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THE CONSTITUTIONALITY OF EXECUTIVE AGREEMENTS:
AN ANALYSIS OF UNITED STATES V. BELMONT

DISSERTATION
Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By
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* * * * * *

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1972

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PREFACE

This monograph is an historical analysis of a key Supreme Court case testing the constitutionality of executive agreements. It is a study both in diplomatic and constitutional history. In doing this the author has tried to demonstrate the mechanics of the legal process that begins with a Federal government suit in U.S. District Court and culminates in the final written opinions submitted by the Justices of the Supreme Court. He has also attempted to illustrate the subjective aspects of constitutional law as well as the substantive issues of presidential diplomacy in both practice and law.

United States v. Belmont was a 1937 Supreme Court case which firmly established the executive agreement with representatives of a foreign state without the advice or consent of the Senate, that is binding both as international and domestic American law. Although an executive agreement is not the same document as a treaty constitutionally, it is like a treaty in that it supercedes conflicting state laws that would compromise the substance of such an agreement. Specifically, this case represented a test of constitutional power between the White House and the State of New York over property laws controlling former
Russian corporate property in a New York City banking house.

The significance of the Belmont case has far overshadowed the particular issues involved in the suit. Justice George Sutherland's opinion for the Court provided a legal basis for later extensive executive commitments to foreign nations. President Franklin D. Roosevelt conducted American wartime diplomacy from 1940 to 1945 almost exclusively by executive agreement. The American military commitment to South Viet-Nam is a recent, and highly controversial, example of Presidential diplomacy with minimal Senatorial participation in policy-making. Indeed, the Viet-Nam imbroglio itself suggests the need for an historical analysis of the recent origins of the President's expanded constitutional powers in the conduct of American foreign policy.

The author would like to thank Professors Marvin Zahniser, Bradley Chapin, and Alfred Eckes of The Ohio State University for their patient assistance and criticism. He must also acknowledge the research assistance of the Ohio State Law Library, the National Archives, and the Manuscript Division of the Library of Congress. The latter was particularly helpful in obtaining permission to use the Charles Evans Hughes Papers and the Harlan F. Stone Papers. Special appreciation is due to Professor Alpheus Thomas.
Mason of Princeton University for his efforts to facilitate this research project. The author also wishes to thank Mr. J. Paul McNamara of McNamara & McNamara (Columbus, Ohio) for his advice and criticism in legal questions.
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"This is government by lawsuit....Constitutional lawsuits are the stuff of power politics in America. Such proceedings may for a generation or more deprive an elected Congress of power, or may restore a lost power, or confirm a questioned one. Such proceedings may enlarge or restrict the authority of an elected President....Decrees in litigation write the final word as to distribution of powers as between the Federal Government and the state governments and mark out and apply the limitations and denials of power constitutionally applicable to each...."


"Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots."

Associate Justice Felix Frankfurter, concurring opinion in Reid v. Covert, 354 U.S. 1 (1957), p. 50.
CHAPTER I

THE INTERNATIONAL POLITICS OF RECOGNITION

On the evening of Thursday, November 16, 1933, President Franklin D. Roosevelt held his first annual dinner party for his cabinet. Besides the members of his council, Roosevelt had invited as guest of honor the visiting Soviet Commissar for Foreign Affairs, Maxim Litvinov, and key personnel of the Administration involved in untangling Soviet-American relations. A few of the guests drifted away after dinner; at eleven o'clock the President excused himself and went upstairs to his study. As he wheeled in, five people stood to greet him: Maxim Litvinov, Secretary of the Treasury Harry Woodin, Henry Morgenthau, the chief of the Farm Credit Administration who would shortly replace Woodin, William C. Bullitt, FDR's personal advisor on Soviet affairs, and William Phillips, Under Secretary of State.

Roosevelt presented Litvinov with seven notes to sign. These prepared drafts were the conditions the President demanded for American diplomatic recognition of Soviet Russia. Although the notes summarized the negotiations of eight days, Litvinov still objected to the wording of certain concessions. After further argument, the
Commissar signed the drafts at about 1:40 a.m. Roosevelt joyfully signed five notes in exchange. To celebrate the resolution of sixteen years of misunderstanding, distrust, and political nonintercourse, the President quaffed with his guests the last of the White House's illegal beer.

The signing of these twelve notes, dated November 16, 1933 (although really finalized early the following day) constituted the American recognition of the Communist government in Russia. The agreements which were negotiated preparatory to the official recognition were known as the Roosevelt-Litvinov Accords. The first note was Roosevelt's acknowledgment of the diplomatic existence of the Soviet regime in Moscow. The second constituted Litvinov's acceptance of political recognition and his government's wish for cordial diplomatic relations with the United States. The next two were a reciprocal agreement on governmental restraint of propaganda and political subversion against the political organization of the other's state. This concession was required by the Department of State as assurance against political contacts between future Soviet diplomats and members of the American Communist Party. Litvinov also wished a promise that the United States would end its propaganda and moral support of White Russian émigrés in Europe.
The fifth and sixth notes concerned the religious freedom accorded American citizens in Russia, a concession of great concern to numerous public opinion groups who opposed recognition of an atheist government. The next two were a reciprocal promise to protect the civil liberties of each other's nationals and a pledge to negotiate a consular treaty in the near future. The ninth note was a definition of economic spying by Litvinov, a note which the State Department hoped would avoid future problems for inquisitive American businessmen in the Soviet Union. The tenth note was the Soviet assignment of all claims to property that it claimed in the United States as a preparatory settlement of American claims against the Soviet government. In the following note, Roosevelt acknowledged the receipt of these claims. And in the last note, Litvinov waived the Soviet claim against the United States for the American expeditory force that occupied parts of Siberia during the Russian Civil War over ten years earlier.3

If these notes were really intended to liquidate the ideological conflict between the Soviet Union and the United States, they were an unqualified failure. The problems raised by different interpretations of what the wording meant created almost as much tension between Moscow and Washington as they were meant to eliminate. Soviet
propaganda via the Communist International in Moscow continued to influence the American Marxists. Soviet officials continued to harass American citizens in Russia. For a while Ambassador Bullitt could not even find a permanent site for his embassy in Moscow. But for the Roosevelt Administration, ultimately the greatest aggravation probably concerned the Soviet debt issue. There had been a secret note, signed by Roosevelt and Litvinov on November 15. In it they made a "gentleman's agreement" that Moscow would pay between $75 million and $150 million on the debts of Imperial and Provisional Governments to the American Government and private citizens. The whole point of the last three notes was to eliminate certain claims so that the exact amount that Moscow would pay Washington could be negotiated swiftly. In the nearly forty years since the accords, the Soviet Union has never paid any of those claims based on the obligations of former Russian regimes. Of all the notes exchanged on November 16, only the tenth note, the Litvinov Assignment, gave the United States any satisfaction in the realization of claims. And it was the Department of Justice, acting through nine years of litigations in American courts, that recovered nearly $10 million of Soviet funds in the United States.
Before recounting the legal battle that issued from the government's prosecution of claims by the Litvinov Assignment, perhaps it would be helpful to review Soviet-American relations from 1917 to 1933 in order to understand the nature of the problems that the 1933 accords sought to solve.

It seemed vital to the existence of Bolshevik rule in Russia that it receive as soon as possible, after its revolution in October 1917, political recognition from the rest of the world to formalize its usurpation of power. That governments born of revolution should not be recognized was a principal foreign policy of the Wilson Administration. For President Woodrow Wilson, a political scientist who believed that world order must be based on the rights and obligations sacred to Anglo-American institutional values, recognition could not be given to any new government until it had been legitimizied by its own people. The State Department on March 12, 1913 had circulated a "Declaration of Policy with Regard to Latin America" which stated that "Cooperation is possible only when supported at every turn by the orderly process of just government based on law, not upon arbitrary or irregular force." Following legalistic standards for diplomatic intercourse had created numerous problems for the administration in its relations with Mexico. Yet this policy
toward Latin America, which had already clearly revealed complications for American military and business interests, was basically the same approach Wilson took toward Communist Russia. When the workers of Petrograd had overthrown the Tsarist government early in 1917, Wilson departed from his recognition policy and granted almost immediate recognition, even though there was not only no constitution but also no firmly established government. In this case, only one month before American entry into World War I, Wilson accepted an abstract notion of legitimacy based more on diplomatic expediency than anything else. The fall of the Provisional government eight months later showed how wrong the United States was in its expectations for its successful execution of the war and fulfillment of Russian domestic needs.6

Washington's first reaction to V. I. Lenin's Soviet government was doubt as to whether it would survive. This was an uncertainty which Lenin himself felt. It was not until 1921, after the bloody civil war between Whites and Reds, that the Bolsheviks gained firm control of Russian political affairs. Wilson was ambivalent about the Soviets: he despised their Marxist values and their violent abrogation of individual freedoms, but he opposed a restoration of the monarchy or political chaos in Russia. Meanwhile, he feared Japanese exploitation of Russian political
disorder to penetrate into Siberia. His primary reasons for allowing an American expeditionary force to Siberia in 1919 was to frustrate the Japanese in any attempt to annex the Maritime Provinces.

Secretary of State Robert Lansing on the other hand had a marked hostility to the Bolsheviks. He viewed them as traitors to the Allied war effort against Germany and as revolutionaries who were attempting to subvert world stability. After Wilson's crippling stroke in mid-1919, foreign affairs were handled by his new Secretary of State, Bainbridge Colby. Colby was even more rigid in his approach to the Soviet Union. He refused to consider recognition of the Soviet Union because he was unconvinced that its leaders were the legitimate representatives of the Russian people. As a matter of national interest, he said, the United States refused to deal with a regime that confiscated Russian as well as foreign property and abrogated the enormous foreign debts of the Tsarist and Provisional Governments. Colby also feared that American recognition would somehow imply approval of the revolutionary socialist doctrines of the Communists. 7

The Republican Administrations of the 1920's continued Wilson's policy toward Soviet Russia. Moscow, however, believed that the business-oriented Republicans would be anxious to accord recognition in order to stimulate Russian-American trade. On March 22, 1921, Soviet
President Mikhail Kalinin sent a proposal to Washington through the Soviet representative in Estonia. It is not known exactly what President Warren G. Harding personally thought about the Russian situation, but he certainly would not do anything independently of his cabinet and political advisors. Harding presented Kalinin's message at a cabinet meeting on March 25. No one supported diplomatic recognition at that time. Two secretaries were adamantly against it: Secretary of Commerce Herbert Hoover and Secretary of State Charles Evans Hughes. They both objected on much the same ground as had Colby: American recognition would strengthen the weak Bolshevik dictatorship; and Moscow would use diplomatic personnel for political subversion in the United States. They further argued that recognition must be preceded by Soviet guarantees for civil liberties of American citizens in Russia and a commitment to settle the debt question.®

Hoover compared Russia to a "bad neighbor." He said that if you left him alone, hopefully he would leave you alone; at least, you would not invite him into your home.® He was convinced that trade would not be realized with Soviet Russia until the Russians resumed industrial production. In Hoover's mind industrial productivity and communism were antithetical, since capitalism was the only system industrialization had ever known.® With Hoover's
and Hughes' insistence, Harding included in his reply message to Kalinin that "Production is conditional upon the safety of life, the recognition by firm guarantees of private property, the sanctity of contract, and the rights of free labor." 11

Charles Evans Hughes dominated American foreign policy in the early 1920's. In contrast to President Harding, he had had a distinguished public career that had won him much public esteem and independent political influence. He had been a Progressive Governor of New York (1906-1910), an Associate Justice of the Supreme Court (1912-1916), and the Republican candidate for President in 1916. As Secretary of State from 1921 to 1925, Hughes was one of the most influential men in the cabinet. In matters of foreign policy, it was his attitude that consistently prevailed. A man who played many roles in American public life, Hughes was first of all a lawyer, and as Secretary of State he saw himself as "Advocate for the United States." 12

Hughes viewed the Soviet problem in the same context of legalistic and moral standards as had Wilson. He, too, identified American national interests with established principles of international law. One of his clearest policy statements was a paper he wrote on the centenary of the Monroe Doctrine in 1923. The basis of this doctrine, he explained, was the need to preserve American security,
peace, and prestige through independence of action. As for Europe, Hughes paraphrased the dictum of Thomas Jefferson: "Peace, commerce, and honest friendship with all nations, entangling alliances with none." He asserted that the United States had fought in the World War to protect liberty from autocratic power, and now that the war was won, the United States would not lose its freedom of action by committing itself to the different priority of interests that Europe had from America. In the relationship of nations, Hughes continued in a legalistic view, there are obligations and responsibilities. "Among these obligations is the duty of each State to respect the rights of citizens of other States.... A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property validly possessed under the laws existing at the time of its acquisition that the conduct of activities in helpful cooperation are possible." These remarks were aimed as much at Soviet Russia as at Mexico.13

Hughes refused to recognize the Soviet government for three principal reasons. First, communism as a social and economic experiment was, in Hughes' eyes, both ruinous to Russia and dangerously subversive to a world order based on capitalistic economy and Anglo-American common law.
doctrines of international law. Secondly, Hughes feared that American recognition of Russia also might expose this nation to Communist propaganda and political subversion. Thirdly, Hughes feared that political recognition would validate Soviet confiscation of American assets in Russia and acquiesce to the Soviet abrogation of the public debt to the United States acquired during 1917 to carry on the war against the Kaiser. The Secretary readily admitted in public that the United States acknowledged the existence of the Soviet government in Russia, and that it was a relatively stable regime. But in order to have relations with America, Hughes insisted that the Kremlin had first to show good faith as a basis for any meaningful diplomatic exchange.14

Even though there was considerable pressure on Harding by businessmen eager to exploit Russia's untapped wealth, the President adhered to Hughes' non-recognition policy. In his last prepared speech which he never gave due to his sudden death in 1923, Harding had written that "political recognition prior to correcting fundamental error tends only to perpetuate the ills from which the Russian people are suffering. International good faith forbids any sort of sanction of the Bolshevik policy.... The whole fabric of international commerce and righteous international relationship will fail if any great nation like ours shall abandon the underlying principles relating
to sanctity of contract and the honor involved in respected rights."^15

The Soviets sent another feeler to Washington in December 1923 in the hopes that President Coolidge would reconsider Harding's foreign policy. Whereas the administration scandals had shaken up the cabinet, Hughes, uninvolved in the corruption in the Justice Department and Interior Department, remained Secretary of State and continued to dominate foreign relations. Hughes wrote a response to the Soviet inquiry through the American consul in Reval, Estonia. He insisted that the Soviet Union would have to make three unilateral concessions before the United States would grant diplomatic recognition: either restore the confiscated property of American citizens or make just compensation, repeal the decrees of 1917 that repudiated Russian obligations to the American government, and end all subversive propaganda in the United States.'^16

The policy of non-recognition based on political distaste was not a new one for the Department of State. Since the Administration of George Washington, the United States has always had two criteria for recognition of a new state or government; present and future political stability and willingness to honor international obligations. The changes in recognition policy from time to time were only one of emphasis, not substance. Whether the stress was on
stability or fulfillment of commitments was determined by the American national interest at that time and in that particular situation.17

The concept of diplomatic recognition itself originated in the courts of Europe where one monarch judged the legitimacy of another's claim to a throne. Before the era of republicanism, recognition prompted questions of family and divine right. Naturally, the newly established republic on the western shore of the Atlantic did not accept this criterion for its standard of international intercourse. As Secretary of State, Thomas Jefferson helped to establish the policy that the United States would recognize any de facto government. The policy questions arose in response to the radical regimes in Paris that emerged from the chaos of social revolution. Jefferson was generally sympathetic to French republicanism in principle, and he fully realized that ideologically it would be beneficial to American interests to have an anti-monarchical ally in Europe. The one prerequisite Jefferson demanded of a new government was that it have popular support, or it could not be truly republican. In a letter to the American minister in Paris, he wrote: "It accords with our principles to acknowledge [sic] any government to be rightful which is formed by the will of the nation substantially declared. The late government was of this kind, & was accordingly
acknowledged by all the branches of ours. So any alteration of it which shall be made by the will of the nation substantially declared, will doubtless be acknowledged in like manner."\(^{18}\)

The State Department could not concede recognition based only on de facto existence in the secession crisis of the Civil War. Secretary of State William Seward demanded that any new government should first show its political stability by a constitutional acclaim of the broadest number of people. This was not necessarily a more legalistic approach, but certainly a more demanding criterion for legitimacy in order to prevent foreign recognition of the Confederate States of America. "The policy of the United States," Seward wrote to the America minister to Peru in 1866, "is settled upon the principle that revolutions in republican states ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own."\(^{19}\)

It was in the latter part of the Nineteenth Century that the State Department required a new government to acknowledge the obligations of international law before American recognition. This requirement was based upon two concepts of national interest. The United States was
becoming a major world power, proving the American republican experiment a striking success. The State Department officials, many of them lawyers by training, projected American values upon foreign societies. Since international law was the product of Western culture, it was in the American interest to demand that new governments adhere to the values which affirmed a world order based on values which were in harmony with those of American society. Too, international law protected individual rights, the sanctity of private property, and urged the solemn duty to honor public debts. The State Department, of course, would not, as a rule, recognize any government that abrogated its debts or infringed on American business interests, which by 1900 had become very considerable indeed. William Howard Taft, the President with a judicial temperament, expanded on Seward's recognition standard, as Seward had elaborated on Jefferson's. During Taft's administration, a great stress was placed on ascertaining the legitimacy of new governments as judged by Anglo-American standards of law.20

Woodrow Wilson's recognition policy was not therefore a drastic change from his predecessors'. Wilson was less business-oriented than Taft, but more moralistic in his concern for governmental structures and methods of rule. He used the policy of non-recognition as a political tool
against foreign regimes of which he disapproved. The test of his policy was Mexico, an imbroglio that frustrated him for four years. Fully aware of the political potency of the recognition tool, Wilson was quick to accept the Provisional Government of Russia, because he believed that it would be easier ideologically to deal with it in the war effort than the Tsarist autocracy. As soon as the new Petrograd government agreed to honor the obligations of the Imperial state, it received official American sanction and financial support. 21

In the final analysis, the legalism of American diplomacy in the 1920's was in the national interest as policy-makers understood it at the time. The American government had gone deeply in debt to its own people in order to finance World War I. If the former allies did not repay their loans to America, the repayment of American war bonds would have to come from the taxpayers. Since taxation is a very unpopular way to finance government, the Republican administrations insisted that England and France pay their debts. In turn, the Allies could not pay their obligations unless Germany paid reparations, or Bolshevik Russia agreed to pay the enormous debts of the Tsarist government. Lenin had solved financial disaster in Russia very expeditiously: he abrogated all foreign debts, and nationalized private property above a certain size (so as
not to alienate his domestic political allies, the poor peasants). If the United States had given diplomatic recognition to Soviet Russia, it would validate in the eyes of American law all acts of the Communist government since its creation. This would have jeopardized American interests in Latin America and damaged our moral suasion (the substitute of physical force) on Europe, besides forsaking our claims against Russia itself.

There was, however, a national interest greater than the debt issue which was Hughes' top priority. That was world stability which assured the peace that would be so conducive to American prosperity at home and the expansion of markets overseas. If he did not like the Communists and the socialist experiment, Hughes did not want political disintegration of the huge Eurasian state. At the Washington Conference in 1921, he played the role of "Protector of Russia—Foe of Leninism." He put pressure on the Japanese to withdraw from Siberia and to accept the Pacific status quo of 1919. He also supported the American famine relief mission to Russia, a project headed by Herbert Hoover. On August 19, 1921, the United States signed an agreement with the Soviet government (an act of de facto recognition) for 200 American agents to distribute $66 million worth of goods directly to the Russian people. Hughes saw this mission as good political propaganda and an
opportunity to find out more about Communist society. Hoover hoped that it might facilitate American economic penetration of Russia. In any event, Hoover realized that food relief was good business for depressed American farmers.\textsuperscript{22}

After the election of Calvin Coolidge in 1924, Hughes turned the State Department over to his good friend Frank Kellogg. Kellogg frequently sought Hughes' advice and continued the Russian policy formulated in 1921. By this time, non-recognition had lost its political value because Russia had won the recognition of the major European powers. With diplomatic intercourse in Europe, Russia acquired credits, loans, and trade. Yet Kellogg refused to change American policy as long as nothing was to be gained for the United States by it.\textsuperscript{23}

Herbert Hoover was elected President in 1928, and he brought to the White House the same attitudes he had held as Secretary of Commerce. He was adamantly against dealing with the godless, private property-destroying Communists. Before 1929, the United States could afford to be demanding in its diplomatic relations with the Soviet Union. It did not have to bow to the economic pressures and social unrest that made London and Paris more amenable to economic relations with Russia. This state of affairs ended with the stock market crash in the autumn of 1929. Now trade
became very important to the general economic scene, and some believed that Washington could no longer afford diplomatic luxuries. New pressures from businessmen were put on the White House to recognize Soviet Russia in the hope of stimulating profitable trade. Hoover would not yield. He conducted foreign affairs with the same lofty principles with which he handled domestic problems.

