquely, the problem of the "political question."

In the negotiation of treaties, questions may arise as to the constitutional or legal capacity of a foreign government to commit its nation by particular undertakings. Such questions are to be resolved by the departments of the Government which are responsible for the making of treaties. It could hardly be otherwise. Nor may their determinations be subjected to later reconsideration or review in judicial proceedings. In the leading case of *Doe v. Braden*,[110] a plaintiff in ejectment for Florida lands relied upon a grant from the King of Spain which the King was later persuaded to annul, at American insistence, by an article of the treaty of cession and an express stipulation incorporated in the royal ratification. Plaintiff argued that the King lacked constitutional authority to annul by treaty his prior grant. To this Chief Justice Taney, speaking for a unanimous Court, replied that: "It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it." [111] The case for judicial reconsideration found "no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands." [112] In a notable part of the opinion, Chief Justice Taney observed:

109. See Dickinson, *supra* note 1, at 827-31.

110. 57 U.S. (16 How.) 635 (1853).

111. *Id.* at 657-58.

112. *Id.* at 658.

"But these are political questions and not judicial. They belong exclusively to the political department of the government. . . .

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." [113]

A conclusion, comparable in important respects, was reached fifty years later, in *Terlinden v. Ames,*[114] where the question argued was whether an early extradition treaty with Prussia had survived the incorporation of Prussia in the German Empire. Governments of both Germany and the United States had acted upon an assumption that the treaty continued in force. Whether this was an approved application of principles of state or governmental succession might be a debatable question, perhaps one of considerable difficulty, but in the circumstances it was thought no question for the courts when confronted with an attack upon the committing magistrate's jurisdiction in an extradition proceeding. Said Chief Justice Fuller for a unanimous Court:

"We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard." [115]

A comparable conclusion was again reached in *Charlton v. Kelly,*[116] where the question argued was whether an extradition treaty

113. *Id.* at 657.

114. 184 U.S. 270 (1902).

115. *Id.* at 288, noting and quoting from *Doe v. Braden.* A like result was reached recently in the Ninth Circuit, in a proceeding for extradition to Yugoslavia, but apparently in reliance upon an independent judicial conclusion from the facts with respect to Yugoslavia's succession to Serbia. Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954). Citing *Terlinden v. Ames,* it was said that in a matter turning upon the effect of state or governmental succession on the continuing validity of treaties, the agreed executive decisions of the countries concerned, if not conclusive when based upon supporting facts, "should at least weigh very heavily." *Id.* at 573-74. Does this give full effect to *Terlinden v. Ames? Cf.* Hanafin v. McCarthy, 95 N.H. 36, 57 A.2d 148 (1948).

116. 229 U.S. 447 (1913).

with Italy had survived Italy's alleged breach. In this instance the fugitive held for extradition was a national of the United States. It was contended that the treaty had been abrogated by Italy's consistent refusal to deliver up fugitives of Italian nationality upon demand of the United States. However, while rejecting the Italian interpretation, the Secretary of State had elected to regard the treaty as continuing in force. The Supreme Court affirmed a dismissal of the petition for habeas corpus. Even taking Italy's attitude to have constituted a violation, it was said, abrogation would not follow automatically. Speaking for a unanimous Court, Justice Lurton concluded:

> "The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition." [117]

It will be noted that in each of the treaty cases discussed up to this point there was raised in national court proceedings a question of international capacity or obligation which had arisen previously in the conduct of foreign relations, that in each instance the question was one which the executive had been constrained to answer in its conduct of such relations, and that in each the executive answer had been clear and, in the circumstances, not implausible. In *Doe v. Braden* the executive had proceeded, with the advice and consent of the Senate, upon the clear assumption that the King of Spain had constitutional authority to enter into the treaty. In *Terlinden v. Ames* the executive had agreed with German authorities that the extradition treaty with Prussia should be regarded as continuing in force. In *Charlton v. Kelly* the executive had elected to regard the extradition treaty with Italy as continuing in force notwithstanding Italy's alleged breach. These were constitutionally proper and prior conclusions reached by the executive in the conduct of foreign relations. With governmental powers distributed as they are in the American system, the judicial branch has no authority to review such conclusions or to substitute its own view as to how an approved practice among nations might be more appropriately observed.