Military concerns compounded the Russian dilemma for Washington. In 1931 Japan invaded Manchuria and converted it into a Japanese puppet state. More than economic matters, this act of aggression deeply affected Secretary of State Henry L. Stimson. To Stimson, the crisis came at a bad time for the United States to deal properly with it. He and Hoover grew further apart as the President refused to divert either his attention or national resources away from domestic problems. Stimson's dilemma was to raise enough objection to the Manchurian crisis to show the world that the United States continued to defend peace and world order, yet not protest enough to alienate Japanese diplomats or embarrass the civilian government in Tokyo in its apparent internal power struggle with the military. Discussion and conciliation failed to deter the Japanese encroachments upon China. Stimson favored a more forceful American policy, but Hoover refused to consider any economic sanctions against Japan. A naval show of power was
absolutely out of the question. So Hoover relied on the cheapest weapon he had: moral suasion and public opinion against Japan. When Japanese troops attacked Shanghai, Stimson was near despair.24

Hoover's policy was non-recognition of the new state of Manchukuo, a feeble denial of a fact that had been made true by bayonets. Stimson was sure that this approach would be no deterrent to future Japanese actions. It was during this crisis in Asia that the Secretary began to realize the diplomatic importance of the Soviet Union, the only power in Asia that could check Japanese expansion. In Geneva during the spring of 1932, Stimson met Karl Radek, an important figure in the Communist Politburo. He told Radek that no matter how desirable Soviet-American relations might be American public opinion would not support the recognition of the Soviet Union unless Moscow made some ideological concessions to the United States.25

Officially, however, Stimson continued the old policy vis-a-vis the Kremlin. In a letter to Senator William E. Borah on September 8, 1932, he explained that the American policy in Asia was based on the defense of the integrity of international obligations, the "good faith and sacredness of keeping international promises," and mobilizing world public opinion against the Japanese. To recognize Soviet Russia at this time, he argued, would be to weaken
American moral suasion on Tokyo. Perhaps Stimson was caught in the dilemma of legalism versus power politics. Or maybe as Secretary of State he had to adhere to policies that he personally disapproved. But behind the scenes, he was working hard to change Hoover's generally pacifist policy. On January 9, 1933, with the greatest reluctance on Hoover's part, Stimson met with President-elect Roosevelt at Hyde Park. They discussed the Asian situation, among other things, for six hours. They met again in Washington ten days later. Stimson felt reassured that Roosevelt and his Secretary of State, Cordell Hull, would take a stronger stand toward Japan than had Hoover. Under FDR Stimson felt that both the fleet build-up and the recognition of the Soviet Union were the realization of his foreign policy.27

The Roosevelt-Litvinov Accords were the culmination of nine months of secret negotiations through various unofficial channels. One of the first Soviet feelers for renewed relations came at Tokyo in February 1933. The Soviet Military Attaché told his American counterpart there that there was a need for friendly Soviet-American relations in the face of the Japanese threat to Russia's far-eastern provinces and American interests in China. He said that while the Kremlin still refused to pay the American claims against it, it would be willing "to arrange
something that would be the equivalent of paying the
depts."²⁸ Five months later, William C. Bullitt, FDR's
personal advisor on Russian affairs, met twice with Maxim
Litvinov, the Soviet Commissar for Foreign Affairs, in
London during the Economic Conference. The Commissar
agreed that he would accept an anti-propaganda condition
for American recognition as long as it was a bilateral
agreement. Litvinov also gave Bullitt the impression that
Moscow could spend $50 million a year in gold for American
goods if normal diplomatic intercourse were established.²⁹

From his first day in office, Secretary of State
Hull received delegations and petitions both for and
against recognition of Moscow. Religious, labor, and
patriotic associations were still against any detente with
the Communists. Business leaders and political liberals
strongly advocated recognition for their own variety of
interests. Hull, too, and another Presidential advisor,
Columbia professor Raymond Moley, met with Litvinov in
London. In September, Hull made his official recommenda-
tion to Roosevelt to grant diplomatic recognition to the
Soviets, but with some conditions which the Kremlin had to
accept as a quid pro quo for recognition.³⁰

Roosevelt himself probably favored recognition from
the beginning of his administration. His problem was how
to do it in a way that would win genuine Soviet friendship
without alienating American public opinion, particularly the anti-Russian lobbies on Capitol Hill. For awhile, he let the State Department handle the issue, even though he did not fully trust the judgment of career diplomats and striped-pants bureaucrats. Then as he began to grow impatient, FDR used his own personnel to explore private channels. In August Henry Morgenthau of the Farm Credit Administration informed the President that Amtorg, the American chartered Soviet trading organization, wanted to buy $75 million of raw materials. To increase business and farm pressure, FDR held up the Reconstruction Finance Corporation negotiations with Amtorg on a cotton deal. He told Morgenthau to put a $100 million ceiling on American sales to Russia, half machinery and half raw materials, with a 15% to 20% down payment.\(^3\)

Meanwhile, the State Department tried to caution the White House on the risks involved in dealing with the Soviets. In the first full memorandum on the subject, Chief of the Division of East European Affairs Robert F. Kelley outlined for FDR the technical problems of recognizing the Soviet Union after sixteen years. He warned that recognition itself would not mean friendly relations and trade unless three major points of conflict were eliminated beforehand. These were Moscow's relationship to Communist Party activities in the United States, the repudiation of
debts and the confiscation of American property, and the almost irreconcilable differences between the two economic and social structures. Kelley listed exactly what the Soviet debt was to the United States: $192 million to the American government owed by the Provisional Government, $86 million worth of Tsarist and Provisional Government obligations to American citizens, and $336 million worth of American owned property confiscated by the Bolsheviks in 1918. He further remarked that it was in the national interest to make the Kremlin acknowledge these obligations in order to protect American interests abroad and to eliminate a barrier to trade. These debts, Kelley advised, should be settled before recognition, since neither London nor Paris had been able to make the Soviets pay after Moscow had won recognition. Finally, he pointed out the legal complications that would arise over Russian property rights in American that had been tolerated by the State Department because of non-recognition of the Soviet government.  

On October 5 Hull forwarded to the President two further memoranda on the subject. Assistant Secretary of State R. Walton Moore made several observations. He approved of recognition without delay, provided that Moscow made a promise not to interfere in internal American affairs. He then pointed out that after the Soviets gained
recognition, which they dearly wanted, they would be much more difficult to deal with. Therefore, Moore recommended that there be a full agreement between the United States and the Soviet Union that could be formalized in a treaty later before the President granted official recognition. The topics of such an agreement would be Communist subversion, rights of American citizens in Russia, claims of Americans for loans and damages, and the Soviet counter-claims against the United States. Unconditional recognition, he warned, would be of no advantage to the United States and would only create hostile American public opinion. Moore also observed that, legally, recognition was not revocable and was retroactive unless otherwise stated.33

The second memorandum was by Bullitt, whose official title was Special Assistant to the Secretary of State. Bullitt agreed with Moore's conclusions. He warned that before recognition, the Soviets would be willing to negotiate; but after they got what they wanted, they would not make any concessions. So he recommended that "formal recognition should not be accorded except as the final act of an agreement covering a number of questions in dispute." These questions were the same as Moore's topics, with the added suggestion that the recognition take effect only from the date of proclamation and not be retroactive.34
Roosevelt decided to send a feeler to Soviet President Kalinin through Boris E. Skvirsky of Amtorg. Bullitt talked with Skvirsky while he was negotiating trade loans with Morgantau. Bullitt showed Skvirsky the proposed draft of a letter from Roosevelt to Kalinin and asked him whether the Kremlin would accept FDR's invitation to send a representative to Washington to discuss recognition. A few days later Skvirsky showed Bullitt a proposed response to Roosevelt's letter and asked whether it would be acceptable to the American President. Bullitt said it would, and then pulled out his official letter from FDR. Skvirsky then pulled out the official response from Kalinin. The man who would come to Washington would be none other than Litvinov himself.

Two days before Litvinov's arrival in Washington, FDR met with Hull, Bullitt, Morgantau, and Under-Secretary of State William Phillips to outline negotiations with the Soviet Commissar. They agreed that the two most important issues were propaganda, and freedom of religion for Americans in Russia. Hull personally met Litvinov at the railroad station on November 6. From the beginning the Commissar was uncooperative. He said he had expected American recognition first, with negotiations to follow. Hull assured him that without prior agreements there would be none. Then Litvinov rejected the State Department's pre-
pared draft on domestic non-interference. He also opposed Hull's insistence on a religious guarantee. By November 9, Bullitt and Phillips felt that the only way to save the talks was to shift them to the White House.36

Roosevelt and Litvinov had gotten along well at a luncheon at the White House on November 8. Speaking fluent English, the Commissar chatted pleasantly with the President. Showing that he knew his adversaries better than they knew him, Litvinov produced some booklets of new Russian stamps to give to the philatelist President. On November 10 and 12, Roosevelt met with Litvinov again. The Hyde Park squire turned on his famous charm, apparently believing that he could break the Commissar down by laughing and smiling. Gradually, Litvinov relented on some issues, as long as any agreements reached were reciprocal. Roosevelt presented the final drafts of the accords to him in his study after the annual cabinet dinner, and Litvinov signed reluctantly.37

The Accords were the results of hard bargaining, and the State Department did not get all that it had wanted. It had strongly urged the President to settle the debt question before recognition. To have fixed a sum, however, would have taken too long to be worth FDR's valuable personal supervision, so the White House was satisfied with the "gentleman's agreement" to place the figure between
$75 million and $150 million. Roosevelt was confident that Moscow would pay the latter sum. Litvinov had agreed to drop the Soviet claim against the United States for its military expedition in Siberia during the Russian civil war after Hull and Phillips produced files to show him that the American intent was directed against Japan, not the Soviets. In addition, Litvinov had assigned various Soviet claims to assets and bank accounts in the United States to the American Government. Exactly what was included in this assignment no one was sure, or even cared to define outside of one specific asset named (the American debt to the Russian Volunteer Fleet for the confiscation of some ships in World War I). All in all, both Roosevelt and Litvinov appeared satisfied with the results of their bargaining.38

Neither Roosevelt nor Litvinov had wanted prolonged negotiations at this time. The whole point of the conversations was to emphasize the friendliness and common interests between the United States and the Soviet Union, not their differences; when FDR touched upon a subject which Litvinov refused to concede, he backed off. The purpose of the Accords was to be broad enough to solve only the most fundamental conflicts and leave the details for future handling. Friendship was the key word, and neither FDR nor the Commissar wanted to make their deep-seated differences of opinion known to the public.
Roosevelt wanted to recognize the Soviet Union for American political benefits; Litvinov wanted American recognition to further Soviet interests. Roosevelt's top priority, like his predecessor's, was domestic economic recovery. "Our greatest primary task is to put people to work," he had told the nation in his First Inaugural Address. The depression was like a war, he said, and in a war the President must use all of his powers in order to win. In pushing his domestic program through Congress, FDR had to muster all the public opinion and political force that he could. Issues of foreign trade were not as important as domestic recovery to F.D.R., and foreign affairs were subordinated to national politics. Much of his support for the New Deal came from men who were isolationist in their views of international relations; FDR had to respect their sensitivities in order to win their approval for his reform program.

Roosevelt's dilemma was that he could not have both a vigorous domestic program and an active foreign policy. At heart, FDR was a Wilsonian who believed in collective security. But in foreign affairs, he could go no further than public opinion carried him without risking wavering support for certain New Deal programs. For example, early in his administration, Roosevelt told British Prime Minister Ramsay MacDonald and French Premier Edouard Herriot
that he supported taking coordinated measures against any agreed-upon aggressor nation. He sent a bill to the Senate that would put an embargo on American-made arms to any nation declared to be an aggressor by the President. Senator Hiram Johnson had the bill amended so as to put an embargo on all belligerents, which would defeat the purpose of the bill as a tool of collective security. Rather than allow a bitter debate on foreign policy while New Deal bills were pending, FDR abandoned his idea.42

Yet, Roosevelt was deeply concerned about the international situation in 1933. Adolf Hitler had come to power in Germany on the promise to restore German power and destroy the peace of Versailles. Japanese troops were defeating Chinese forces on the Asian mainland. World trade languished as people all over the world felt the pains of economic depression. In this atmosphere of unrest and despair, Roosevelt looked for cheap ways for the United States to influence events without becoming directly involved. Diplomatic rapprochement with Soviet Russia was such a move. Through friendly relations with the Kremlin, FDR hoped to promote profitable trade for American manufacturers and farmers and caution both Berlin and Tokyo against rash adventurism.

Despite the lack of American diplomatic recognition of Soviet Russia, the Department of State had lifted the wartime trade restrictions on the Soviet Union on July 7,
1920. Without recognition the Kremlin had no legal rights in American courts, so it solved the legal problem by chartering a government-owned corporation in the United States under New York law. In 1924 Moscow opened a branch of its London-based commercial company, Arcos, in New York City. The same year Amtorg, a dummy stock company owned by the Soviet government, began business in the United States. By 1925 the United States was the primary exporter of goods to Russia, and remained so until Soviet trade relations improved with Germany. During the 1920's, American firms sold five times as much goods to Russia as they bought. In 1930, the peak year for Soviet-American trade, the United States exported $114.4 million to the Soviet Union and imported only $24.4 million worth of goods. By 1932 the import-export figures had dropped drastically to $12.5 million and $9.1 million, respectively.43

Many American businessmen hoped to restore the lucrative Russian trade when Washington recognized the Soviet government, which controlled all Russian trade as well as industry and agriculture. Department of State officials warned inquiring businessmen that recognition had little or no effect on trade, because trade flow ultimately rested upon credits and sanctity of contracts.44 Since it refused to recognize her debts and abide by international obligations, Moscow could not be trusted to fulfill future obligations. Indeed, the fall in Soviet-American trade was not
due to Soviet diplomatic pressure, but to the effects of the first Five Year Plan, when Moscow could not afford to pay for large amounts of imports unless it could get generous credits abroad. All Soviet imports fell from $560 million in 1931 to $179 million two years later. Yet, in this period the fact remained that 89.7% of all Soviet imports were capital goods and the United States was in a depression partly because industry had over-produced many of the kinds of materials that Russia so desperately needed.\textsuperscript{45}

Restoration of trade was an important reason for Roosevelt’s recognition of Russia, especially in terms of building favorable public opinion and the gratitude of otherwise politically hostile businessmen, but it was not the most important one in FDR’s mind. He hoped that the attitudes created during recognition negotiations would lead to friendly relations and eventual diplomatic cooperation, particularly in Asia. This is why Roosevelt did not want to seem obstinate in front of Litvinov or insistent on ironclad agreements. If good relations could be established by friendship, then Moscow would adhere to the implicit meaning of any vaguely written accord. The purpose, however, for the accords was more cosmetic than substantive. It was to suggest the possible threat of Soviet-American cooperation against Japan in Asia. But
FDR refused to commit the United States to any action that would lose the support of the isolationists on Capitol Hill. In June, he diverted $238 million from the National Recovery Administration for naval armaments, but he flatly refused Litvinov's proposal of an American-Soviet-Japanese or American-Soviet-Chinese non-aggression pact. The best he could hope for was that American recognition of Soviet Russia would give it a moral boost so that it could deal more effectively with Japan by itself. Therefore, the President had little concern for the precise wording of the Roosevelt-Litvinov Accords as long as they appeared to be a solution to outstanding problems in the eyes of the American public and had the desired effect on Tokyo.46

To understand more fully the meaning and the significance of the Roosevelt-Litvinov Accords, it is necessary to review briefly Soviet economic and foreign policy. The First World War destroyed Russian political order more thoroughly than any other nation involved in it. When the people of Petrograd overthrew the autocracy in February 1917, the Tsar and the centuries-old aristocracy were virtually totally discredited in the eyes of the oppressed Russian people. The Provisional Government that replaced the Romanov Dynasty was aptly named, for it was temporary in every sense. Unprepared to assume power and lacking any constitutional authority, it had difficulty maintaining order in its own capital. Military defeat was as bitter
under republican rule as Tsarist, and hunger had no politics. When Alexander Kerensky failed to provide effective leadership in coping with social disintegration, Lenin's Bolsheviks seized power in the name of the Soviets, the organizations of workers, soldiers, and peasants that had exercised co-authority with the Provisional Government.

The Russia of 1917 was a bankrupt, defeated, humiliated, disorganized, and nearly dismembered state. Its foreign debt was enormous. From 1895 to 1914, the Russian foreign debt had grown from 1,733,000,000 to 4,229,000,000 rubles. Most of this was in the form of state and private loans for rapid industrialization. Then came the great European war in 1914. Russia's allies heavily subsidized the Russian war effort so that seven million Russians would die rather than Englishmen or Frenchmen. Russia's foreign debt jumped from four billion rubles in 1914 to over thirteen billion by 1917.47

Lenin acted swiftly to ease the financial chaos. In December, 1917, the Bolshevik-dominated Soviets nationalized all banking houses in the country. Troops emptied vaults, taking all bank assets and private valuables. The following January 28, 1917, the Soviets repudiated the entire Russian public debt. All foreign loans were unconditionally annulled. The countries most seriously damaged by this were Great Britain and France. London had supplied
Petrograd over five billion rubles during the war and Englishmen held 22.6% of the private foreign investments in Russia. Paris had contributed nearly a billion and a half rubles to the war effort and Frenchmen owned 32.6% (732 million rubles) of the private debt. This was of no importance to Lenin. The building of the socialist order did not include capitalist and imperialist obligations, especially ones that he had not made.  

After banking, the next major section of the economy that the Soviets nationalized was foreign trade. The economic crisis, however, grew worse in 1918 because of the harsh terms of the Treaty of Brest-Litovsk with the Central Powers and domestic disorder. On June 28, 1918, the Soviets nationalized all industries that had a capitalization of over one million rubles. This did not mean that the government confiscated the property of the managers. That had been done by the workers themselves shortly after the October Revolution when workers took over their plants and farmers seized the fields. Few labor councils, however, were as organized and as efficient as the Petrograd metal workers, the vanguard of the Russian workers, and many simply looted their factories. Chaos was intolerable to Lenin, who wanted a disciplined social order to carry out the promise of Marxist communism. At first, the Soviet nationalizations were considered punitive against capital-
ists who would not cooperate with the new regime. By June, however, the nature of confiscation changed to "a system of planned nationalization." So complete freedom for the proletariat lasted only six months; workers subjected to the injustices of bourgeois managers now became the workers for oppressive commisars.49

Interestingly enough, American-owned property in Russia was not legally nationalized. Moscow hoped that American factories would continue to produce goods as before. The effect was all the same: American firms were frightened and their personnel refused to cooperate with the Soviets, so the government took control of all American interests. Singer Manufacturing lost over $38 million; International Harvester, nearly $41 million; and Vacuum Oil Co., over $1.5 million. Much of the over $100 million worth of American industrial property lost was through the ownership of confiscated Russian subsidiaries. The largest category of American property lost, however, was in banking assets. The Soviet government confiscated $209,825,348.82 worth of deposits belonging to American bank branches in Russia. The largest losses were claimed by National City Bank for $180 million and Guaranty Trust for $1.7 million. New York Life Insurance claimed a loss of $67 million and the Equitable Life Assurance Society, $10,000. All totalled, the American claim against the Soviet Union for
sequestered property of damages amounted to a principle of $336,691,771.03.50

Besides the private debt, the American government had a claim of $187 million for war loans to the Kerensky Government. Of this, $125 million was transferred to the Russian Ministry of Finance in Petrograd, and $62 million spent in the United States under the supervision of Boris Bakhmetyev, the Provisional Government's Ambassador to America, and his Financial Attache, Serge Ughet. When the Kerensky regime fell in October of 1917, Washington demanded that the Soviets honor this debt, just as the United States demanded repayment of war loans from her other allies. Moscow refused to honor this debt for two reasons. First, as a matter of principle, Lenin refused to pay for the imperialistic war that he had so bitterly opposed. Also, if he had recognized the American debt, he would have had to concede the debt to Great Britain and France, which was considerably greater than the American. Secondly, Bakhmetyev and Ughet politically were White Russians, and there was evidence that they had used the American loans to aid White armies in Russia during the civil war. Lenin, of course, would not repay the United States for goods that went to his enemies in the field.51

The war loans, confiscation of American private property, the Communist hostility to capitalism were the
major reasons why the United States refused to recognize the Soviet Union. In 1919, only the Central Powers, who had forced the militarily defeated Soviets to sign a humiliating peace as the price of leaving the war, had recognized the Moscow regime. From 1920 to 1921 a series of Russia's neighbors recognized the Soviets as a matter of diplomatic necessity, but the major powers refused to do so. On March 16, 1923, however, British Prime Minister Ramsay MacDonald reached an agreement with the Kremlin that connected the debt settlement with a trade arrangement. This constituted *de facto* recognition, followed by *de jure* recognition on February 1, 1924. That same year, Moscow was diplomatically acknowledged by France, Canada, Italy, Norway, Denmark, Czechoslovakia, Sweden, Greece, China, Arabian Saudian Kingdom, and Mexico. Trade was the avenue to diplomacy, and many countries recovering from the economic shocks of the world war could not afford to ignore Russian trade, no matter the color of Bolshevik politics.

What politicians in London, Paris, and Berlin understood that apparently Hoover and Hughes did not was the relationship between Russian debts and Soviet trade. Moscow would agree to acknowledge her obligation to pay the Tsarist and Kerensky debts if it could get generous credits or loans for trade. The percentage of interest on these trade contracts would be slightly higher than normal to pay
the pre-1917 Russian debts. In other words, the Kremlin paid old obligations in proportion to the lucrativeness of trade with a country. As long as the United States refused to grant diplomatic recognition and denied the Soviets long-term trading credits, Moscow refused to honor old obligations. It should also be pointed out that before World War II, the Soviet Union never defaulted on an obligation which the Communists themselves contracted abroad.

Soviet representatives in America did try to settle accounts with private firms in order to restore trade with Russia. In 1927 they tried to reach an agreement with National City Bank, J. P. Morgan & Co., and Guaranty Trust Company, which together maintained a claim against Moscow for $91 million. Charles E. Mitchell, the President of National City Bank, negotiated with Soviet agents in Paris, but he refused to promise long-term trade credits before the Soviet began repayment of debts. That ended the talks. American manufacturers, on the other hand, were more anxious than the banks to do business with the Russians. Standard Oil of New York began oil purchases from the Soviets in 1924. In 1928 General Electric granted Amtorg (the Soviet commercial corporation in New York) a five-year, $26 million trade credit. A year later, Henry Ford contracted to build a factory in Nizhni-Novgorod. If the Department of State wanted the Soviets to repay government loans, it had
to be prepared to offer the Kremlin at least a credit agreement, if not a loan, for trade.52

Soviet Russia wanted recognition from the United States in 1933 for many of the same reasons that Roosevelt wanted to grant it. Trade was one important factor. America was in a depression and needed to sell surplus goods abroad, and Russia was beginning her second Five Year Plan and sorely needed both machinery and food stuffs. Trade, however, was not as important as the need for peace. Roosevelt wanted to handle the American economic crisis with domestic relief and reform and not make the success of his New Deal dependent on the uncertainties of world conditions. The President also did not want to divert time, energy, or resources from the New Deal to prolonged foreign intrigues and expensive military armaments. Joseph Stalin also needed peace. He had created a social civil war between city workers and rural peasants during the first Five Year Plan. He needed peace in order to build up Russian industry to the point where the nation could compete successfully in the ideologically anticipated world war with imperialism. Like the United States, the great energies of Russia were diverted inwardly. Both nations required peace and world stability to work out their domestic problems.

On the whole, Stalin's foreign policy had been a
disaster. The Communist International (Comintern), the Moscow dominated organization of international Communists, had cooperated with Chiang Kai-shek in the Chinese civil war of the 1920's until the Generalissimo had turned against the Communists and crushed the Chinese urban proletariat party. In Germany the Communist Party had taken a hostile position against the government and cooperated with the Nazis to destroy the Weimar Republic. When Hitler came to power in January 1933, he persecuted the Communists. In a matter of months, the German Communists leaders were either shot or interned in concentration camps by the Nazis. Meanwhile, diplomatic relations were strained with Great Britain and France.

The greatest threat to Soviet security since 1921 came from Japan in 1931. While Tokyo gave friendly reassurances of peaceful relations, Japanese field commanders invaded Manchuria and encroached upon the Amur River. Foreign Affairs Commissar Litvinov subsequently offered a non-aggression pact with Japan but was rebuffed. There was a great fear in Moscow in 1932 and 1933 of a war with Japan, a repeat of the 1904-1905 war except fought in Siberia instead of China. It was obvious from the way that the League of Nations handled the Manchurian affair that neither London nor Paris wanted a diplomatic confrontation with Tokyo. In the minds of some paranoid
Communist leaders, this may have been the great anti-Communist imperialistic alliance they had feared. Moscow decided to disentangle itself from Manchuria as gracefully as possible. In June 1933 Soviet and Japanese agents discussed the Soviet sale of its extensive interest in the Chinese Eastern Railway. In October (a month before the Roosevelt-Litvinov Accords), the talks ended abruptly in violent words. Until a final settlement was reached in late 1934 and a treaty signed early in 1935, there was the threat of a Soviet-Japanese war in Asia.53

Litvinov's foreign policy in the early 1930's had three objectives. First, he wanted to isolate the Far Eastern crisis from the rest of world problems. He could do this if he could liquidate Russian interest in Manchuria, thereby eliminating a friction point with the Japanese and reaching a diplomatic rapprochement with the United States. Secondly, he had to avert a capitalist anti-Soviet coalition of Western powers. The Four Power Pact of July 15, 1933, among Britain, France, Germany, and Italy was not in the Soviet interest. Litvinov wanted to cultivate good relations with London, Paris, and Rome in order to isolate Berlin. And thirdly, Litvinov had to avoid or at least postpone a war with Hitler, Stalin's avowed enemy.54

On July 25, 1932, Litvinov concluded a non-aggression
pact with Poland, which led to a pact with France four months later. Diplomatic relations were restored with China after five years of quiet hostility. But a new diplomatic crisis erupted with Britain in March 1933 over the Soviet arrest of alleged English industrial spies in Russia. For four months there was an English embargo of 80% on Russian purchases there. Meanwhile, Litvinov preached collective security and friendly relations throughout Europe. He often used the lure of vast trade with the depression-torn nations to attain friendly diplomatic relations. Litvinov's chief immediate goal in 1933 was to win American recognition. Early in 1932 he had discussed the need for good Soviet-American relations with Secretary of State Stimson and other American officials in Geneva. Nothing had come from these talks. During the London Economic Conference, he offered the promise of rich trade to Roosevelt's trusted advisors, William C. Bullitt and Raymond Moley. By summer of 1933, it seemed that American recognition was only a matter of time. Stalin was very pleased.55

Litvinov was in no position to argue technicalities with FDR in November. He wanted immediate American recognition as a diplomatic blow to Japan. Yet, he could not make concessions to the United States that Moscow had made to no other country or that the Politburo disapproved. FDR let Litvinov out of his dilemma by presenting agreements
that were broadly worded, the details of which could be worked out later. Timing and cosmetic appearances were more important in November 1933 than substantive agreements, or at least so both Roosevelt and Litvinov believed. The principal deal was the one made on November 15, concerning the range of $75 million to $150 million debt settlement. The exact sum was to be negotiated later, and it would be paid "in the form of a percentage above the ordinary rate of interest on a loan to be granted to it [the Soviet Government] by the Government of the United States or its nationals. . . ." This statement caused considerable problems later, because Litvinov thought that Russia would get a large loan from the American government, whereas Roosevelt intended the agreement to mean that the United States would give Moscow credits to buy goods in America, or encourage private loans to the Russian state.

The American recognition was well received in Moscow, although the Roosevelt-Litvinov Accords were not made public (perhaps out of embarrassment over the concessions). Soviet Premier V. M. Molotov called it the greatest Soviet foreign policy achievement in 1933. Karl Radek wrote in Izvestiia that President Roosevelt had taken a bold step to preserve peace in Asia. The first Soviet Ambassador to Washington was Alexander Troyanovsky, who had been the Ambassador to Japan. Roosevelt chose Bullitt as the
American minister to Moscow. In his first dispatches from the Russian capital, Bullitt described the great anxiety there about a war with Japan. Stalin himself spoke with him about the need for American firmness in China. Bullitt warned him that the United States did not want war with Japan and would use nothing more than moral suasion against Tokyo. "Nevertheless," Bullitt reported, "the Soviet Union is so anxious to have peace that it is obvious that even our moral influence is valued very highly by the Soviet Government." 57

When the war scare passed, however, the Soviets became less concerned with the cordiality of relations with the United States. The State Department prediction that when the Soviets got what they wanted they would become harder to deal with turned out to be absolutely correct. Bullitt had discovered on the day before Roosevelt granted recognition that Litvinov was obstinate on the debt issue. The Commissar complained that the Russian public debt had been used against the Soviets and that the private claims were grossly inflated (many of which were based on the 1914 ruble, which was worthless by 1933). Litvinov stayed in Washington to discuss further the debt question, but no agreement was reached. Back in Moscow, Litvinov leveled with Bullitt. He told the American Ambassador that Russia was not really interested in a large foreign trade since
the emphasis of the Five Years Plans was to make Russia a wealthy, self-sufficient nation. Russia would trade with the United States only if the latter granted it long-term credits, and the United States could take no more than $60 million worth of goods out of Russia a year in order to pay the interest and part of the principal on the loan.58

In Washington, Secretary of State Hull, who had been absent since November 11 representing the United States at the Pan American Conference at Monteviadeo, negotiated with Soviet Ambassador Troyanovsky. He told the Ambassador that the American government, through the Export-Import Bank, was willing to give a trade credit to the Soviet Union of up to $11 million provided some agreement could be reached on the debt question. In February 1934, Litvinov offered Bullitt a settlement of $100 million with no interest provided the United States supplied a direct governmental loan. Hull informed Bullitt that that offer was unacceptable to the President. The Secretary related to Litvinov that FDR had never intended the Accords to mean a direct loan to the USSR, and that the Chief Executive had supported a ruling by the Export-Import Bank that no credits would be given to Moscow until the debt issue was satisfactorily settled. Litvinov's response to this position was, "We could remain on friendly terms with the United States without mutual trade, but I fear that the United
States would not remain on friendly terms with the Soviet Union."

The reason for Soviet obstinacy was the change in the international situation. In November 1933 Litvinov felt compelled to reach an agreement with Roosevelt; by the spring of 1934, he did not. The situation had improved in Asia for the Russians. It appeared that Japanese military designs had shifted south toward China rather than toward Siberia. In Europe, Moscow was moving closer to London and Paris in the face of German military reconstruction. In April, Russia renewed its non-aggression pacts with Finland and the three Baltic republics until 1945. On June 12, 1934, the Soviet Union entered the League of Nations, which Litvinov believed could help to isolate Germany. Six months later Moscow and Paris signed a diplomatic consultive pact, which in May 1935 became an alliance. So with new security through collective defense in Europe and the crisis passing in Asia, Russia no longer felt the dire need for friendship with the United States. Anyway, every nation except Finland defaulted their wartime debts to the United States on June 15, 1934. As an international obligations abrogater, Moscow was in good company.

In April Litvinov informed Bullitt that his government had decided that it would take a credit instead of a
loan, a credit amounting to twice the figure of the settled
debt figure. This plan, and a similar one offered by
Troyanovsky in Washington, were totally unacceptable to
Hull. Meanwhile, an outraged American Congress passed the
Johnson Act that prohibited loans to foreign nations in
default of their wartime debts. In an official opinion by
Attorney General Homer Cummings, the Johnson Act applied
to the Soviet government as successor of prior Russian
governments. This meant that legally Moscow could not get
long-term credits in the United States until it settled its
obligations. Litvinov was not moved. The personal rela-
tions between the Commissar and Bullitt cooled sharply, so
that after the Ambassador returned to Washington in 1936
he was reassigned by FDR to the embassy in Paris. From
the summer of 1934 until the summer of 1935 there were
sporadic periods of negotiation, but no debt settlement and
no trade agreement. Finally in July 1935, Hull agreed to
drop American tariff barriers on Russian goods if the
Soviets promised to buy at least $30 million worth of
goods in the United States per year. This agreement re-
mained in operation until World War II. But there never
was any settlement of the debt question. During the Second
World War, it became a moot issue when Roosevelt extended
$11.1 billion of Lend-Lease support to Stalin.60
Nearly all of the agreements of the Roosevelt-Litvinov Accords were broken at one time or another.\textsuperscript{61} As it has been seen, the "gentleman's agreement" on the debt issue amounted to nothing. In August 1935 Hull vigorously protested that the Soviet Union had broken its pledge not to interfere in domestic American affairs after the Seventh Congress of the Communist International in July. Of course, the Soviet government denied any connection with the Comintern or the American Communist Party, just as Litvinov had in 1933. American citizens, including Bullitt, were harassed in various ways in Russia. The Kremlin probably considered it too subversive to their regimented society to allow foreigners to enjoy the civil liberties that Americans took for granted. The most important agreement as far as the results achieved, however, was the last one made, the Litvinov Assignment. This note resulted in the American government's acquisition of nearly $10 million (the only money ever gotten out of the Accords), not by diplomacy but by court litigations in the United States.

The Litvinov Assignment had four parts to it. The first sentence prefaced the agreement as "preparatory to a final settlement of the claims and counter claims" between the two governments. Secondly, Litvinov pledged the Soviet government to abstain from any American court rulings or litigations that involved Soviet claims to property in the
United States "as the successor of prior Governments of Russian, or otherwise. . . ." This did not say that the Soviet government could not sue in American courts on its own behalf, only that it surrendered all legal claims to Russian interests in America acquired before October 1917. In the third part, the Soviet government assigned to the American government those interests which it had just renounced, providing, fourthly, that the latter informed the Soviet government of such funds realized. The only claim specified was that of the Russian Volunteer Fleet, for which the United States owed the Russian state $1,412,532.35. In a short note, FDR accepted the assignment under the stipulations so stated.62

It is doubtful whether Roosevelt knew exactly what this assignment included. The Department of State, through its legation in Riga, Latvia, had made a study of Soviet agreements with other nations on the same issue. The Division of Eastern European Affairs prepared some twenty drafts of desired conventions, as well as the Treasury Department's drafts on financial matters. But when it came to the debt issue, where Litvinov was adamant, FDR in his cavalier manner dismissed the debt issue as less important than other provisions.63

There was a legal problem with the recognition of the Soviet regime which the State Department believed had to be
settled before recognition was granted. Boris Bakhmetyev had been the Ambassador of the Provisional Government of Russia in the United States since July 15, 1917. When the Bolshevik coup d'état overthrew his government, he was recalled to Russia by the Soviets. But the American government refused to recognize the Soviets, so Bakhmetyev remained the official Russian representative in the United States until he retired on June 30, 1922. For five years he was an ambassador without a government. From 1922 to 1933, the State Department recognized Serge Ughet, the Provisional Government's financial attaché, as the only legal representative of the Russian state in America. Embassy property, bank accounts of the Russian governments before October 1917, and Russian claims against American firms that had not fulfilled wartime contracts were all under Ughet's authority. He sued in American courts in the name of the Russian state (abstractly, a nation without a government) and conducted diplomatic affairs.

According to United States Supreme Court rulings in regards to Mexican claims, similar in their diplomatic nature to the Russian situation, the political act of recognition of a foreign government by the President is legally retroactive. That is, recognition validates all acts of the recognized government since its historical creation. In the Mexican cases, the legal complications
were not so very great since the period of diplomatic non-recognition was only a few years during the Wilson Administration. In the Russian cases, the legal complications of State Department policy toward the Soviets were considerable. For sixteen years Russian companies that had been nationalized in their own homeland continued to conduct business in the United States. Diplomatic recognition of Moscow in 1933 would legally invalidate all contracts, claims, and rights involving the Provisional Government and Russian private corporations with American citizens.

A State Department Memorandum of July 27, 1933, recommended that the President reach an agreement with the Soviet Commissar on the disposition of Russian government property and rights in American from 1917 to 1933. If no agreement could be reached, then the Soviets should be made to abstain from taking action in American courts to press their claims. The memorandum also suggested that there be an official provision that the act of recognition would not be legally retroactive.  

Part of the legal problem was solved on August 25, 1933, when Ughet assigned to the American government all Russian government assets and claims. This included bank deposits of $5,186,770.97 in three New York Banks (Guaranty Trust, New York Trust, and National City Bank), and $3,001,650.42 worth of claims against various American
companies. These were the only specific assets that he knew, and he admitted that there might be others. But several of these claims were matched by American corporate claims against the Soviet Union for confiscation of their property in Russia. Recognition might mean that some New York banking house would suffer double jeopardy: they would lose their claims against the Soviet government (recognition means legal validation of the recognized country's laws) and would be held accountable for all transactions with Bakhmetyev and Ughet.

In a Department of State Memorandum of October 25, 1933, the suggestion was made that the United States government take over Russian state property in America as partial settlement of the public debt. At the same time, the Soviet government should acquiesce in the disposition of Provisional Government property in the United States from 1917 to 1933. If the Soviets refused to assign such rights to the American government, then they should be made to renounce its legal title to them pending the negotiation of claims.

There were still two more problems. One concerned the claims of private American bondholders of the Tsarist government. Their claims had to be accounted for as well as the American government's. The other question concerned the status of Russian corporate deposits and assets in the
United States. Under Soviet law, those funds belonged to the Soviet government by the sequester decrees. But American courts continuously since the early 1920's refused to honor the effects of Soviet laws upon business conducted in the United States as long as the national government refused to recognize the Soviet government. It was one Edgar Lowell of the Premium Credit Company who brought this problem to the attention of Presidential advisers Louis Howe and William Bullitt. Lowell strongly urged that if the Soviet government acquired any legal right to Russian corporated assets in America that it should assign that right to the American government in partial settlement of the debt question.67

Lowell wrote again to Bullitt on November 20, 1933, that he was not sure whether the Accords included Russian corporate assets or not.68 Bullitt's response was not reassuring. Early in January, Lowell visited Eastern European Division chief, Robert F. Kelley, and reported to Bullitt that Kelley seemed interested, if not surprised, by Lowell's idea.69 A month later, Kelley informed Lowell that no action would be taken at the time by the government on the Russian corporate assets.70

A second incident occurred in March when Troyanovsky brought a recent New York Court of Appeals case to the attention of Hull. He was apparently upset that the high-
nest New York court had ruled in favor of pre-Soviet Russian companies in the United States. "The Ambassador further suggested," Hull recorded in a memorandum of March 26, 1934, "that under the agreement in the conversations with Litvinoff [sic] in November last, amounts going to nationals of either country should be turned over to their respective governments and handled through them. He [Troyanovsky] said that he and the Russian claimants felt, or at least they felt, they were entitled to attention by our Government to the effect of this New York Court decision."71

These two pieces of evidence seem to imply that FDR did not have in mind Russian corporate assets in America that were allegedly confiscated by the Soviet Union when he signed the Accords. Probably, he and his State Department experts only meant the assignment to include those assets and claims that had belonged to the Russian state and not to its private citizens in the United States. On the other hand, the exact wording of the assignment was broad enough to include those claims if the State Department so chose. The key phrase was "amounts admitted to be due or that may be found to be due it [Soviet government] as the successor of prior Governments of Russia, or otherwise. . . ." (Italics added). "Otherwise" could be interpreted as Soviet claims to Russian private property that was
nationalized by Soviet law. The other underlined words could mean that the United States could claim any assets that American courts ruled belonging to the Soviet government, and hence the American government by assignment. These questions were legal ones, not diplomatic, and had to be handled by the Department of Justice.

It is not known who made the decision that the Justice Department would begin litigations to recover Russian private funds in the United States. It appears from the documentary evidence available at the National Archives that the initiative came from the Treasury and Justice Departments rather than the State Department. The three principal individuals who would handle the government's cases in the courts for the next six years were Henry Munroe, the Attorney for General Counsel of the Treasury, and Paul A. Sweeney and David E. Hudson of the Justice Department. They prepared the strategy and sought from the State Department the information they needed to take into court. But much of the official correspondence among Hull, Bullitt, Litvinov, and Troyanovsky that was later submitted as evidence to prove the government's cases was written in the State Department according to the counsels' specifications.

The decision to litigate the Federal government's claim was made in the summer of 1934 at the time the debt
and trade negotiations collapsed in Moscow. There well may have been a direct relationship between the two. In a letter to Secretary of the Treasury Morgenthau, William Phillips gave the State Department’s encouragement to take the Litvinov Assignment to the courts. On September 14, 1934, United States Attorney Martin Conboy gave official notice to Robert Kelley of his filing federal suits ordered by the Attorney General against two large New York banking firms. Three days later, Attorney General Homar Cummings rendered his official opinion to Hull that the Litvinov Assignment included not only Russian state property in the United States, but also Russian corporate property that the Soviet government had legally confiscated by its own law. By October 1, 1934, the Justice Department had initiated seven suits for $6,639,910.62 with eight more cases, involving over $4 million, in preparation. Thus began one of the most important legal contests ever fought in American courts over the constitutionality of Presidential diplomacy.
CHAPTER I: NOTES


3Ibid., pp. 29-36.


10Bennett, Recognition of Russia, p. 54.

11Quoted by Charles Evans Hughes, Foreign Relations (Republican National Committee, 1924), pp. 35-36.


15 Warren G. Harding, "On Foreign Relations" (Harding Memorial Association, Marion, Ohio), p. 5.


19 William Seward to Alvin P. Hovey, March 8, 1866, Diplomatic Correspondence (Washington, 1868), Part 2, 1866-67, p. 630.


21 Ibid., pp. 62-63.

22 Pusey, Hughes, II, 523-26; Murray, Harding Era, pp. 349-51.

23 Bennett, Recognition of Russia, pp. 69-75.

Bennett, Recognition of Russia, p. 76.