Coming to constitutionally proper and prior legislative conclusions affecting treaties in force, the effect so far as the judiciary is concerned

117. *Id.* at 476; *cf. In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291 (N.Y. Surr. Ct. 1940), involving the effect to be attributed an executive certification that there was no treaty in force.

proves to be the same. Indeed one is tempted to suggest that a like effect must follow a fortiori. Treaties and acts of Congress are on a parity under the Constitution and in case of conflict the later in time prevails. An act of Congress in conflict with a prior treaty may and generally does commit the United States to violation of an international obligation; but the judiciary, once it has strained unsuccessfully at reconciliation, has no choice but to respect the later enactment. The reasons which may have persuaded Congress and the President to approve the later enactment are not matters for judicial consideration. This follows from the constitutional distribution of powers.

These familiar principles were first clearly elaborated one hundred years ago by Justice Curtis, on circuit, in the case of *Taylor v. Morton.*[118] There was conflict between a treaty with Russia and a later tariff act. The importer had sued the collector in assumpsit to recover an alleged overpayment of duties required pursuant to the later act and in disregard of the treaty. In support of a decision for the collector, Justice Curtis said:

> "Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government." [119]

Justice Curtis' opinion in *Taylor v. Morton* was subsequently approved and its principles applied in a sequence of important cases in the Supreme Court.[120] In the *Chinese Exclusion Case,* discussed hitherto in another context,[121] it was conceded that the applicable act of Congress was in conflict with express stipulations of prior treaties, but it was held that "the last expression of the sovereign will must control." [122] Noting and approving *Taylor v. Morton,* Justice Field said of the statute under attack in the *Chinese Exclusion Case:*

118. 23 Fed. Cas. 784, No. 13799 (C.C.D. Mass. 1855).

119. *Id.* at 787.

120. See Head Money Cases, 112 U.S. 580, 597-99 (1884); Whitney v. Robertson, 124 U.S. 190, 193-95 (1888); Botiller v. Dominguez, 130 U.S. 238, 246-47 (1889); Chinese Exclusion Case, 130 U.S. 581, 600-03 (1889).

121. See text at note 95 *supra.*

122. 130 U.S. at 600.

> "The validity of this legislative release from the stipulations of the treaties was of course not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts." [123]

The capacity of a foreign government or nation, the effect upon continuity of treaty obligation of a succession of foreign governments or nations, the effect upon continuity of treaty obligation of a foreign government's breach—these and like questions, within limitations which the Supreme Court has had no occasion to explore, are within the range of executive responsibility in the conduct of foreign relations. Confronted with prior executive disposition of such a question, the courts march in step. The implementing of a treaty which requires a statute to give it external or internal effect, the amendment or repeal of such an implementing statute, the repudiation or abrogation of an existing treaty commitment by enactment of an inconsistent statute—these and like matters, again within limitations which the Supreme Court has had no occasion to explore, are as clearly within the range of legislative responsibility. In the presence of such legislative action, the courts interpret and abide by the conclusions of the coordinate governmental department. The "political" conclusions are controlling.

The interpretation of treaties presents the general problem in another and a differing aspect, particularly as between the executive and the judicial branches. The executive of necessity interprets treaties in the conduct of foreign relations. The judiciary of necessity interprets treaties in cases arising thereunder and as part of the supreme law of the land.[124] The same treaty may be interpreted differently in the two departments of the Government. While the judiciary may be expected to give very great weight to a considered executive interpretation, it is agreed that within its own area of responsibility it may come notwithstanding to its own independent conclusion. In other words, executive interpretation in diplomacy and judicial interpretation in ad-

123. *Id.* at 602; *cf.* Cook v. United States, 288 U.S. 102 (1933), in which Justice Brandeis said: "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Id.* at 120.

As to the effect upon prior treaties of the Eighteenth Amendment and the Prohibition Act of 1919, see Grogan v. Walker & Sons, 259 U.S. 80 (1922); as to the effect upon prior treaties of the Immigration Act of 1924, see Haff v. Yung Poy, 68 F.2d 203 (9th Cir. 1933); United States v. Kwan Shun Yue, 194 F.2d 225 (9th Cir. 1952); and as to the effect upon prior treaties of the Selective Service Act of 1940 and its amendments, see United States v. Rumsa, 212 F.2d 927 (7th Cir. 1954); Petition of Moser, 182 F.2d 734 (2d Cir. 1950); United States v. Claus, 63 F. Supp. 433 (W.D.N.Y. 1944).