Stimson and Bundy, On Active Service, pp. 292-98.

Lt. Col. J. G. McIlroy to Assistant Chief of Staff Smith, February 23, 1933, FRUS: Soviet Union, 1933-1939, p. 3.


FRUS: Soviet Union, 1933-1939, pp. 6-11.

Ibid., pp. 14-16.

Ibid., pp. 16-17.


Farnsworth, Bullitt, pp. 102-106; Feis, 1933, pp. 324-26.


44 Under Secretary of State W. R. Castle, Jr., to Fred L. Eberhardt, March 3, 1933, FRUS: Soviet Union, 1933-1939, pp. 3-5.


47 Leo Pasvolsky and Harold G. Moulton, Russian War Debts and Russian Reconstruction (New York, 1924), pp. 17, 19, 21; Elisha M. Friedman, Russia in Transition (New York, 1932), pp. 501-504.


Ibid., pp. 232-38; Fischer, Soviets in World Affairs, II, 701-703, 766-69; 811-12; Friedman, Russia in Transition, pp. 515-16.


Beloff, Foreign Policy of Soviet Russia, 1929-1941, I, 90-91.


FRUS: Soviet Union, 1933-1939, pp. 35-36.

For comments by Molotov and Radek, see Degras, Soviet Documents on Foreign Relations, III, 46-48, and Eudin and Slusser, Soviet Foreign Policy, 1928-1934, II, 587-90, respectively; Bullitt to FDR, December 24, 1933; FRUS: Soviet Union, 1933-1939, p. 54.

59 Ibid., pp. 66-69; quote on p. 69.


61 For an excellent analysis of the terms and the results of the Accords, see Bishop, Roosevelt-Litvinov Agreements.


63 Memoirs of Cordell Hull, I, 299-300, Bennett, Recognition of Russia, pp. 120-21.


65 Department of State File, 411.61 Assignments/1 1/4 and 411.61 Assignments/2a, National Archives.


67 Edgar Lowell to Louis Howe, November 8, 1933, Department of State File, 411.61 Assignments/1 1/2, and same to William C. Bullitt, November 13, 1933.

68 DSF 411.61 Assignments/2 3/5.

69 Lowell to Bullitt, January 15, 1934, DSF 411.61 Assignments/3 2/5.

70 Kelly to Lowell, February 15, 1934, Ibid.


72 DSF 411.61 Assignments/4a.

73 DSF 411.61 Assignments/ 5 1/4

74 DSF 411.61 Assignments/6.

75 Memorandum for the Assistant Attorney General, DSF 411.61 Assignments/19 1/2.
CHAPTER II

LEGAL CONSEQUENCES OF NON-RECOGNITION

The existence of the Soviet government was a legal problem that plagued American courts all through the 1920's and 1930's. While the State Department refused to grant Moscow diplomatic recognition after 1917, the courts were bound by both tradition and inclination to ignore the new Russian regime as long as the political branches of government did too. Yet case after case raised serious judicial questions as to the rights Russian individuals and property enjoyed in this country beyond Federal governmental authority. Property rights of both American citizens and aliens alike in the United States are protected by the federal and state constitutions. Could the courts rightfully deny constitutional rights to Soviet citizens simply because the national government refused to grant recognition for purely diplomatic reasons? There was also the problem of Russian property in Western countries that under Soviet confiscatory laws belonged to the Soviet government. To recognize Soviet nationalization of property not located within the Soviet Union would be to deny the constitutional protections guaranteed in the legal forums of the West.
The legal problems also had political overtones. Much of the Russian property in the West belonged to the former Tsarist government and the Russian bourgeoisie and aristocracy—the victims of the Communist social revolution in Russia. Like the French émigrés after the terror of 1793, many Russian noblemen fled their country and formed political pressure groups in foreign countries. From Paris and other European capitals they gave moral and alleged financial support to anti-Bolshevik forces inside Russia. Many of the Russian émigrés never lost hope, after the defeat of White armies in the Russian civil war, that someday they could return to their homes following an anti-Communist revolution. To finance their fantasies, the exiles sought to recover any Russian property in the West that the courts there would award them.¹

Since the early days of the Supreme Court under Chief Justice John Marshall, the rule in American courts was that diplomatic recognition of a foreign state or government was a political question that could not be challenged by the courts.² A foreign government not recognized by the Department of State had no legal rights in the United States. This legal doctrine, however, created judicial problems when a foreign government was in operation for several years preceding American diplomatic recognition. Were private property rights acquired from the new
government before American recognition void in the United States? This question was answered by the Supreme Court in 1918 when it heard appeals from conflicts over property rights granted by the Mexican government which President Wilson had refused to recognize. In Oetjen v. Central Leather and Ricaud v. American Metal, the Court ruled that diplomatic recognition by the United States had the effect of being legally retroactive to the time that the recognized government was historically established. The principle was established that property rights acquired from a new government would not be acknowledged in American courts before diplomatic recognition, but would be fully valid after it. Conversely, legal rights connected with a former government would be valid until the United States recognized a new one (even if the old government no longer existed as a political identity). It was a confusing, and often contradictory, legal doctrine, but it was a successful temporary solution to handle cases arising from a confused and contradictory foreign policy.

Following this doctrine, both federal and state courts in the United States refused to acknowledge the Soviet government as a sovereign entity following the Bolshevik Revolution. Federal Circuit Courts of Appeal in California and New York in three admiralty cases ruled that the Russian Soviet Federated Socialist Republic (RSFSR)
could not sue in American courts because it was not a sovereign acknowledged by the American government. At the same time, a Circuit Court ruled that Boris Bakhmetyev, the Ambassador of the Provisional Government, could represent the interests of the Russian state in American courts, since he was the only Russian diplomatic representative that the State Department acknowledged. In this 1919 case, the court differentiated between a "state," which once recognized is perpetual, and "government," which is the political organ of the state and dependent on diplomatic recognition by other nations before it succeeds to the rights of the former government in international law.

American courts refused to give effect to the Soviet laws of nationalization in relation to Russian private property located here by reason of non-recognition. The principal court in this type of case was the New York Court of Appeals (that state's highest court) because most of the Russian corporate property in the United States was in New York City. The leading cases were Wulfson v. RSFSR, decided on January 9, 1923, and RSFSR v. Cibrario, decided two months later. The first case involved a suit by Max Wulfson, a New York dealer in furs, for recovery of pelts in Russia that were confiscated by the Soviets. His argument was that the RSFSR could not enjoy sovereign immunity in American courts simply because it was not diplomatically
recognized by the United States. Judge William S. Andrews, speaking for six of the seven judges, rejected that argument, since no American court is competent to judge the actions of a de facto foreign government. Andrews concluded that the Soviets could not be sued in New York since the courts were not the place for redress against foreign countries. That was the duty of the political branch of the national government.\textsuperscript{7}

The \textit{Wulfson} case was significant for two reasons. It was the first case in which a major American court recognized the \textit{de facto} existence of the Soviet government. Recognition, Andrews stated, did not create states; it only established diplomatic relations between equally sovereign nations. The case also decided that Soviet confiscatory laws were valid in the eyes of American courts so far as they affected property inside the Soviet state. Whether those laws were equally valid concerning Russian property outside of Russia was a question that the Court of Appeals would answer negatively in later cases.

The \textit{Cibrario} case established the rule that the Soviet government could not sue in New York courts. Judge Andrews, delivering the opinion of a unanimous court, wrote that comity among nations, the respect that the courts of one nation give to the laws of another, is a privilege based on political recognition. He cited a
public statement by Secretary of State Colby and another by his successor, Charles Evans Hughes, on American policy toward Communist Russia to the effect that there was a state of enmity between the two states that could not allow legal comity in the courts. "We should do nothing to thwart the policy which the United States has adopted," the judge ruled. In other words, the Court of Appeals supported a legal parallel to the diplomatic policy of non-recognition. But Andrews added in his opinion a new element to legal thought on Soviet confiscations: comity would not be granted in New York courts if it would mean a conflict with the public policy of the state as interpreted by its courts. What Andrews was adding in the form of obiter dictum (extraneous remarks that do not relate to the specific case at hand) was that the Court of Appeals did not have to enforce any Soviet laws, even after diplomatic recognition by the government in Washington, if doing so would violate the constitution and laws of New York which do not allow public expropriation of property without good cause and just compensation.8

The interesting thing about the Cibrario case was that it did not involve any confiscatory laws or Russian property rights before 1917. Cibrario was commissioned by the Soviet government in 1918 to purchase photographic equipment in the United States, for which the Soviets
deposited about a million dollars with the City National Bank of New York. Cibrario absconded with the money and the Soviet government appealed to New York courts for restitution. The Cibrario case involved a right in equity that the Court of Appeals would have defended in almost any other circumstance. The effect of the decision was that the Soviet Union had no legal rights of contract in the United States even though the Department of State allowed it to trade in this country. This legitimate Soviet claim was not satisfied until 1942.9

If the Cibrario case contradicted the business reality of the facts involved, it was consistent in principle with decisions in other capitalistic nations. Immediately after the Bolshevik Revolution neither English nor French courts took notice of any political changes in Russia and continued to adjudicate cases involving Russians according to Tsarist and Provisional Government laws. For example, in 1921 Justice Roche of the King's Bench of Great Britain found in favor of the Estonian Company for Mechanical Woodworking in its suit against an American firm for rights to plywood confiscated in Russia from the former and sold to the latter by the Soviets for resale in England. Justice Roche refused to recognize the validity of Soviet expropriation of the Company for Mechanical Woodworking's mill and stock in Russia, and therefore invalidated the claim of
James Sagor and Company to the same stock sold to it by the Soviet government.\\(^{10}\)

The English Court of Appeals, however, reversed this decision in May 1921. There were three written opinions in this case, *Luther v. Sagor*. The principal fact which altered the case was that the British government concluded a trade agreement with the Soviet Union on March 16, 1921, while the case was under appeal. The Foreign Office provided the court with a statement that it considered L. B. Krassin of the RSFSR a bona fide foreign delegate in Great Britain representing a *de facto* government. This was sufficient reason for Lord Justice Banks to reverse the lower court's decision. He wrote that *de facto* recognition was sufficient reason for English courts to honor the acts of a politically operating foreign government. For precedents, Banks cited two cases from the American Supreme Court on the legal effect of political recognition.\\(^{11}\)

Lord Justice Warrington agreed with Roche's ruling that political *de facto* recognition of the RSFSR by the Foreign Office altered the facts enough to reverse the verdict. He, too, relied on American precedents.\\(^{12}\)

The third decision in *Luther v. Sagor* was different in its approach from the other two opinions. Lord Justice Scrutton asserted that *de facto* recognition was not retroactive in effect, but became legally binding on the courts
of the recognizing power only from the date it was granted. He raised the subject of comity, and observed that courts in the past had refused to extend comity in situations where it would clash with English law and morality. But Scrutton was not dissenting with the final judgment of the Court, since the Foreign Office had established the national policy for the court. He concluded that "the responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges." In this case, he did not wish to embarrass the foreign policy of Prime Minister David Lloyd George and Foreign Security Lord Curzon.13

The English Court of Appeals also ruled that Russian branch banks in Western nations ceased to exist legally as corporate personalities when the Soviets nationalized all banking houses in Russia. In The Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse,14 Mr. Justice Sankey ruled that a Russian banking firm in London was no longer a legal identity and had no right to sue in English courts. The principle behind the decision was that legal personality depends upon the laws of the place where it was incorporated; the state that can create corporations can also destroy them.

The above principle was reaffirmed in Banque Internationale de Commerce de Petrograd v. Goukassow,15 which
involved a suit against an Englishman by the Paris branch of a Russian bank for the recovery of a debt contracted in France. In this case, the Court barred the suit because the plaintiff was not a personality in the eyes of English courts. Lord Scrutton wrote, "If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person." On the other hand, Lord Atkin made the observation that under English precedent the Crown could seize all Russian corporate property in England by *bona vacantia*, a form of the medieval right of escheat. Atkin's argument was that it was the law of the forum, the place where the court sat, that determined legal personality, not the law of the corporate domicile.

The House of Lords took Lord Atkin's point of view when it reversed the Court of Appeals in the *Mulhouse* case. The Law Lords decided that the Soviet confiscatory decrees did not dissolve the Russian companies but only provided for seizing their assets inside Russia. This decision became the judicial polestar for several cases throughout the 1920's.¹⁶

French courts also refused to extend comity to Soviet laws that conflicted with French laws regarding property and property rights in France. They refused to acknowledge the legal existence of Russian banks in France,
but with one great exception. The French courts granted Russian firms a de facto domicile in France in situations where Russian corporate funds were deposited with French business firms and banks. In other words, if a pre-1917 Russian corporation had financial affairs with French companies in France, it could sue as a legal person in French courts. A Russian firm located in London, for example, could not sue in French courts for a contract made outside of France.  

Even after recognition of the Soviet government by France, the French courts refused to award Russian private property in France to Soviet authorities. Most of the pre-Revolution Russian corporate interests were turned over to a government-appointed trustee. In 1925 the Soviet Ambassador sued the administrator of one such Russian firm for the corporate assets. The court ruled in favor of the trustee, allowing him to liquidate the company for the benefit of its former stockholders (many of whom were probably White Russians in Paris). The appeal of the Soviet Ambassador was rejected at the intermediate level and again at the court of last resort. 

A case in 1930 further empowered the administrator of a Russian firm to collect debts owed to it by French companies. The administrator sued two financial institutions for over a million francs, which they refused to surrender
because they had lost over seven and a half million francs by Soviet confiscations of their property in Russia. The court ruled that the funds be turned over to the administrator in order that they be applied equitably to all French claims against the Soviet Union. 19

In both Germany and Switzerland, courts ruled that Soviet nationalization of banks and industry had ended their corporate existence in those nations as well as in Russia. In those countries, the emigree Russian stockholders and corporate directors could not sue German or Swiss firms to recover accounts or claims. The situation was different in Sweden, where the courts allowed Russians to sue and recover claims against Swedes. 20

Many legal complications probably could have been avoided in the United States if the Department of State had wished to freeze all Russian assets in America until recognition of Soviet Russia and settlement of the debt question. Yet this policy was not possible as long as it officially recognized the Provisional Government, rather than recognizing no government at all for Russia. In the light of the State Department's contradictory Russian policy, the New York courts chose to follow the English precedents in Russian corporate cases. For ten years, Russian émigrés sued to recover Russian business assets in the United States with consistent success.
In 1924 the New York Court of Appeals followed the Mulhouse precedent in Sokoloff v. National City Bank. Boris N. Sokoloff had made a deposit with the National City Bank in New York in order to open an account with that bank's branch in Petrograd. After the Bolshevik Revolution, Sokoloff demanded payment of the account in dollars at New York City. The bank refused, claiming that when the Soviet government confiscated its branches in Russia it acquired all the bank's liabilities as well as assets. It is interesting to note that the counsel for Sokoloff was Morris Hillquit, the famous American Socialist. The unanimous decision of the Court of Appeals in favor of Sokoloff was written by Benjamin N. Cardozo. Until his appointment to the Supreme Court in 1932, Cardozo would deliver most of the Court of Appeals' judgments in the Russian corporate cases.

Cardozo based his argument on the fact that the Soviet government was not recognized by the United States; thus in the eyes of Americans the confiscatory acts of the RSFSR had no greater legal authority than the robbery of common bandits. He asserted that the Oetjen case, in which the Supreme Court had validated a confiscation by the Mexican government after American recognition, was not controlling in regards to the Soviet state. Cardozo further remarked that Sokoloff had made a contract with a New York
firm in New York, under New York law that could not have been affected by Soviet law. In conclusion, he offered an idea that would cause much trouble in the future: "The intangible chose in action [Sokoloff's right to sue for recovery], at least when it is the result of a deposit in a bank, has for some purposes a situs at the residence or place of business of the debtor [National City Bank], though the creditor be far away. . . ."22

The Sokoloff case actually decided that the plaintiff did have a chose in action; it did not rule the recovery of all Sokoloff's deposit or recovery in pre-1918 rubles. In the denial to re-argue the case, Cardozo assumed that recovery would be in the value of rubles, but he did not say whether that would be 1917 rubles or 1924 rubles. In terms of the latter, the debt would be worthless because of the near catastrophic inflation that had swept Russia during the civil war.23

Two months after deciding the Sokoloff case, the Court of Appeals rendered its judgment in James v. Second Russian Insurance Co.24 This case, like its predecessor, decided only questions of procedure and not of substance. Cardozo delivered the unanimous opinion of the Court again. The Fred S. James & Company was an American firm which had received an assignment from the Eagle, Star & British Dominions Insurance Company, Ltd. (an English firm) of a
claim against the Second Russian Insurance Company. (The assignment was probably made because the English firm doubted that it could get a favorable verdict in an English court after Britain's recognition of the Soviet Union.) Cardozo ruled that the Russian company still existed as a legal personality in the eyes of New York law since the Soviet confiscatory decrees were not applicable in the New York courts. As long as the Second Russian Insurance Company existed in New York, its funds were liable to claims against it, even if the claims were of foreign origin.

In February 1925 the Court reached a similar decision in *Russian Reinsurance Co. v. Stoddard*. This was a 4-1 decision delivered by Judge Irving Lehman (Judge Crane dissenting, Judges Chester McLaughlin and William Andrews not participating, and Cardozo in the majority). The plaintiffs were the remaining directors of the Petrograd insurance company who were living in Paris. They wanted to recover from Francis R. Stoddard, the New York Superintendent of Insurance, the sum the company had deposited with him according to New York law when it began business in New York in 1906. The question at hand was whether the directors had a right to represent the company in New York courts since it had been dissolved in its homeland. Lehman observed that since the United States did not recognize the RSFSR, the laws that governed the operation of the company
should technically be the laws of the Imperial Russia. Yet he believed that this proposition was both absurd and unnecessary. He reasoned that as long as the State Department refused to recognize Soviet Russia the New York courts could judge cases according to the public policy of that state. In order to escape a judicial dilemma, Lehman concluded that the Court had to disclaim jurisdiction in this type of equity case until after recognition of Moscow by the United States. This would protect the Bankers Trust Company, that held the Russian assets in trust, from double jeopardy.26

Within the next five months the Court of Appeals rendered two more important decisions affecting Russian corporate assets in New York. It ruled in one that the First Russian Insurance Company did exist as a legal identity and its directors were empowered to act for it against the Superintendent of Insurance.27 It decided in the second that obligations contracted by New York firms with Russian businesses were not abrogated by Soviet laws. This was another suit against the National City Bank for dollar deposits made by a Russian joint stock company in New York after the Bolshevik Revolution. The court ruled that the contract had been made in New York and was therefore governed by New York law, not Soviet.28

Up to this time, neither the national nor the state
governments had done anything about the status of Russian interests in the United States. But the Court of Appeals cases threatened several of the large American insurance companies with honoring policies contracted in Russia, even though the Soviet government had expropriated all of their assets in Russia. The New York legislature, under heavy pressure from the insurance lobby, passed a stay law in 1926 on all insurance contracts made by New York firms with Russian citizens until thirty days after American recognition of the Soviet Union. It was not long until the Court of Appeals heard an appeal in a case that was a showdown between private Russian interests and American business interests. 29

Henry F. Sliosberg was a Russian subject who had bought a twenty-year life insurance policy from the New York Life Insurance Company for 20,000 rubles. The policy was delivered to Sliosberg in St. Petersburg (later named Petrograd) on November 1, 1901, and the endowment policy was payable in Petrograd in rubles. Sliosberg paid premiums until October 18, 1918. In the meanwhile, the revolutionary Soviets nationalized all insurance firms on December 1, 1917. Two years later, the Soviet government cancelled all life insurance contracts. The New York Life Insurance Company lost all of its assets in Russia, and it assumed that it also lost all liability to Russian citizens
under the new socialist laws. But Sliosberg escaped from Russia in 1920 and resided in Paris. In the spring of 1925 he came to New York City in order to file suit against New York Life to recover 16,140 rubles.30

_Sliosberg v. New York Life Insurance Company_ brought an impressive array of corporate lawyers into court. For the defendant, there were former Secretary of State Charles Evans Hughes and a future Secretary of State, John Foster Dulles. John W. Davis, the 1924 Democratic Presidential candidate and famous Wall Street lawyer, appeared as _amicus curiae_ for the Equitable Life Assurance Society. Hughes' principal argument was that the 1926 stay law prohibited his client from paying its obligation to Sliosberg until after outstanding diplomatic questions were settled by American recognition of the Soviet regime. He asserted that "A stay law which is reasonable as a conservatory measure is not unconstitutional." Sliosberg's attorneys repeated the argument that had won them the case in lower courts: the stay law was unconstitutional because it violated the sacred obligation of contract. Cardozo was now Chief Judge of the Court of Appeals, but he did not choose to write the opinion himself. Judge Henry T. Kellogg, who had just joined the court, delivered the unanimous opinion of the court. The court ruled that the 1926 stay law was unconstitutional and Sliosberg's claim was a valid one.
Whether or not Sliosberg was an alien was immaterial, Kellogg contended, because the defendant was a New York corporation bound by New York law, the contract was drafted in New York (although effective in Russia), and New York courts were the proper place for this type of legal action. He concluded that there was no justification for the New York stay law, and that the Court would never recognize the legitimacy of Soviet laws which would infringe property rights in New York.31

Between 1927 and 1930 there were two important federal cases that concerned the legal rights of Russians in the United States. The first was Lehigh Valley Railway v. State of Russia, which was heard in Second Circuit Court of Appeals in 1927. Judge Martin T. Manton rejected the idea that federal courts could distinguish between de facto and de jure governments, since they must follow the foreign policy of the national government. This case determined that Serge Ughet was the official representative of the Russian state in the United States and therefore had the right to sue in American courts in the interest of Russia.32 The second case involved a suit by the Banque de France against the Equitable Trust Company of New York in 1929. The case involved questions of fact submitted by the defendants. Judge Henry W. Goddard wrote for the same court that Soviet Russia was a de facto government, but
that fact itself was not a question for adjudication since it was a political question determined by the political branches of the national government. In the matter at hand, Goddard observed that France had recognized the Soviet Union. That act had validated all Soviet laws as they concerned Frenchmen, but not Americans. The Banque de France had no legal claim to Soviet accounts with American firms as means of restitution for losses suffered in Russia, but must go through the diplomatic channels of its own government for relief.33

In 1930 the New York Court of Appeals reversed the decision of the Stoddard case and gave the Russian corporate directors the right to recover their assets in that state. The case was Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank,34 decided on February 11, 1930. The plaintiff was a Russian chartered bank which had deposits in various cities in the West. It had made two deposits with the National City Bank of New York amounting to $66,749.45. In 1925 when the suit was initiated, six of the seven directors of the bank in 1917 were alive and living in Paris. By 1930, only three of them were alive. The National City Bank refused to honor its debt to the directors because it claimed that the Petrogradsky Bank was no longer a legal personality and that its directors had no right to govern for the institution. In a 5-2 decision, Chief Judge Cardozo rejected the National City Bank's
defense and ruled in favor of the Paris directors. "The personality created by law may continue unimpaired until law rather than might shall declare it at an end," he wrote. Apparently, Cardozo did not believe that the Soviet nationalization decrees were "law." At least, they were not law in New York. Cardozo reasoned in a lengthy opinion that contained much obiter dicta and few legal citations that the Petrograd Bank was still a legal personality and its directors did have the power to act in its behalf. The judgment of the Court was that the National City Bank owed the plaintiff directors $66,749.45 plus interest from 1920.35

Meanwhile, the State of New York had acted to settle the matter of the Russian insurance company assets. In August 1925 the New York Supreme Court ordered the Superintendent of Insurance to take possession of various securities placed in trust by several Russian insurance companies according to New York insurance laws. The Superintendent of Insurance took over these assets in order to satisfy all claims against the insurance companies by New York residents. There was a sizable amount left over, and foreign claimants appeared in court to press their claims. The lead case in the disposition of these funds came in Matter of People (First Russian Insurance Co.) in 1930.36 Cardozo delivered the opinion of the Court that
the Superintendent must honor the claim of Fred S. James & Company, the American firm that had received a claim from a British firm by assignment and had sued for it in the 1925 case cited above. The question remained, however, what was to be done with insurance assets after all claims, domestic and foreign, were satisfied. The amount involved was about six million dollars including interest, and the beneficiaries would be Russian emigres who were stockholders in these companies in Russia. Less than a month after the case reported above, the New York Supreme Court (the intermediate court of that state) ruled that the surplus assets were not to be distributed, but to be held by the Superintendent of Insurance until after American recognition of the Soviet Union. In the meantime, the court placed an injunction on all suits for recovery.37

In eight consecutive cases, all argued on January 5, 1931, and decided on February 10, the Court of Appeals reversed the lower court's orders and settled some matters of detail. In Matter of People (Russian Reinsurance Co.) and Matter of People (First Russian Insurance Co.),38 Cardozo, delivering the unanimous judgment of the Court, distinguished by name the Stoddard case and followed the Petrogradsky M. K. Bank case. The Chief Judge reasoned that it would be unjust to satisfy domestic claims and not foreign ones. He therefore raised the injunction that
barred foreign claimants from suing in New York courts. Any surplus after satisfaction of these claims would be turned over to the surviving directors of the insurance corporations. Cardozo took notice that in the case of the Russian Reinsurance Company, the directors controlled 8,000 out of 12,000 shares, and the directors of the First Russian Insurance Company had only 3,700 out of 10,000 shares. But he talked as though the outstanding shares belonged to Russian citizens who could not sue in American courts because of their government. He never conceded the fact that those shares could belong to the Soviet government itself by expropriation of private holdings.

In the six other cases, the Court made equally unreasonable decisions. One concerned the amount of interest that should be paid to a claim by the company liquidator. Another allowed submission of proof of claim based on foreign business transactions into New York courts. A third ruling ordered that claims in rubles should be satisfied at the rate of one ruble equalling $.51. This was a judicial misrepresentation of the facts since the Court demanded that the claimant received equal value for the contract when it was made before World War I, ignoring the great inflation afterwards. The value of the ruble in the third quarter of 1914 ranged from $.52 to $.51, but by the end of 1917 it had fallen to $.12. Yet in current Soviet
money, this policy would have been worthless. In two cases decided together, that of the Northern Insurance Company and the Moscow Fire Insurance Company, the Court ruled that the one and two surviving directors respectively could recover their company assets if they would post a bond to insure proper use of the funds. Otherwise, the directors were to put the assets in a trust company to be governed by the courts. In the last case, the court found that the Second Russian Insurance Company was insolvent, having four times as many claims as assets, so the available funds would be put into a trust company for safekeeping.

In 1932 President Herbert Hoover appointed Cardozo as an Associate Justice of the United States Supreme Court, and his place as Chief Judge in New York was taken by Cuthbert W. Pound. The position of the Court of Appeals on the Russian cases, however, did not change. In 1933, four months before the Roosevelt-Litvinov Accords, the New York superior court upheld the right of Standard Oil Company to oil deposits in Russia based on a Soviet concession. The facts of the case were similar to Luthar v. Sogar and the Wulfson case. At the intermediate level, the New York Supreme Court observed that the laws of the RSFSR were binding in Russia, although not beyond its borders. The consequence of not giving extraterritorial effect to Soviet decrees, the court observed, "has been
that corporations non-existent in Soviet Russia have been, like fugitive ghosts endowed with extra-territorial immortality, recognized as existing outside its boundaries. . . . To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve."45 Chief Judge Pound, delivering the unanimous opinion of the Court of Appeals, agreed. The M. Salimoff & Company could not sue in this court to recover property losses suffered inside Russia, since New York courts had no right to judge the acts of a foreign government in its own territory, be it de facto or de jure.46

On the other hand, the superior court did not accept the lower court's analogy of Russian corporations in New York as "fugitive ghosts endowed with extra-territorial immortality." If the Court of Appeals had based its judgments on recognition alone, it would have been obliged to give all Soviet laws effect in New York after American recognition in November 1933. Yet it had on several occasions remarked that it would never honor foreign laws that were contrary to the public policy of the state. This doctrine was reaffirmed in a case decided three months after the Roosevelt-Litvinov Accords. The Vladikavkazski Railway Company sued the New York Trust Company for recovery of a deposit of $46,584.18 made in its behalf by the Imperial Russian Government. The case at hand concerned
particular motions that had been stricken by the lower courts in the litigation of the claim. Judge Irving G. Hubbs reiterated the Court's position that the Salimoff case applied only to property located in Russia, and it did not affect Russian property in New York. The basis for the Court's continued rejection to enforce Soviet confiscatory laws was the lack of comity. The Court found that the Soviet expropriations were "contrary to our public policy and shocking to our sense of justice and equity." Hubbs continued, "That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts."  

It appeared that the Court of Appeals may have begun to change its views on the Russian cases in 1934. Indeed, the decisions of the 1920's seemed to have little relevance to the realities of the 1930's. In Dougherty v. Equitable Life Assurance Society, which involved the reversal of twenty-six cases from the lower court, Judge Frederick Crane (who had sat on the Court during the earliest cases) ruled that a contract made in Russia before the Bolshevik Revolution was worthless. While the Soviet laws were still repugnant to him personally, the Judge observed that "we at least must admit that other peoples can try the experiment [socialism] if they please." He also took
notice that in 1924 the Soviet government had issued a new ruble standard where one new ruble equaled fifty billion old ones. Therefore, the plaintiffs could not recover full value on insurance policies contracted in rubles that matured after March 7, 1924. Judge Lehman, concurred with the result, but he wrote a separate opinion differing with Crane's judicial concessions to Soviet rule. In no circumstance would he allow any Soviet law that abridged the obligation of contract to be effective in this court, although he had to acknowledge that inflation indeed had changed economically the real value of contracts.49

The slight shift in the Court of Appeals' reasoning was consistent with the adjustment of other Western courts to the diplomatic realities of the times. A 1933 English Chancery decision found that the Soviet reorganization of the Russian economy had terminated the legal existence of Russian firms abroad. The case involved the distribution of assets of a defunct Russian branch bank in London. But to concede that Soviet laws ended the bank's existence was not to say that the Soviet government had a legitimate claim to that bank's assets. The Chancery court ruled that all claims based on contracts negotiated in England would be governed by English law. Sir F. H. Maugham therefore dismissed the Soviet claim and ruled that English claims would be honored against the bank's remaining assets.50
As could be expected, the New York and British cases reported above created much controversy among legal commentators. In 1925 a lawyer writing for the North Carolina Law Review observed that, according to the English precedents, recognition alone was the critical factor as to whether Western courts would give affect to Soviet laws.\textsuperscript{51} Three years later, John G. Hervey, a political science instructor at the Wharton School of Finance and Commerce at the University of Pennsylvania, wrote that there had been a variety of reasons why Western courts had refused to honor Soviet laws when the political branch of government had not extended recognition. In the absence of political advice, the courts, in his opinion, had relied on the doctrine of non-recognition too heavily. Hervey believed that American courts should give affect to the acts of \textit{de facto} governments whenever justice required it, as long as enforcement was not contrary to the laws of the forum. The basis of this legal doctrine would free the judicial branches from the political policies of the national government, because the courts could continue to invalidate Soviet decrees even after recognition.\textsuperscript{52}

Hervey's opinions were adapted by Yale Law Professor Edwin Borchard in a 1932 article for the American Journal of International Law, of which Borchard was an editor. The distinguished international law expert bemoaned the legal
confusions over *de facto* and *de jure* recognition that had resulted from Wilson's foreign policy. He was particularly upset with the state of Russian affairs: the Department of State recognized the representative of a non-existent government, while it allowed representatives of a non-recognized government to do business in the United States, even though the latter technically had no legal rights. Borchard strongly urged the courts to free themselves from the legal quagmire that resulted from unorthodox diplomatic policies and judge the laws of foreign governments according to the legal standards of the forum. In other words, Borchard was advocating that the courts decide what they like and dislike rather than leaving that evaluation to the State Department.  

An excellent study by George Nebolsine for the *Yale Law Journal* in June 1930 supplied the Hervey-Borchard thesis with a wealth of information. Nebolsine categorized Western decisions about Russian property into four approaches. First, there were courts that had rejected the effect of Soviet laws because of diplomatic non-recognition. Secondly, there were courts in countries that had recognized the Soviet Union, but had interpreted Soviet law in such a way as not to give it an extra-territorial effect. In the third category, some courts had given some Russian firms a *de facto* domicile outside of Russia, as the
French courts had done. And lastly, there were those which had ruled that the forum determined what laws applied to the governance of corporations and not the laws of the state of incorporation. Nebolsine pointed out how the New York Court of Appeals had shifted from the first to the fourth approach. In conclusion, he gave much praise to Cardozo for evoking the law of the forum doctrine. 54

To what degree these journal articles affected the judges of the Court of Appeals would be very difficult to determine. It is true that the Court held weak premises to refuse to acknowledge the legal existence of the Soviet Union only because of American diplomatic non-recognition. As one commentator at the time pointed out, recognition does not create a state or a government in the international system, but only establishes diplomatic intercourse. 55 Professor Louis L. Jaffe of Harvard was very critical of the Court of Appeals because it refused to allow the Soviet government legal rights which it had earned by political survival in a hostile world environment. 56 To base decisions on conflict of laws, however, was a different matter. Here the courts exercised the initiative in judging cases rather than submitting to the political branches which conducted political policy. It would not be until the Belmont decision by the Supreme Court in 1937 that the conflict of laws approach also
bowed to the national government's interpretation of international relations.

In summary, these New York cases involving Russian corporate assets after the Bolshevik Revolution were important in respect to the legal nuances of the American non-recognition policy toward the Soviet Union. They illustrate the judicial frame of mind preceding the Roosevelt-Litvinov Accords, and were the precedents upon which later cases were litigated after the Justice Department entered the court battles in 1934. Three specific things should be noted in regard to these cases. First, during the 1920's the American courts followed the well-established doctrine that foreign policy was the responsibility of the political branches of government and the judicial branch was bound by the larger value decisions of the Executive branch. During this decade, the New York Court of Appeals made its judgments consistent with the State Department's foreign policy. It gave no legal benefits to the Soviet Union which the State Department chose to deny Moscow, the Department acting in retaliation for repudiation of Russian debts and Soviet international revolutionary activities. The second point is that the Court of Appeals did not change its outlook on the Russian situation when the Roosevelt Administration changed the national policy in 1933. It refused to grant comity to the laws of the Soviet
system. It continued its emnity to the Russian socialist experiment despite the fact that President Roosevelt was trying to mitigate ideological differences in the face of bellicose fascism.

Finally, Cordozo and other members of the Court of Appeals may have had an exaggerated sense of protection for individual property rights. They consistently upheld foreign claims against the interests of larger American companies that had lost millions by Soviet confiscations. Why should former Russian property claims in the West be more favored than the claims of American nationals? It is true that allowing the New York banks and insurance firms to keep Russian deposits to satisfy their own claims would have been unfair to other Americans having claims against the Soviet Union. The simplest solution would have been a federal court order demanded by the State Department to hold all Russian corporate assets in escrow until a diplomatic settlement could be reached with Moscow. This was a legal impossibility as long as the State Department continued the fiction that Bakmetyeff and Ughet represented the Russian state. They actually represented nothing but their own interests and those of exiled Russians who opposed the Soviet dictatorship. The other solution was that the New York courts could have held Russian assets in trust. This they did do for the Russian insurance companies, but only because they ceased to function after 1925.
The United States government had little difficulty in recovering those assets in the country that had belonged to the Russian state itself. On February 6, 1934, less than three months after the Roosevelt-Litvinov Accords, the Justice Department won the right to replace the "State of Russia" in a suit initiated by Serge Ughet against the National City Bank in 1928. At stake was a deposit of $115,788.32 made by the Russian government before the Bolshevik Revolution. The U.S. Attorney argued the government's claim as assignee of the Soviet government before the United States Circuit Court of Appeals for the Second Circuit. Judge Martin T. Manton with the concurrence of Judges August Hand and Harrie Brigham Chase, ruled that the conduct of foreign relations was a political rather than a judicial matter and that the assignment had been made within the powers of the President to make such an executive agreement. While this case involved only a chose in action (a right to sue for a claim) based on a fund once belonging to the Russian government and not involving private Russian corporate assets, it was encouraging to the American government that the courts would be sympathetic to its interpretation of the Litvinov Assignment.

The total amount of Russian state claims against American nationals, as listed by Ughet in his assignment of claims to the American government on August 25, 1933, was
over eight million dollars. The largest single claim was of five million dollars against the Guaranty Trust Company of New York for deposits made by Ughet in 1917, most of which was probably aid from the American government. The U.S. Attorney demanded the deposit, but was refused, so the Justice Department began a suit for recovery on September 21, 1934. It took nearly four years for the case to reach the Supreme Court, which eventually ruled against the government's claim on a legal technicality. The government did receive some Russian claims without a court battle, but only a small amount. By autumn of 1935, it had recovered less than $170,000. One of the amounts was $825.93 from the estate of August Belmont, Jr., an amount that Belmont had received from Ughet on behalf of the Provisional Government. 58

The recovery of Russian corporate property was a long and difficult judicial process. As explained in Chapter I, there is reason to believe that President Roosevelt and his advisors did not intend the Litvinov Assignment to include these as well as Russian state property. Or, perhaps there were people at the White House and State Department who were aware of the New York cases involving Russian assets and were satisfied that the Litvinov Assignment was worded broadly enough that the government could wait to see whether it would be worth the trouble to press the Assignment in
American courts. Either way, it was Soviet Ambassador Troyanovsky who first approached the State Department for a clarification of exactly what the Accords meant in details. Robert F. Kelley, the Chief of the Division of Eastern European Affairs, reported on February 21, 1934, a conversation with Troyanovsky in which the Assignment clauses were discussed. The Soviet Ambassador suggested that the paragraph with regard to Soviet waiver of claims was too broad, and Kelley agreed that that part of the Accords needed revision. Troyanovsky complained to Secretary of State Hull in March about the results of a recent New York Court of Appeals case that refused to honor Soviet laws in relation to Russian interests in the United States. The case to which he referred was probably Vladikavkazski Railway Company v. New York Trust Company, which was decided on February 27, 1934. This was the first major case after the American recognition of Soviet Russia in which the Court of Appeals refused to give comity to Soviet property laws because they were in conflict with New York public policy. It was Troyanovsky's suggestion to Hull that the American government should intervene in the judicial handling of Russian property interest.

The interesting thing to note here is that all through the 1920's Soviet agents in the West had not tried to claim for their government the property of Russian companies
outside of Russia. In his famous "Circular No. 42," dated April 12, 1922, Soviet Foreign Affairs Commissar Georges Chicherin instructed his diplomatic agents not to make legal claims to private Russian property abroad. At the end of the message, he concluded:

Consequently, the structure of rights of property established by decrees issued by the Russian Soviet Authorities, regulate but property relations within the territory of the R.S.F.S.R. Property rights pertaining to persons who do not reside within the territory of the R.S.F.S.R. and are not connected with the latter, cannot be ruled by Russian Law and are subject to local legislation, independently of the citizenship of persons interested therein, even if they happen to be Russian citizens.\(^\text{61}\)

It is not known whether the circular was an honest legal appraisal by lawyers in the Commissariat of Foreign Affairs, or only a pragmatic diplomatic policy to prevent Soviet representatives from getting involved in Western judicial battles that might create bad public opinion toward Moscow. A case was mentioned earlier in this chapter in which the Soviet Ambassador to France prosecuted a claim against former private Russian property in 1925, with no success.\(^\text{62}\)

This much is known: in the eyes of orthodox Communists, international law is a capitalistic tool to protect bourgeois society. Communists view it as merely a political technicality to be used in dealing with the West only to protect Soviet interests. There is no question that the
Soviet confiscatory decrees intended to expropriate all the property that the Soviets could put their hands on. If Moscow did not claim nationalization of Russian property abroad, it was because it could not get to it. Since the Soviet government could not get Russian assets in New York City by its own authority, its assignment of them to the American government cost Moscow nothing and perhaps could pacify Washington as a token payment of war debts.63

In any event, the Department of Justice, in cooperation with the Treasury and State Departments, decided to prosecute the government's claim to Russian corporate property in New York by virtue of the Litvinov Assignment. The object of the first suit was the residue fund of the Moscow Fire Insurance Company, which the New York Bank and Trust Company was holding in trust for eventual distribution pending the findings of a court-appointed referee. On August 13, 1934, U.S. Attorney Martin Conboy filed the government's claim with the referee. Then only nine days later, Conboy filed suit against the New York Bank & Trust and requested a court injunction against any distribution of the fund pending litigation. By October 1, 1934, the Justice Department had initiated seven suits involving over six and a half million dollars, with eight more, for over four million dollars, in preparation.64

The details of the New York Bank & Trust case, the
first government suit to recover Russian business property to reach the United States Supreme Court, were very complicated. The case involved three suits handled together: against the New York Bank & Trust Company for $1,080,399.54 held in trust for the Moscow Fire Insurance Company; against the President and Directors of the Manhattan Company for $249,000 of the Northern Insurance Company of Moscow; and against the New York Superintendent of Insurance for about one million dollars of the First Russian Insurance Company. As mentioned earlier, these Russian insurance companies had done business in New York until 1925. New York law required that every insurance firm doing business in the state had to deposit a security to cover policies with the state Superintendent of Insurance. In 1925 and 1926 the New York Supreme Court ordered the Superintendent to take legal custody of all Russian insurance company assets and hold them pending court order for distribution. By 1931, the Superintendent had satisfied all domestic claims and still had a sizable amount left. The Court of Appeals in the eight cases decided on January 5, 1931, had ruled that in the question of the Moscow Fire Insurance and Northern Insurance, for which there were only one and two surviving directors, respectively, the funds could be placed in a trust company pending final liquidation. On April 18, 1933, the Superintendent, George S.
Van Schaick deposited the fund of Moscow Fire Insurance with the New York Bank & Trust Company. The very next day, Paul Lucke, the sole surviving director of the insurance company sued in New York court for final distribution of it. The case was heard by a referee from October 1934 to August 1935. His report recommended the satisfaction of twenty-five non-Russian foreign claims and the distribution of $700,000 to 400 shareholders, most of whom were Russian emigres. The claim of the United State government was not included.65

Conboy filed the government complaint in the District Court for the Southern District of New York on August 22, 1934. Seven days later, the defendant moved to dismiss the Federal complaint on the grounds that it failed to state facts sufficient to constitute a case. Conboy's case was based on the Litvinov Assignment and the fact that American recognition of Soviet Russia had retroactively validated Soviet laws since 1917, including confiscatory decrees. Conboy argued that the Litvinov Assignment included this fund, that it was a valid contract between the American and Soviet governments, and that the Soviet confiscatory decrees intended to cover Russian corporate assets abroad. The counsel for Paul Lucke was a well-known conservative New York attorney, Frederick B. Campbell, who was under indictment for his failure to turn in gold
bullion in opposition to Roosevelt's economic policy. Judge Alfred C. Coxe heard the case on October 4 and 6, and rendered his opinion on November 28. He dismissed the government's suit because he believed that the Soviet government had no legitimate right to the insurance corporation's assets under the law of New York and that the Litvinov Assignment had not included this type of claim. 66

Conboy appealed the case to the Circuit Court of Appeals on December 22, 1934. Judges Manton, Chase, and August Hand (the same three who had decided in favor of Government's rights by Litvinov Assignment on February 6, 1934) heard the case and rendered their judgment on May 20, 1935. The Circuit Court upheld Judge Coxe's ruling against the government by a 2-1 vote, Judge Manton dissenting. Judge Chase, rendering the judgment of the court, did not follow Coxe's reasons. He did not dispute the validity of the Litvinov Assignment, nor that of Soviet laws affecting property in this country. Whereas Coxe had dismissed the government's suit on substantive grounds, Chase dismissed it on procedural technicalities. He and August Hand believed that the government had to sue in the New York state courts for recovery, not in Federal courts, because the suit was in _rem_ (against a thing) which was in the original jurisdiction of the state courts. 67

This decision meant eventual disaster for the govern-
merit's case. It could not hope to win its argument in the Court of Appeals which had taken such an uncompromising stand against giving any extra-territorial effect to Soviet confiscatory decrees. That was the whole point behind Conboy's pleading the case in a Federal court. Chase based his opinion on the judicial status of the United States as a plaintiff in a private capacity, as statutory successor to a corporation, once removed, rather than as the national polity, which would entitle it to sue in its own courts.