124. The line of leading and illustrative instances should begin with Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

judication are separate and singular responsibilities, neither controlling the other. Persistent conflicts are not likely to arise in practice, though in theory they are possible. Were it not so, treaties being both international compact and national law, the most vital matters of private right arising thereunder might disappear adventitiously in the current of diplomatic negotiation instead of being resolved judicially under law and in conformity with due process.

The independence of judicial interpretation from the executive's "political" control is illustrated, though indecisively, in the case of *United States v. Rauscher*.[125] The case reached the Supreme Court on a certified division of opinion. Stated generally, the question upon which the lower court divided was whether a fugitive surrendered by Great Britain under the treaty of extradition to be tried for the offence of murder could be tried for the lesser offence of inflicting cruel and unusual punishment without first being afforded an opportunity to return to the country of asylum. A decade earlier, in diplomatic correspondence with Great Britain, the Secretary of State had contended for an interpretation of the treaty which would have permitted indictment for the lesser offence; and the United States now relied upon that interpretation in the prosecution of Rauscher. Of the diplomatic correspondence, Justice Miller for the majority remarked: "The correspondence is an able one upon both sides, and presents the question which we are now required to decide. . . ." [126] Relying upon reason and authority, and also upon a congressional construction which was thought to have been indicated by the language of the implementing legislation, the majority rejected the permissive interpretation for which the United States had contended. In thus deciding, the Court gave judicial approval to a doctrine which would be known as the doctrine of specialty. Its principle was incorporated in express terms in a new extradition treaty with Great Britain three years later and has since become an accepted feature of extradition law and practice.[127]

In *Sullivan v. Kidd*,[128] the Court reaffirmed the independence of judicial interpretation while at the same time approving, in this instance, an interpretation for which the executive had contended previously in diplomatic correspondence. A Canadian claimed inheritance of Kansas land in reliance upon a treaty of 1899 with Great Britain. The United States and Great Britain had disputed the meaning of the treaty's relevant provision. The Court's conclusion, in accord with

125. 119 U.S. 407 (1886).

126. *Id.* at 415-16.

127. See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 325-26 (1939).

128. 254 U.S. 433 (1921).

the meaning which the United States had supported diplomatically, was rested upon a view of the treaty's real purpose and the practice of both governments. Of the deference due to executive interpretation, Justice Day for the Court remarked:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight." [129]

Such a rationalization of the judicial approach has had general acceptance, sometimes in cases in which the executive and the prevailing judicial interpretations have proved to be in accord and sometimes in cases in which they have diverged, and even the language descriptive of the approach has developed in something of a pattern.[130] Illustrative of interpretations in accord is *Factor v. Laubenheimer,*[131] a rather famous extradition case, in which Justice Stone for the majority stressed the propriety of looking beyond the written words of a treaty "to the negotiations and diplomatic correspondence of the contracting parties . . . and to their own practical construction of it," and then went on to remark that "in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." [132] Illustrative of interpretations which have diverged is the notable case of *Perkins v. Elg,*[133] in which the Court was unanimous in rejecting the State Department's latest interpretation of one of the early naturalization conventions.[134] Not only was the latest executive interpretation disapproved, but in the result a declaratory decree was permitted

129. *Id.* at 442.

130. Of relatively recent opinions in the lower courts, see United States v. Ushi Shiroma, 123 F. Supp. 145 (D. Hawaii 1954); Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952); Fragoso v. Cisneros, 154 S.W.2d 991 (Tex. Civ. App. 1941). In the *Shiroma* case, interpreting the Treaty of Peace with Japan, Judge McLaughlin remarked: "The reasonable construction of treaty terms by the State Department, acquiesced in by the other signatory powers, is entitled to great weight." 123 F. Supp. at 149; *cf.* Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

131. 290 U.S. 276 (1933).

132. *Id.* at 294-95. It is of interest to compare Justice Stone's recourse to an accepted formula in this case and his attempt at formulation of a so-called "overriding principle" in the case of *Ex parte Peru.*

133. 307 U.S. 325 (1939).