It was precisely on this point that Manton wrote a lengthy dissent, over twice as long as Chase's opinion. His argument was that the American government acted as a sovereign in everything it did, particularly in foreign relations where it shared power with no other level of government. Manton emphasized that recognition was an Executive political act which is both retroactive in its legal effect and binding on the courts. He also maintained that an executive agreement stating the conditions of recognition was likewise binding on the courts. In other words, as of November 16, 1933, the Soviet government became the legal owner of the former Russian corporate assets in New York, not the courts of New York. When the Soviet government assigned this right to the American government, the latter succeeded to a sovereign right, and the New York courts had no responsibility except as
custodian for the United States. Manton rejected the argument that Soviet confiscations were against the public policy of New York; New York has no "public policy" in foreign affairs. The national "public policy" in diplomatic relations is determined by the President. 68

The State Department was rather nonplused over the entire judicial process. In a note to Assistant Secretary of State Walton Moore, a legal expert in the department, Eastern European Affairs chief Robert Kelley urged that the suits be dropped because he did not like the argument that Soviet laws could have extra-territorial effect in the United States. 69 Hull, however, informed Attorney General Cummings on December 15, 1934, that the State Department agreed with the Treasury Department. Conboy should appeal Judge Coxe's opinion to the Circuit Court. 70 In a similar note after the Circuit Court's judgment, Moore informed Cummings that it was up to the Justice and Treasury Departments to make the decision to appeal to the Supreme Court. Moore showed no interest in the case, as though the State Department were trying to disown a policy that had failed to produce results, a policy that it had not originated. 71

The government had not yet decided what to do with the money it recovered from the Litvinov Assignment. One private suggestion made to President Roosevelt was that the suits should be dropped because the Soviets would deduct from their obligations any money the government recovered
in the United States. But by spring 1935 it was obvious that the United States was not going to receive any debt payments from Moscow. Therefore, Secretary of the Treasury Morgenthau wrote to Hull on May 4, 1935, suggesting that Roosevelt announce his intention of asking Congress to provide for the use of any recovered funds from the Litvinov Assignment to compensate private American claims against the Soviet Union. Hull responded that he fully agreed that the government should not keep any assets it recovered, but rather apply them to the private American claims. This was done by act of Congress in 1939.

The Justice Department petitioned on July 1, 1935, for a writ of certiorari in order for the Supreme Court to review the Bank of New York & Trust Company case. The Justices granted the petition on October 14. The parties filed their briefs and argued the case orally on December 18. Solicitor General Stanley F. Reed, with the assistance of David E. Hudson, Paul A. Sweeney, Henry Munroe and other members of the special legal team from the Justice and Treasury Departments, presented the government's case. Reed's argument was basically the same as Conboy's at the lower levels: the Executive act of diplomatic recognition was legally retroactive and thereby validated Soviet confiscatory laws, which included Russian corporate property in the United States, in the eyes of American courts. His central idea was that the state of Russia governed the life
of its corporations; what it could incorporate it could also destroy. The right to the Russian deposits in New York always remained in Russia; therefore it was governed by Russian laws, not the laws of New York where the property was actually located. As for doctrines of public policy, Reed argued that the only public policy involved was the President's foreign policy, which demanded full judicial respect for the Soviet Union.\textsuperscript{75}

Frederick B. Campbell handled the defense for the Bank of New York & Trust. He insisted that Soviet confiscatory decrees could not be honored in the United States where such acts were forbidden by federal and state constitutions. He further argued that the courts had a responsibility to construct international agreements in order to protect the sanctity of private property. He concluded by restating Judge Chase's opinion that the proper jurisdiction for the case was in New York courts.\textsuperscript{76} The brief for the Superintendent of Insurance largely repeated the assumptions made in Judge Coxe's decision. There were also briefs of \textit{amicus curiae} filed in behalf of the National City Bank and the Guaranty Trust Company, which was represented by John W. Davis.

Somewhat ironically, the decision of the Supreme Court handed down on January 6, 1936, was written by former Secretary of State Charles Evans Hughes, who had become
Chief Justice in 1930. Hughes reported the facts on the case at length and then rendered a short decision. Speaking for a unanimous Court, the Chief Justice agreed with Judge Chase's judgment that the United States must plead its case in New York courts because of their original jurisdiction over the matter. He added the observation, that Chase had also made, that if the government could not win its case in New York courts, it could appear to the Supreme Court for final judgment. The Chief Justice made no comments on the merits of the case.77

In conclusion, the diplomatic policy of non-recognition left the American courts in a legal dilemma concerning Russian property rights in this country. The New York Court of Appeals sought to solve this dilemma by acknowledging private Russian property rights in New York as though there had been no political revolution in Russia. The court refused to hear suits against the Soviet government, but it also refused to allow the unrecognized Soviet government to sue in New York courts. It continued to apply New York laws governing business obligations of the Russian corporations as though nothing had ever changed in Russian laws. But the court refused to change its judicial policy after the American recognition of Moscow. It still refused to grant comity to Soviet laws which it believed were incompatible with New York property laws. The authority of
New York to control property rights within its jurisdiction as opposed to the national foreign policy would be the constitutional contest in United States v. Belmont.
CHAPTER II: NOTES


2 Rose v. Himley, 4 Cranch 241 (1808), and Gelston v. Hoyt, 3 Wheat. 246 (1818).

3 Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., Ltd., 246 U.S. 304 (1918). The precedent for these cases was Underhill v. Hernandez, 168 U.S. 250 (1897), which arose from a revolutionary change in Venezuela.

4 The Rogdai, 278 Fed. 294 (1920) and 279 Fed. 130 (1920); The Penza, 277 Fed. 91 (1921).


7Wulfson v. Russian Socialist Federated Soviet Republic (RSFSR), 234 N.Y. 372 (1923); Judge Frederick E. Crane dissented.

8 RSFSR v. Cibrario, 235 N.Y. 255 (1923); quote on p. 263.

9 Bishop, Roosevelt-Litvinov Agreements, pp. 193-94. Also see Louis L. Jaffe, Judicial Aspects of Foreign Relations (Cambridge, 1933), pp. 150-56; Edwin D. Dickinson, "Recent Recognition Cases," 19 American Journal of International Law 263 (1925). This journal will hereafter be cited as Am. J. I. L.


14[1923] 2 K. B. 630.

15[1923] 2 K. B. 682.


21239 N.Y. 158 (1924).

22Ibid., pp. 164-69; quote on p. 169.


24239 N.Y. 248 (1925).

25240 N.Y. 149 (1925).

26Ibid. For Lehman's decision, see pp. 153-69; for Crane's dissent, see pp. 169-70.


33 Banque de France v. Equitable Trust Co. of New York, 33 F. (2d) 202 (1929).

34 253 N.Y. 23 (1930).


36 253 N.Y. 365 (1930).


38 255 N.Y. 415 (1931).


40 Matter of People (First Russian Insurance Co.), 255 N.Y. 440 (1931).

41 Matter of People (First Russian Insurance Co.), 255 N.Y. 428 (1931).

42 Pasvolsky and Moulton, Russian Debts, p. 42.


44 Matter of People (Second Russian Insurance Co.) 255 N.Y. 436 (1931).


266 N.Y. 71 (1934).

Ibid.; Crane's opinion, pp. 77-100; quote on p. 83; Lehman's opinion, pp. 105-14.

In re Russian Bank for Foreign Trade, [1933] Ch. 745.


John G. Hervey, The Legal Effects of Recognition in International Law as Interpreted by the Courts of the United States (Philadelphia, 1928), pp. 139-55, 156-60.


Jaffe, Judicial Aspects of Foreign Relations, pp. 79-236.


For Ughet's assignment, see DSF 411.61 Assignments/2a and 411.61 Assignments/l 1/4. Also see Bishop, Roosevelt-Litvinov Agreements, p. 184. For Government recoveries without court actions, see DSF 411.61 Assignments/76a. For
details of the Guaranty Trust Co. case, see 304 U.S. 126 (1938).


60 Memorandum by Hull, March 26, 1934, in ibid., p. 71.

61 "Circular No. 42," DSF 411.61 Assignments/14 1/3.

62 Etat Russe v. Ropit (1925), 52 Clunet 391.


64 Memorandum for the Assistant Attorney General, October 1, 1934, DSF 411.61 Assignments/19 1/2. The Bel­mont suit was not listed among the fifteen.


67 Chase's opinion, 77 F. (2d) 866 (1935), pp. 867-70.

68 Manton's opinion, ibid., pp. 870-80.

69 Kelley to Moore, December 5, 1934, DSF 411.61 Assignments/23.

70 Hull to Cummings, December 15, 1934, DSF 411.61 Assignments/25

71 Moore to Cummings, no date (June 1935?), DSF 411.61 Assignments/60.

72 Frank L. Polk to President Roosevelt, March 11, 1935, DSF 411.61 Assignments/54.
Morgenthau to Hull, May 4, 1935, DSF 411.61 Assignments/57.


Brief for Respondent, ibid.

CHAPTER III

LITIGATION AGAINST THE BELMONT ESTATE

On Tuesday, June 18, 1935, Federal authorities demanded $25,438.48 from the executors of the estate of the famous New York financier August Belmont, Jr. This sum was the account of the Petrograd Metal Works, a Russian metallurgical foundry that had been nationalized by the Soviet government in 1918. The Belmonts refused to surrender the deposit. Nine months later, U.S. Attorney Lemar Hardy served a complaint against them for recovery of the Metal Works fund. Thus began a court battle that would end with the Supreme Court's announcement of one of the broadest doctrines of governmental powers ever advanced in constitutional history.

The object of the government's suit was Morgan Belmont and his step-mother, Eleanor Robson Belmont, the widow of the late August Belmont, Jr. August Belmont, Jr., was the son of the wealthy financier August Belmont, Esq., who had been the Rothschild representative in New York from 1837 to 1890. Upon his father's death, the younger Belmont became the head of the prestigious Belmont bank. The family also had been influential in Democratic politics.
since the elder Belmont had been the Democratic National Committee chairman from 1860-1872. Eleanor Robson Belmont, however, had been a great admirer of Theodore Roosevelt, and she was a friend of his niece, Eleanor Roosevelt. It was coincidental that this test suit would be against a prominent Democratic family and one close to FDR's own wife.¹

When August Belmont, Jr., died on December 10, 1924, his last will and testament provided ten million dollars in personal property and an equal amount in real property to his beneficiaries. He probably was much wealthier than his will indicated, and he may have turned over much of his wealth to his wife and sons before he died. In 1923, Belmont had changed his will in order to make Cornelius Wickersham, a prominent Wall Street attorney, an executor, but then he changed it again to include his son Morgan. Wickersham would be the Belmont's attorney during the litigation of government's suit against them. The banking firm itself had not been active for some time, and the will provided for its dissolvement. Included in the estate were two deposits from Russia: $825.93 from the Russian government and $25,438.48 from the Petrograd Metal Works, which had ceased to operate as a private corporation in Russia in 1918.²

There were good reasons why the Justice Department
chose to attack the Belmont claim after the defeat of the New York Bank & Trust suit in the Supreme Court early in 1936. There was much more money involved in the suits for the defunct Russian insurance companies, but the suits were harder to win because of legal technicalities. The Russian insurance firms had operated for six to seven years after the Bolshevik Revolution under New York law. The Petrograd Metal Works had never operated in the United States, so there was no question that its legal domicile was only in Russia. The New York Supreme Court had taken jurisdiction over the insurance assets in order to satisfy domestic, then later foreign, creditors. The Metal Works deposit had remained in the hands of the Belmonts; there were no domestic claims against it and the courts had taken no notice of it. The insurance companies ceased to exist in Russia after Soviet expropriation, but the Metal Works continued to operate within the Soviet-managed economic system. In this case, there was no question that the Soviet government had succeeded to the management of the company and had assumed all rights that the former directors had had. Those included all assets that the company had, whether in Russia or in deposits in Western banks.

It was not until March 6, 1936 that Lamar Hardy served the government complaint in U.S. District Court, Southern District of New York, against Morgan Belmont and
Eleanor Robson Belmont as executors of the Belmont estate. Hardy served an amended complaint on April 2 and a second amended complaint three weeks later. On April 29 Cornelius Wickersham, who at one time had been designated as an executor of the Belmont estate himself, served upon Hardy notice of motion to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. On May 5, 1936, Hardy appeared in court for the United States, and Wickersham, of Cadwalader, Wickersham & Taft, appeared in behalf of the Belmonts. The presiding judge was the Hon. Murray Hulbert.\(^3\)

Hardy's Second Amended Complaint stated a series of facts to show the government's right to sue for the recovery of the fund. In legal terms, Hardy presented evidence for the government's chose in action to recover the res (the "thing," or the deposit of the Petrograd Metal Works in the hands of the Belmont estate executors). He stated the following facts. The \textit{Kompania Petrogradskago Metallicheskago Zavoda}, or Petrograd Metal Works, was a corporation organized under the laws of Russia in 1916 with a fixed capital of over a million rubles. On June 28, 1918, Soviet government by decree nationalized this company along with all other metallurgical operations. On December 10, 1924, August Belmont, a "general partner" of August Belmont & Company, died. Nineteen days later the Surrogate's
Court of Nassau County made Morgan and Eleanor Belmont executors of the estate, which included a deposit of $25,438.48 by the Petrograd Metal Works with the Belmont bank prior to 1918. On November 16, 1933, the Soviet government assigned its claims to property due it from American citizens to the American government; since the former had exclusive right to the deposit in question, the latter acquired it by assignment.⁴

To prove his assertions, Hardy included six documents as exhibits. One was a copy of the Soviet degree of June 28, 1918, and the second was a certified translation of it by the State Department. Section I read:

The industrial and commercial enterprises enumerated below, which are located within the borders of the Soviet Republic, together with all their capital and property regardless of what the latter may consist, are declared the property of the Russian Socialist Federated Soviet Republic:

Part 9 of this section specified all iron and metal works with a capital of over a million rubles that were owned by joint stock companies. "Furthermore," Part 10 read, "not withstanding the extent of basic capital, all enterprises which produce any kind of metal-ware, constituting the sole production of wares worked from metal within the borders of the Russian Republic, are declared to be the property of the Republic; . . ." Sections III, IV, V, and VI dealt with the management of these nationalized industries.
Although ownership had passed to the Soviets, the day to day affairs of the firms were to be conducted by the former owners and managers, who were responsible to the Soviets for continued production and protection of physical plants. Section VI proved that

Personal funds belonging to members of the management, stockholders, and owners of nationalized enterprises shall be sequestered until the settlement of the question of the relationship of these funds to the circulating capital and the resources of the enterprise.\(^5\)

Exhibit Three was a copy of the Litvinov Assignment of November 16, 1933. The last three documents were statements by Attorney General Cummings, Secretary of State Hull, and Acting Secretary of State William Phillips. Cumming's letter to Hull, dated September 17, 1934, expressed his official opinion that the Litvinov Assignment did include all former Russian corporate property in the United States claimed by the Soviet government by nationalization decrees. Hull's return letter expressed his concurrence. Phillips' letter to Cummings, dated October 27, 1934, was probably the most accurate evaluation of the Assignment:

When the notes were exchanged, it was not definitely known what assets in the United States might properly be regarded as belonging to the Soviet Government. The notes were intended to cover whatever assets that Government possessed or was entitled to recover in the United States.\(^6\)

Wickersham presented two reasons why the government's
complaint should be dismissed. He first questioned the wording of the Assignment itself whether it did include nationalized Russian corporate assets, since it did not expressly say so. Secondly, he asserted that extraterritorial effect of Soviet confiscatory decrees was in conflict with the public policy of property rights in New York, and therefore the court could not allow the government's claim based on Soviet laws. For precedents, Wickersham cited the Vladikavkazski case and the recently decided New York Bank & Trust case. Judge Hulbert granted the motion to dismiss the complaint. He did so, he explained, in order to expedite appeal to a higher court in order that it might judge the merits of the case not expounded in Chief Justice Hughes' opinion in the New York Bank & Trust case. Judge Hulbert allowed Hardy's appeal to the Circuit Court only a week later.

The Belmont case was argued before Circuit Court Judges Manton, August Hand, and Thomas W. Swan on June 16, 1936. Lamar Hardy represented the United States, with the assistance of David Hudson and Henry Munroe. Appearing for the defendants were Cornelius Wickersham and John W. Davis with the aid of two other attorneys. There were also attorneys present for the President and Directors of the Manhattan Company as amicus curiae and Boris M. Komar, who had handled several of the Russian corporate cases before
the New York Court of Appeals, as amicus curiae for the Day-Gormley Leather Company. All of the facts presented were the same as in the lower court, with one important exception. On June 8, 1936, the New York legislature passed an amendment to the Civil Practices Act, entitled Section 977b, that declared that property rights based on governmental confiscation without just compensation should not be honored in New York courts. In such a situation where a corporation having assets in New York had been nationalized or liquidated, any creditor or stockholder could apply to the state Supreme Court for the appointment of a receiver of those funds. A suit was quickly filed against the Petrograd Metal Works, so the state Supreme Court appointed a receiver, John R. Crews, to take custody of the Metal Works deposit. When he went to the Belmonts to get the fund, he was rejected with no better luck than the government. By the time the Circuit Court rendered its decision, the case had become a good deal more complicated.

The Circuit Court handed down its decision on August 10. Judge Swan delivered the decision for himself and Judge August Hand. Judge Manton dissented on the same grounds that he had in the New York Bank & Trust case. Swan began by conceding that the Litvinov Assignment did intend to include the assets of former Russian business firms in the United States, as Secretary Hull and Attorney General
Cummings had certified. Swan also alluded indirectly to Soviet Circular No. 42, but ruled that the court had no right to question the certified statements of Hull and Cummings. He also decided that the language of the Soviet decree of June 28, 1918, was broad enough to include the account of the Metal Works in New York. On the basis of those two facts, the government's claim might seem valid, except that the res was located in New York, and therefore New York laws must govern its disposition. "Laws of foreign governments," the Judge observed, "have extraterritorial effect only by comity and the public policy of the forum determines whether its courts will give effect to foreign legislation." New York's public policy was clearly stated in Court of Appeals decisions and Section 977b of the Civil Practice Act, all declaring confiscation against the policy of New York. The United States as assignee of the Soviet Union had no better claim to the res than the Soviet government. Swan also asserted that the question of status and situs were not part of the federal public policy, but that of the state where the res was located. Therefore, the government could assert its claim only after those made by the company's creditors and stockholders. The court affirmed the order to dismiss the case. 8

There were several similarities between Judge Swan's opinion in the Belmont case and Judge Chase's in the New
York Bank & Trust case fifteen months before. Both emphasized legal technicalities of title and situs of property rights rather than the diplomatic nature of the government's claim based on the Litvinov Assignment. This aspect of law is known as "conflict of laws," a situation when a court takes notice of a foreign law that governs its own citizens and property, or a right based on a foreign jurisdiction, or a similarity (at least in principles of justice) between the laws of two countries so that the courts of each enforce the laws of the other. Associate Justice Joseph Story had called this "private international law"; that is, the adjudication of private freedoms and personal property on an international level, as opposed to the affairs of governments. Both Chase and Swan chose to decide the Litvinov Assignment cases under the rules of private international law rather than interpreting the Assignment as part of an international compact.

Judge Chase compared the United States to a corporation rather than a sovereign when he ruled that it had no greater right to the assets in question than the Soviet government as statutory successors of the corporations. This notion negated the whole socialistic concept of state-owned and state-managed industry: property wholly within the public domain. But the right that Moscow signed over to Washington was a sovereign right, not a corporate one, and
was in the sphere of public rather than private international law. Judge Swan took the same approach. In effect he had attempted judicial review of Soviet nationalization laws. He could not undo what the Soviet government had done in Russia, but by dismissing the government's suit in the Belmont case he decided that the court would not apply Soviet laws to property situated in this country. Judge Swan rejected the idea that this case involved the national public policy: "If the public policy of the United States is material, it would seem clearly adverse to a claim based on the Russian decree. But in our opinion it is the policy of New York which this court is to apply. The question is whether the plaintiff's assignor had an enforcible right as successor to the Russian corporation after its nationalization. This is really a question of title [;] and state law, not federal law, governs the matter of title." Such legal technicalities as "situs," "domicile," "comity," "law of the forum," and "public policy" were relevant only to private cases of conflict of laws, and had no bearing on international contracts of sovereigns.

The logical way to escape the private international law argument relied upon by Judges Chase and Swan was to argue that an executive agreement, such as the Roosevelt-Litvinov Accords, had the same status as a treaty, in that it was a diplomatic contract concluded by sovereign powers
and must therefore supercede all state laws. Such a proposition, however, was too bold and unprecedented for the times. The government attorneys never argued such a point, nor did Judge Manton ever assert it in his dissents.

Rather than writing another complicated dissertation on the issues, Manton simply referred to his opinion in the New York Bank & Trust case for the reasons for his dissent. As it will be recalled, Manton based his opinion on the idea that diplomatic recognition of a foreign government was a political act of national importance which should be binding on the courts. But he did not go so far as to insist that national foreign policy overrides state laws ipso facto. To say this he would have had to assert that the documents establishing diplomatic recognition constituted a national contract binding on the states; while he hinted at this thought, he did not express it explicitly. But the sentiment that state affairs must yield to foreign affairs was there:

When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerogition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition.

A few words should be said about Circuit Court Judge Martin T. Manton. His passionate ambition was to sit on the Supreme Court, and he went to great lengths to win a nomination to it. In 1922 he came very close to his goal.
Certain members of the Harding Administration thought it would be politically expedient for the President to appoint to the Court a Catholic Democrat, which Manton was. There was great pressure on Harding to nominate him, but the man who blocked the appointment was Chief Justice William Howard Taft, who threw his considerable political weight against Manton. Taft called the New York Circuit Court Judge, a "shrewd, cunning, political Judge," and "an utterly unfit man for our Court." The nomination eventually went to a conservative Catholic Democratic corporate lawyer from Minneapolis, Pierce Butler. Manton tried again in 1925 but failed due to the nomination of another New Yorker, Harlan Fiske Stone. During the New Deal, Manton was a partisan New Dealer on the bench in the hopes of winning Roosevelt's good will. In 1938, however, the law caught up with Manton's ambitions and greed. In that year a special Circuit Court found him guilty of conspiracy to fix cases for parties who invested money in his bogus business organization. Associate Justice Harlan Fiske Stone and returned Justice George Sutherland sat on the court that upheld his conviction.\textsuperscript{12}

Whether Manton wrote his dissent in the Litvinov Assignment cases out of honest conviction or just to please Franklin Roosevelt is not certain.

Meanwhile, the State Department was busy trying to
gather more evidence for the Justice Department to use in its case before the Supreme Court. On May 1, 1936, Hull wrote to the American Chargé in Moscow, Loy Henderson, that the Department desired to get information from the Kremlin whether the Soviet decrees confiscating all assets of the dissolved Russian corporations did intend at the time to nationalize all assets irrespective of location.\textsuperscript{13}

Four days later, the Secretary wrote the Charge that the Justice Department had requested that Ambassador Troyanovsky invite a Soviet legal expert to the United States to testify in the government's suits before the New York courts. Mark Ambramovich Plotkin, the Assistant Chief of the Judicial Department of the Foreign Affairs Commissariat, did come to America in a private capacity to testify on Soviet laws in the summer of 1936 and the winter of 1938-1939. When he was invited to come a third time, the State Department discovered that Plotkin had disappeared in the last of the Great Purges.\textsuperscript{14}

Troyanovsky cooperated with Hull by giving him a memorandum on July 21, 1936, that the 1933 agreement did include corporate assets nationalized by the Soviet government as well as strictly state claims. He interpreted the wording of the Litvinov Assignment to mean that his government assigned to the American government all claims that it had as successor to prior Russian governments, or "other-
wise," "for instance, to pre-revolutionary organizations and companies which were nationalized in accordance with Soviet legislation."\(^{15}\)

On September 1, 1936, Hull reported another legal problem to Henderson. In the suit for recovery of the assets of the Moscow Fire Insurance Company, the defense raised the point that the company had been nationalized by the RSFSR but not by the Union of Soviet Socialist Republics (USSR).\(^{16}\) This was a legal technicality that would have bothered only an American court. In the American federal system, there is a division of powers between the national and the state governments. It had been equal states in 1788 that had created the United States, delegating to the national government only specific powers as enumerated in the Constitution. American courts tend to think only in terms of the American model of federalism, which is an historical exception. In Europe, the historical rule was that one great state formed a nation by dominating sister states. Muscovy united Russia, Prussia united Germany, Piedmont dominated Italy, Isle de France became France, and England became Great Britain. In the Soviet system, the RSFSR was Russia proper while there were separate republics in the Ukraine, Bylo-russia, and Transcaucasia. These republics formed the USSR in 1923. While these republics were officially sovereign and equal, there
was one organization that dominated them alike: the Communist Party of the Soviet Union. Whether the Party acted through the RSFSR or any other republic made little substantive legal difference to the Kremlin.

Yet, to an American judge, the USSR, which Litvinov represented, could not assign the rights of the RSFSR, as though the latter was to the former as Washington was to Albany. Therefore, the Justice Department requested that Hull get a statement from Moscow that the USSR could assign the claims of the RSFSR, in whose name the nationalization decrees had been issued in 1917. Henderson reported a week later a conversation he had had with Plotkin in Moscow. Plotkin told him that there was never any official transfer of the title to confiscated assets from the RSFSR, but that they ipso facto belonged to the USSR in its foreign relations. Henderson replied that what was obvious to Soviet authorities would not be to American courts, so he suggested that Troyanovsky in Washington elaborate on his note of July 21 to cover this point. Plotkin agreed and requested that the State Department write the desired note for Troyanovsky to sign. The Soviet Ambassador delivered the signed note to Hull on September 14.

This still did not settle the issue to the satisfaction of the court-appointed referee in the matter of the
Moscow Fire Insurance case. Henry Munroe, the counsel for
the Treasury Department, requested that Plotkin get a rul­
ing from the Commissariat of Justice or from a Soviet court
on the legality of Litvinov's assignment for the USSR of
claims based on decrees of the RSFSR. Plotkin offered a
long legal opinion on behalf of the Foreign Affairs Commissariat but failed to acquire what Munroe had sought. It
was not until January 9, 1937, that Henderson and Litvinov
exchanged notes clarifying the wording of the Litvinov
Assignment. Litvinov wrote:

. . . the Union of Soviet Socialist Republics ac­
quired the right to dispose of the property, rights
or interests therein located abroad of all corpor­
atations and companies which had theretofore been
nationalized by decrees of the constituent republics
or their predecessors.

You are further informed that it was the pur­
pose and intention of the Government of the Union of
Soviet Socialist Republics to assign to the Govern­
ment of the United States, among other amounts, all
the amounts admitted to be due or that may be found
to be due not only the Union of Soviet Socialist Re­
publics but also the constituent republics . . . or
their predecessors from American nationals, including
corporations, companies, partnerships, or associ­
atations. . . .

Finally, on November 28, 1937, Henderson obtained from the
Commissariat of Justice a statement that the Soviet decrees
of 1918 did in fact nationalize all Russian insurance com­
pany property irrespective of its nature or location.

On November 17, 1936, Solicitor General Stanley Reed
filed a petition to the Supreme Court for a writ of
certiorari to review the Belmont case. He enumerated the alleged errors made by the Circuit Court (essentially, its rejection of the government's contentions) and urged that the case had sufficient federal importance since there were fifteen suits involving eight million dollars pending in various courts based upon the Litvinov Assignment. He submitted that the crucial issues were the authority of the President to conduct foreign relations without the hindrance of the states and the cordiality of Soviet-American relations.\(^{23}\) The Justices of the Supreme Court granted the writ on December 21.\(^{24}\)

Solicitor General Reed, with the assistance of six government attorneys (Acting Assistant Attorney General W. W. Scott, Special Assistants to the Attorney General David Hudson, A. A. Feller, and Albert Levitt, with Henry Munroe and Paul Sweeney), filed a sixty-five page brief for the United States in February 1936. The brief began by posing two questions: "Was the right to receive this bank deposit subject to the operation of the Soviet decrees which transferred the right to the Soviet Government?" and "Is there any controlling public policy which prevents the enforcement of that right, in a Federal court, by the United States as assignee of the Soviet Government?"\(^{25}\) The facts of the case were presented as they had been in the Second Amended Complaint, and the specification of errors appeared
as they had in the Petition for Writ of Certiorari.

The brief consisted of two principal arguments with eight sub-points. The first dealt with the acquisition of the right. There is a debtor-creditor relationship, the brief asserted, between a bank and a depositer. While the obligation to pay is situated at the place of the bank, the right to receive is situated wherever the creditor may be. In this case, the Petrograd Metal Works (the creditor) was located in Russia, where the Soviet government nationalized it in 1918. This transfer gave the right to receive the deposit to the Soviet government. When the domicile of the assignor and assignee and the place of the assignment are the same, the brief continued, the law of that place governs the validity of the assignment.26

Repeating the finding of the Circuit Court, the brief contended on the contrary that if a bank deposit has a situs, that situs is at the domicile of the creditor, not the debtor. To prove this proposition, the brief cited an old doctrine of conflict of laws, mobilia sequuntur personam (movables follow the law of the person). This was a doctrine first expounded by Bertrand D'Argentre, a sixteenth century French legal commentator who advocated that property of a mobile nature (like money) must be governed by the laws governing the possessor. In the Belmont case, this doctrine applied meant that the laws of Russia governed
the rights and disposition of the Metal Works' assets abroad, rather than the laws of New York simply because the assets were physically located in New York City.  

The last point in the government's first proposition was that the state which creates a corporation has the power to destroy it. The citations for this were Canada Southern Railway v. Gebhard and Pendleton v. Russell. The first was a particularly good analogy to the Belmont case. The Canada Southern Railway, charted by the Province of Ontario in 1868 and given a Dominion status by the Canadian Parliament in 1874, issued over eight million dollars worth of bonds which it could not honor because of financial difficulties. In 1878 Parliament ordered the re-organization of the railroad and the issue of new bonds, which were to replace the old ones at a lower interest rate and a longer maturity time. Gebhard, a New York citizen who held the older bonds, sued in American courts on the grounds that he had been denied a vested right. The United States Supreme Court decided against Gebhard's suit in 1883. Speaking for the Court, Chief Justice Morrison Waite ruled that, "Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. . . . Every person who deals with a foreign corporation impliedly subjects himself
to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."  

In the second case, a man had sued in a Tennessee court for recovery of a claim against a defunct insurance company under an order of dissolution by authorities in New York. Justice Stephen J. Field ruled for a unanimous Supreme Court that only New York, the situs of the corporation, had jurisdiction to satisfy claims against the insurance company, even though the domicile of the creditor was not in New York. This would mean that the situs of incorporation determined the legal status of a claim, not the situs of the claim.

The government's brief argued in its second proposition that the government's claim to the Metal Works' deposit was enforceable under American laws. It cited the Mexican confiscation cases where the Supreme Court had upheld property rights acquired by foreign nationalization. The brief explained that the government's claim in this case was based on a foreign nationalization decree, and assignment from the Soviet Union, so its claim should be honored as the private claims were in the Mexican cases. As for public policy, that was determined by the President in the conduct of his foreign policy. The Fifth Amendment,
which forbids governmental confiscation without just compensation, was not applicable in this case because it had been the Soviet government, not the American, that had done the confiscating. And it did not apply to the Belmonts, because they did not own the deposit as the debtor.31

The last three points dealt with New York laws and court decisions. The Court of Appeals repeatedly had honored property rights acquired in Russia over property that had been located inside of Russia.32 Logically, the brief argued, this should extend to claims (legal titles) that were located in Russia as well as tangible property. As for the recently passed Section 977b of the New York Civil Practices Act, it had no application in this case either technically (neither the Soviet government nor the corporation itself were parties in this case) nor substantively, since it could not divest the United States of a right acquired before the passage of the law.33

Finally, the brief argued that New York policy could not be allowed to contradict the foreign policy of the President. For this, it cited Justice Sutherland's obiter dictum in a recently decided case, United States v. Curtiss-Wright.34 It further contended that the Roosevelt-Litvinov Accords itself was valid because it dealt with the settlement of claims.35

As the Soliciter General's brief correctly observed,
"The sole issue before this Court is whether the petitioner's complaint states a cause in action against respondents." Because the suit had been dismissed by the lower courts without a hearing on its merits, the only issue that the Supreme Court had to decide was whether the government had a chose in action, a right to plead the case on its merits in relation to other claims against the same res. But, of course, if the Court granted the validity of the government's claim, it was also indirectly deciding the substantive issue of federal supremacy over state laws.

Reed hinted at this in his closing statement:

To subject the enforcement of the right acquired by the United States under the agreement to the varying and uncertain policies of each of the States would doubtless defeat any attempt at a solution of these international questions.37

One basic issue was whether Executive foreign policy decisions were binding on state courts and whether an international agreement with less status than a treaty affected property rights and laws at the state and local level.

Cornelius Wickersham, with the assistance of two other counselors (G. Forrest Butterworth, Jr., and Daniel E. Woodhull, Jr.) presented a fifty-three page brief for respondents, the Belmonts. He relied heavily on the opinions of Judges Swan and Chase in the lower courts and the propositions that had been argued successfully in the New York Court of Appeals since 1923. The two principal
doctrines that he presented were that the *situs* of the property itself determined the laws that were applicable and the forum determined in a conflicts of laws case whether extraterritorial effect of a foreign law was in conflict with the public policy of the forum.

Wickersham argued that foreign laws could be enforced beyond their jurisdiction only by comity. In this matter there was no comity because the New York Court of Appeals had consistently ruled that Soviet confiscatory decrees were in conflict with the public policy of New York. Many of these decisions had been written by Cardozo, who now sat on the United States Supreme Court. Besides citing a long list of New York cases, Wickersham referred to a 1911 Supreme Court decision that had refused to acknowledge the effect in the United States of a French nationalization decree.38

The 1911 case was *Baglin v. Cusenier*.39 That opinion had been written by none other than Charles Evans Hughes, who had been an Associated Justice then and was now Chief Justice. The case involved a suit by the Order of Carthusian Monks against the importation into the United States of an imitation Chartreuse liquor made by the French government. The Order had made this trade-marked liquor from a secret recipe in France until 1903, when a French court expropriated the Order's properties. The Order then fled
to Tarragona, Spain, with the secret recipe. Hughes wrote that the trade mark was still valid in the United States and that the French decrees had no extraterritorial effect. What made this case different from the Belmont case, however, was that the Carthusian monks had escaped from France with their secret that made it possible for them to continue to make their product in a new location. The directors of the Petrograd Metal Works did not flee from Russia with their equipment and continue their business abroad. If the French authorities had actually captured the secret of the Chartreuse liquor (as the Soviets had occupied the Metal Works and continued production in Petrograd), the two cases would have been more analogous.

Wickersham further contended that the deposit of the Metal Works with August Belmont was made in New York, therefore it was a debt created under, and governed by, New York law. Wickersham pointed out that the Metal Works had not assigned its right to the New York deposit voluntarily. To enforce a confiscatory transaction would be against American principles of justice and rights to private property. He reasoned therefore that the ruling in Canada Southern Railway v. Gebhard was not applicable to this situation.  

Counsel also contended that Soviet confiscatory decrees were penal legislation which never has extra-
territorial effect. Wickerson was mistaken on his first point. The motive behind the Soviet decree of June 28, 1918, was to prevent industrial disintegration and avoid the transfer of property titles to German agents which was rampant after the Treaty of Brest-Litovsk in March 1918. When Wickerson used this argument he was clearly applying a concept of English common law that denial of a vested right is a punishment—an idea that had little application to the Soviet legal system.

Having established a foundation for his case in doctrines of conflict of laws, Wickerson attacked Reed's arguments of foreign policy. The government's assertion, he remarked,

is based upon the proposition that the public policy of the United States in the matter of foreign relations is to be determined by the Executive under the Constitution. With that proposition in its proper application we have no quarrel. It does not apply here, however, because in the first place, there is no warrant for the assumption that the Executive in the performance of his functions can deprive anyone of his property, or confiscate private property, or by his acceptance of the alleged fruits of confiscation of another power enrich the United States at the expense of private persons by taking their property.

Correctly observing that a treaty cannot violate the Constitution, he argued that the President could not do by executive agreement what he could not do by treaty. As for our relations with Russia, Wickerson argued, "We have no quarrel with the so-called Soviet plan of national economy."
It is their business and not ours. . . . But this case does not involve international relations of the United States in their true sphere. . . . Rather than international relations, this case involves title to private property in the state of New York. This cannot be taken or affected by an executive agreement.\textsuperscript{44}

The Solicitor General filed a Petitioner's Reply Brief in answer to Wickersham's arguments. He placed great emphasis on the diplomatic nature of the case, criticizing the defense for making the assertion that the Litvinov Assignment was a private contract governed by the laws of private transactions. "If the Government of the United States is rendered incapable of realizing the amounts assigned to it by the Soviet Government," Reed warned, "the effect may be to render the entire agreement nugatory and make it impossible for the United States Government to assist its own nationals in the settlement of their claims. . . ."\textsuperscript{45} While this was undoubtedly an exaggeration, Reed was probably correct in that friendly Soviet-American diplomatic relations were based to a large degree on whether each could tolerate the antithetical social system of the other, and a Court nullification of the Litvinov Assignment might have only confirmed Soviet dogmatic opinions of the capitalist order.

Reed also contended that it would be a dangerous
doctrine to assume that the American government could protect the rights of aliens against their own government. What Soviet laws did to Russian citizens and property was not a concern of the United States. As a recognized country by this nation, Reed continued, Soviet laws had to be respected as those of an equal sovereign; and to prove what Soviet policy was on this matter, Reed offered as evidence Ambassador Troyanovskv's note of July 21, 1936, to Secretary of State Hull.46

In summary, the government never argued in the Belmont case that an executive agreement had, or should have, the equal force of a treaty. The basic argument of the government was that recognition, being a political act, and the conditions attached to it were not subject to judicial review on their merits. Soliciter General Reed chose to concentrate his attack on the validity of the Litvinov Assignment and the international character of the obligations therein. The defense stressed the property rights aspect of the case. Yet, it never successfully answered the charge that the Belmonts did not own this deposit, so its property was not being confiscated. Nor did it ever say what the Belmonts intended to do with the deposit since they rejected both the government's and the New York receiver's claim to it. Whereas the government emphasized international politics as the frame of reference to judge
this case, the defense attempted to apply a universal standard of legal principles, based on Anglo-American common law.

On February 18, 1937, the New York Supreme Court ordered John R. Crews, its appointed receiver of the Belmont deposit, to submit to the jurisdiction of the United States Supreme Court in this case. On March 1 Crews sought a motion to intervene in the Belmont case. If he became a party to the case, he petitioned, the Court could decide the case on its merits, which would determine the order for the distribution of the Metal Works fund.\textsuperscript{47} The Justices of the Supreme Court rejected his motion to intervene,\textsuperscript{48} whereupon Crew's attorneys filed his position in the form of an amicus curiae brief. This brief amounted to little more than a summary of New York Court of Appeals decisions on Russian corporate property and a restatement of New York law. In substance, it added little to the arguments already presented by Wickersham.\textsuperscript{49}

There were two other amicus curiae briefs, both arguing in favor of the defendants. One was presented by Boris Komar for the Day-Gormley Leather Company, and the other by Robert J. Sykes and William C. Morris for the President and Directors of the Manhattan Company. With minor changes in stress, these briefs followed Wickersham's line of reasoning. In the latter brief, there was added one new
contention. Sykes and Morris argued that the RSFSR had confiscated the Metal Works plant, but it was the USSR that had made the assignment to the United States. As mentioned before, this was a bogus argument and did not affect the outcome of the issue.