134. It appeared that there had been a change of opinion in the State Department at a comparatively recent date. *Id.* at 347.

to enjoin the Secretary of State from denying plaintiff a passport on the sole ground that she had lost her citizenship.[135]

VII.

The experience of our courts and particularly of the Supreme Court in the several areas here explored would appear to warrant, if not to require, at least three general observations of substantial importance. To the extent that the sequence of topics here selected may be considered fairly representative of the whole, these observations should have relevance throughout the case law of external affairs.

For the first, the more deeply one probes the "political question" in the case law of external affairs, the more evident it becomes that the basic legal problem derives in every instance from the constitutional separation of the powers of government. The Constitution is the *lex scripta.* An inheritance of institutional tradition illuminates the search for meaning. Here and there, as experience has accumulated at the highest level, light has penetrated into some of the narrower nooks or more remote recesses of judicial administration. Nowhere has the approach been more luminously portrayed than in the classics of earlier Supreme Court opinions. Without permitting craftsmanship to become arbitrary or mechanical, the classical opinions found their way to solution from the premise of distributed powers. This is the first, the most obvious and the most important of our three observations.

For the second, the considerations which have been somewhat casually indicated by such catchwords or phrases as "inexpediency," "embarrassment" or "judicial self-limitation" are at most factors incidental in the judicial process as it operates in the areas here explored. They are no aspect or part of an identifiable legal principle. Wherever they have been permitted to blur identification, the consequence has been more of confusion than light. Thus it should be possible to take cognizance of an occasional recoil from the inexpedient in judicial administration without elevating the phenomenon to the dignity of doctrine. Moreover, it should be helpful to view it at all times as a judicial recoil restrained and channeled by appropriate judicial considerations. There is even less excuse for loose talk concerning judicial reluctance to embarrass a coordinate governmental service. In the American constitutional system, indeed, as the founders so clearly anticipated, the

135. Disapproved also in passing was the reasoning of a somewhat comparable case in the Ninth Circuit, United States v. Reid, 73 F.2d 153 (9th Cir. 1934), in which it had been said that the State Department's attitude should have "great, if not controlling, weight." See 307 U.S. at 349 n.31 (1939). It is of interest that Chief Justice Hughes who authored the opinion in this case was himself a former Secretary of State.

embarrassments of relationship among coordinate departments are a toughness in the lubricant which keeps the tripartite distribution of the principal powers in balance. In some resemblance to recoil from the inexpedient, a judge's reluctance to embarrass should have at all times the quality of judicial reluctance which tempers relationship without abdicating responsibility. Finally, it illuminates no principle to talk unguardedly of judicial self-limitation or, for that matter, of judicial self-aggrandizement. It must be clear that either formula is in rather obvious discord with the plan and purpose of our national system. The suggestion is here ventured that judicial recoil, judicial reluctance and judicial self-limitation are not only irrelevant in the formulation of a legal principle but that their true relevance is that of words descriptive of the residual good sense in judges which makes law operate effectively. They point to qualities of sensitivity, imagination and restraint which must always distinguish the judicial statesman from the routineer.

For the third and last of our observations, it ought to be made much clearer than it has seemed at times to be that the existence of a question properly called "political" and the disposition of such a question when presented depends much upon the distribution of powers with respect to the matter at hand. Thus, if it is a matter of boundary with another nation, all three of the principal powers of government may have converged. If it is a matter of the existence of another nation, the adjustment will generally concern only the executive and the judicial departments. If it is a matter of excluding or expelling the subject of another nation, the adjustment is likely to concern chiefly the legislative and the judicial departments. Treaty matters have a pattern of their own, as has been indicated, since treaties are made by the executive with the advice and consent of a legislative chamber, may be implemented or abrogated by action of the legislative department, and are interpreted and applied as part of the supreme law by the judiciary. When supporting an argument with precedent, counsel should have a care that the precedent invoked is one which involved the overlappings and priorities of comparable constitutional powers. It is devoutly to be wished, indeed, that judges might be somewhat more consistent in the exercise of a like discrimination. The rhetoric of an opinion concerned with "political questions" in one area of foreign relations law may be less than apposite in another.