The Supreme Court heard the oral presentation of the **Belmont** case on March 4, 1937. Solicitor General Stanley Reed, dressed in formal attire, represented the government and Cornelius Wickersham spoke for the Belmonts. A transcript of the argumentation was taken by a private stenographer, but it has been lost, so that there is no record of what was said that day. It can be assumed that Reed and Wickersham summarized their ideas as written in their briefs.

How the Justices of the Supreme Court reach their decision in any case is a closely guarded secret. The procedure that Chief Justice Hughes followed for eleven years, however, is known and it can be assumed that this process was used for the **Belmont** case as well as others before the Court at this time. After studying the briefs and hearing the oral argumentation, the nine Justices discussed cases at the weekly Saturday conference. This secret conference began sharply at noon and lasted until 5:30 in the evening, with a forty-five minute recess taken for lunch. The Chief Justice expressed his views first, and then he sat
quietly as each Justice spoke in order of his seniority on the bench. Following Hughes, the order in 1937 around the table was Willis Van Devanter (appointed in 1910), James McReynolds (1914), Louis Brandeis (1916), George Sutherland (1922), Pierce Butler (1923), Harlan Fiske Stone (1925), Owen J. Roberts (1930), and Benjamin N. Cardozo (1932). The voting was in the reverse order, with Cardozo voting first and Hughes last. If the Chief Justice was in the majority, he would assign the writing of the opinion to one of the justices, or he might choose to write it himself. If he were in the minority, the senior member of the majority assigned the opinion. The Justice responsible for writing the opinion circulated it among his colleagues when he was prepared. Any Justice had the right to offer a dissenting opinion or a concurring one, in which he agreed with the result but differed with the logical and legal thoughts expressed in the majority decision. Opinions were then read aloud during the Monday session of court.52

What the Justices said in conference about the Belmont case will never be known. The final vote on the case in any event was unanimously in favor of the government. The Chief Justice assigned the opinion to George Sutherland. Stone, however, did not agree with Sutherland's opinion, and he wrote his own opinion of the case. Justices Brandeis and Cardozo agreed with Stone's opinion, but the rest of
the Court stuck with Sutherland. They read their opinions aloud on Monday, May 3, 1937.

Sutherland's opinion was short and simple in its legal presentation. For the first three pages, he restated the facts of the case for the record. There was a clue in his review of the particulars to show that the decision would be in favor of the government when he placed the Roosevelt-Litvinov Accords in the context of international relations. Sutherland directed his comments to only two questions. The first concerned the situs of the bank deposit and the public policy of New York. He dismissed both aspects as irrelevant. He wrote that "We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved."^53 For the next three pages Sutherland reviewed the Mexican cases of 1918 and the English case, *Luther v. Sogar*, on the validity of private property rights acquired from a recognized government which had originally confiscated the property involved. The act of recognition in 1933, Sutherland continued, validated in American courts the laws of the Soviet government since 1917.

At this point Sutherland chose to comment on the status of executive agreements as a tool of national diplomacy:
Government power over internal affairs is distributed between the national government and the several states. 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. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, Sec. 2), require the advice and consent of the Senate.54

He continued by pointing out that not all international compacts were treaties, and he cited precedents when the Supreme Court had upheld international agreements not reached by the treaty process. Sutherland affirmed that legitimate international agreements have all the status that a treaty has in our Constitutional system; they could supercede state laws. "In respect of all international negotiations and compacts," he concluded, "and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."55

The second question answered in Sutherland's opinion concerned the national policy of the United States. Sutherland answered this question simply by saying that what another country did to its nationals was not subject to judicial review in American courts. The Soviet claim to the Metal Works funds was valid in Russia, so it must be in the United States as well. Sutherland asserted that there was no involvement of the Fifth Amendment as a bar to the government's claim because the government had confiscated
nothing and the Belmonts had no rights beyond those as custodian of the Metal Works deposit.

In conclusion, Sutherland reiterated that this case only determined that the United States had a chose in action. As for the merits of other claims against the Metal Works funds, he passed no judgment. Whether the government could collect anything from the Belmonts was a question to be answered by other courts at a later time. Yet, Sutherland provided ammunition in his opinion that an executive agreement could have all the force of a treaty so that the government could successfully prosecute subsequent cases.

Because Sutherland's decision was so broad in its discussion of constitutional issues, Stone wrote a much narrower opinion based on the specifics of the case. Stone relied heavily on the assertions presented by Wickersham, with the exception of the conclusion. Stone agreed with Sutherland that the government's case must be heard rather than simply dismissed. But he added that the government's claim must be weighed against other claims. As for the status of an executive agreement, Stone rejected Sutherland's thesis as irrelevant to the facts at hand. In conclusion, he asserted that the Belmonts had no right to reject the government's claim since they had no authority to challenge the assignment of a deposit that they held
only in trust. Therefore, there was no public policy of New York to bar the government's case in court.

In summary, the legal presentation of the Belmont case influenced to a large degree the construction of Sutherland's and Stone's opinions on the substantive issues of the case. This chapter has followed the legal steps of the litigation and summarized the Supreme Court's decision only briefly within the context of the litigation. The next chapter will examine in detail both the constitutional and personal aspects of Sutherland's opinion and Stone's objections to it.
CHAPTER III: NOTES

1 For an historical account of the Belmont family, see Irving Katz, August Belmont (New York, 1968), Perry Belmont, An American Democrat (New York, 1940), and Eleanor Robson Belmont, The Fabric of Memory (New York, 1957).


4 Ibid., pp. 2-5.

5 Ibid., Exhibit 2, pp. 6-12; quotes on pp. 7, 8, and 11, respectively. For the correspondence between Hardy and Robert F. Kelley of the State Department, see DSF 411.61 Assignments/81.

6 Ibid., pp. 14-16; quote on p. 16.

7 Ibid., pp. 16-21. Judge Hulbert's opinion was not reported.

8 United States v. Belmont, 85 F. (2d) 542 (1936); Judge Swan's opinion, pp. 542-44; quote on p. 543.

9 Ibid., p. 544.


11 77 F. (2d) 866, p. 878.

12 For the excellent account of the 1922 Supreme Court nomination battle, see David J. Danelski, A Supreme Court Justice Is Appointed (New York 1964); quotes by Taft on pp. 43, 59. For the case against Manton, and Sutherland's decision, see United States v. Manton, 107 F. (2d) 834 (1938).


14 Hull to Henderson, May 5, 1936, ibid., p. 346.
15 Troyanovsky to Hull, July 21, 1936, ibid., p. 347.

16 Hull to American Embassy in Moscow, September 1, 1936, DSF 411.61 Assignments/100b.

17 Ibid. Across the bottom of the note a State Department official wrote, "Based on Mr. Sweeney's letter of August 25 and subsequent conversation with him today. He has approved this."

18 Henderson to Hull, September 8, 1936, DSF 411.61 Assignments/102, and FRUS: Soviet Union, 1933-1939, pp. 348-49.


22 Henderson to Hull, December 3, 1937, ibid., p. 356.

23 Petition for a Writ of Certiorari, Transcript of Record and Briefs, Belmont Case, pp. 1-10.

24 299 U.S. 537 (1936).

25 Brief for the United States, Transcript of Record and Briefs, Belmont Case, p. 2.

26 Ibid., pp. 6-7, 16-19.

27 Ibid., pp. 7, 24-27. For the doctrine of mobilia sequenter personam, see Joseph Story, Conflict of Laws (Boston, 1841), p. 310.

28 Canada Southern Railway Co. v. Gebhard, 109 U.S. 527 (1883); quote on p. 537; for Justice Harlan's single dissent, see pp. 540-49.


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31 Brief for the United States, pp. 8, 32-37.


33 Brief for the United States, pp. 8-10, 32-48.

34 299 U.S. 304 (1936). See Chapter IV for an explanation of this case.

35 Brief for the United States, pp. 10-11, 48-50.


37 Ibid., p. 51.

38 Brief for Respondents, Transcript of Record and Briefs, Belmont Case, pp. 6-7.

39 221 U.S. 580 (1911).

40 Brief for Respondents, pp. 10-39.

41 Ibid., p. 24.

42 See Carr, Bolshevik Revolution, II, 82-87, 99-100.

43 Brief for Respondents, pp. 39-40.

44 Ibid., p. 47.

45 Petitioner's Reply Brief, Transcript of Record and Briefs, Belmont Case, pp. 9-10.

46 Ibid., pp. 11-13, 15, 18-19.

47 Petition and Notice of Motion to Intervene by Samson Selig for John R. Crews, Transcript of Record and Briefs, Belmont Case.

48 300 U.S. 641.

49 Brief of John R. Crews as Receiver, Amicus Curiae, Transcript of Record and Briefs, Belmont Case.

50 Brief of Amicus Curiae, President and Directors of the Manhattan Co., Transcript of Record and Briefs, Belmont Case., pp. 27-28.
The author would like to thank the following for their attempt, although unsuccessful, to find the transcript of the oral argumentation of the Belmont case before the Supreme Court: the Office of the Marshall, Office of the Clerk, and the Library of the United States Supreme Court; Mr. Roger D. Sandack of Cadwalader, Wickersham & Taft; Nicholas L. Sullivan of the Department of Law, State of New York; and Solicitor General Edwin N. Griswold. The author is fortunate to know an attorney, Mr. J. Paul McNamara who heard the oral argumentation of this case on March 4, 1937.


Ibid., p. 330.

Ibid., p. 331.
Constitutional doctrines have developed in the United States much like the common law evolved in England: case by case. The Constitution is a guideline for government, the printed rules of our political game. What the Constitution means in its practical application to specific problems at any given time is the function of the judicial branch of government. It is the Supreme Court which determines whether or not the government has the constitutional power to implement a certain policy. Therefore, the nine Justices who sit on the Court have an enormous responsibility to arbitrate social and political conflicts in the judicial arena both to ensure effective government and to protect individual rights. One Justice, when it is his duty to write a majority opinion for his colleagues, can have a profound influence on the conduct of organized society.

Justice George Sutherland wrote the Court's decision in the Belmont case that became the established doctrine on the President's powers to conduct foreign relations. In order to fully understand that doctrine it is necessary both to analyze his decision for its legal and
constitutional merits and to examine his own career to see what personal insights may have influenced his opinion. Likewise, attention is due to Justice Harlan Fiske Stone, who wrote a concurring opinion that presented a different interpretation of the Belmont case. Finally, it is necessary to recount the public and professional reaction to the Belmont decision to see how it was received by the molders of public opinion.

Was Sutherland's opinion soundly based on precedent? There was no precedent in law for an executive agreement like the Roosevelt-Litvinov Accords, but Sutherland supported skillfully well his basic contentions that led him to uphold the legal effect of the Litvinov Assignment. He referred to eleven sources to support his opinion: eight Supreme Court precedents, one English precedent, one commentator on international law, and an historical incident.

The strength of Sutherland's arguments in the Belmont decision were Underhill v. Hernandez, Oetjen v. Central Leather Co., and Ricaud v. American Metal Co. The first was an 1897 Supreme Court case arising from the Venezuelan civil war of 1892, which culminated in the fall of the government of President Raimundo Anduza Palacio. The revolutionary army of a General Hernandez had taken the city of Bolivar on August 13, 1892, and placed it under
revolutionary martial law. An American citizen named Underhill was forcefully detained there, and when he returned to the United States he sued General Hernandez for damages in an American court.2

The Supreme Court heard the case in October 1897 and Chief Justice Melville Fuller delivered a decision against the plaintiff on November 29. The Chief Justice wrote that "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."3 The critical factor for Fuller was that the State Department had given recognition on October 23, 1892, to the government of Joaquin Crespo, for whom Hernandez had captured Bolivar. He held that the rule of international judicial comity applied not only to established governments but also to "the agent of governments ruled by paramount force as matter of fact."4 Therefore, he concluded that the case was not judiciable in American courts, but was a diplomatic question of international claims to be handled through the political branches of governments.

The Oetjen and Ricaud cases, which were decided together by the Supreme Court on March 11, 1918, arose from the chaotic political situation in Mexico after the assassination of President Francisco Madero in 1913. President
Wilson refused to grant recognition to Madero's successor, Victoriano Huerta. A revolutionary movement led by Venustiano Carranza seriously threatened the stability of the Huerta regime. The facts relating to the Oetjen case began on October 1, 1913, when Carranza's Commander of the North, Pancho Villa, occupied the city of Torreon. Villa imposed a tax on the city residents and confiscated property belonging to Huerta loyalists. One such loyalist was a hide dealer named Martinez, who fled the city leaving his hides to a man named Oetjen. Villa sold Martinez's hides to the Finnegon-Brown Company, which in turn sold them to the Central Leather Company. Oetjen sued Central Leather in an American court on the basis that the latter's right to the hides was invalid because it was based on confiscation by a bandit. The facts of the Ricaud case were similar in that it concerned a similar conflict of claims over property seized by another Carranza commander.5

Associate Justice John H. Clarke wrote the unanimous opinion of the Court in both cases. The critical factor in these cases, as in Underhill, was whether the State Department had granted recognition to the revolutionary government. Clarke observed that it had granted de facto recognition to Carranza on October 19, 1915, and de jure recognition in 1917. He asserted that the conduct of foreign relations was a political rather than a judicial question,
and "when a government which originates in revolution or revolt is recognized by the political department of our government, as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."⁶

Clarke concluded from this premise that the actions of Carranza's military commanders were acts of state not questionable in American courts. He further wrote that "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."⁷

It is interesting to note in passing that there were three Justices who concurred with Clarke's opinions in 1918 who were still on the Court in 1937 during the *Belmont* case: Van Devanter, McReynolds, and Brandeis.

Having reviewed the three above cases in forty-three lines, Sutherland reported at length *Luther v. Sogar*, the 1921 English Court of Appeals case which was discussed in Chapter II. It, too, had been based on these three American precedents cited by Sutherland. Sutherland concluded from these four cases that the Supreme Court could not pass judgment on the validity of Soviet laws regarding Russian
property rights. He could deduce from this principle that the Petrograd Metal Works' account with the Belmonts had in law, if not in fact, passed to the Soviet government as successor to the Petrograd Metal Works.

Yet Sutherland could not build his opinion on these cases alone, because the Belmont case was not exactly like them. In those precedents the property had been located physically in the territory of the government that had confiscated it, whereas in Belmont the property was in New York City. Sutherland had not solved the question of whether New York did or did not have authority to regulate property within its territorial jurisdiction.

Sutherland avoided the whole conflict of laws issue by resorting to the argument that the states had no power to interfere in a foreign policy question. He contended that an executive agreement, although not a treaty in the constitutional sense, had the effect of a treaty on American political relationships between the states and the national government. In other words, he claimed that an executive agreement was superior to any conflicting state law just as a treaty is "the supreme law of the land."\(^8\) Sutherland cited B. Altman & Co. v. United States\(^9\) as precedent that executive agreements were constitutional contracts concluded by the President without the Senate's consent.
The Altman case involved two issues: whether the Supreme Court had jurisdiction according to the Circuit Court of Appeals Act of 1891 and whether an executive agreement was operative in setting a tariff rate. At stake was whether an imported French cast bronze statute should be taxed at 15% ad valorem according to an executive agreement or 45% as provided by the Tariff of 1897. This act, besides setting the tariff rates, had authorized the President to make tariff rate adjustments according to reciprocal trade agreements. Justice William R. Day, who had been Secretary of State in 1898, wrote the Court's unanimous opinion. He found that the trade agreement was a treaty for purposes of review by the Supreme Court. As for the correct duty, Day concluded that this particular statute did not qualify for the 15% rate. He did not say that the executive agreement was invalid, but only that it did not apply in this specific instance.

Sutherland further asserted that executive agreements were constitutionally valid as a matter of historical diplomatic practice. For this he cited John Bassett Moore's Digest of International Law. Moore, as the leading legal expert for the State Department at the turn of the century, had compiled an eight volume study of international law in 1906 that was considered the most authoritative work on the subject until World War II. He had reported a number of
historical examples of executive agreements concluded by the President without Senatorial approval. These agreements included the adjustment of American claims against foreign governments (such as the Spanish-American protocol of 1871) and various military agreements. Examples of the latter were the Anglo-American agreement of 1817 to demilitarize the Great Lakes, a reciprocal agreement with Mexico in 1882 concerning the pursuit of Indians across the Rio Grande, the armistice agreement with Spain of August 12, 1898, and the Boxer Rebellion protocol of September 7, 1901. Moore also listed international copyright and postal conventions as instances of executive agreements. He had concluded that Presidential agreements concerning claims and military affairs were like treaties in that they were binding under international law although they were not treaties in the American constitutional sense.

If an executive agreement were like a treaty, there was no question that it could supercede state laws since the Supreme Court had consistently ruled that treaties were the "supreme law of the land." Sutherland cited four references for this contention. The first was not a case, but a quotation by James Madison from his debate with Patrick Henry at the Virginia ratifying convention in June 1788. Madison's words carried much weight in Sutherland's mind because he believed that the intent of the framers should
be always maintained by the Supreme Court. Madison on this occasion had pointed out that the constitutional wording on treaties was no change from the Articles of Confederation and that if treaties were not superior to state laws they would have no practical effect.

Sutherland also cited the first judicial test of the superiority of treaties to state laws. This was the well-known Ware v. Hylton of 1796. At stake was a pre-Revolutionary debt of a Virginian to an English subject and whether the Virginia legislature could confiscate or annul such a debt. The Treaty of Paris of 1783 had provided that there should be no legal barriers to the recovery of English claims against American citizens. This was a test case concerning state property laws and the authority of a national treaty to abridge them.

Each of the five Justices who sat on the Supreme Court in 1796 wrote a separate opinion. Samuel Chase, writing his first opinion on the Court, delivered its majority decision. He reasoned that the Virginia laws concerning debts to Englishmen during the Revolution were the acts of a sovereign and had the full force of law until the ratification of the Constitution. He observed that the states had delegated their treaty-making power as sovereigns to the national government. This delegation abrogated their authority to block the enforcement of national
treaties. Chase concluded that the American people were sovereign in the United States, not the states themselves, and the people of one state had no power to frustrate the will of the whole people. Chase's theory was that:

There can be no limitation of the power of the people of the United States. . . . A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in the way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States shall be superior to the Constitution and laws of any individual state; and their will alone is to decide.16

Associate Justices James Wilson and William Cushing agreed with Chase. Wilson wrote that "The State made the law; the State was a party to the making of the treaty; a law does nothing more than express the will of a nation: and a treaty does the same."17 Cushing reiterated the same idea: "The treaty, then, as to the point in question, is of equal force with the constitution [sic] itself; and certainly, with any law whatsoever."18

Sutherland cited two cases from the 1920's that further strengthened the authority of Ware v. Hylton. Whereas it had dealt with the financial relationship of individuals and their state government in relation to the treaty power, Missouri v. Holland in 1920 settled the question of the relationship between state and national regulatory legislation. Congress had passed the Migratory Bird Act of 1918 pursuant to a 1916 treaty with Great Britain to prevent the
killing of migratory birds in Canada and the United States. A similar act passed before the 1918 treaty had been found unconstitutional in a lower court because the judge claimed that Congress did not have the power to infringe on state game laws. The State of Missouri sued the Federal game warden to prevent him from enforcing the 1917 law in Missouri since that state received a revenue from hunters who shot the birds. The Supreme Court upheld the Federal law by a 7-2 vote. Justice Oliver Wendell Holmes delivered a brilliant opinion for the majority, which read in part:

As most of the laws of the United States are carried out within the States and as many of them deal with matter which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.\(^20\)

The second case, Asakura \(v\). City of Seattle,\(^21\) was decided in 1924. Justice Pierce Butler delivered the Court's unanimous decision that overruled a 1921 Seattle ordinance that infringed upon the American-Japanese treaty of 1911. The plaintiff was a Japanese subject living in Seattle who had been a pawnbroker there since 1915. The city passed an ordinance six years later that forbade the licensing of pawnbrokers who were not American citizens. Asakura sued the city claiming it had violated the American-
Japanese treaty of 1911 that granted reciprocal rights for the economic pursuits of each other's nationals. Butler concluded that Asakura's occupation was covered by the treaty, and that Seattle could not abridge the rights guaranteed to Japanese subjects by the Federal government. He further noted that treaties could extend to all matters properly subjects of international negotiation, as long as their terms did not violate an expressed constitutional prohibition. "Treaties are to be construed in a broad and liberal spirit," he wrote, "and, when two constructions are possible, one restrictive of rights that may be claimed and the other favorable to them, the latter is to be preferred." 22

Sutherland concluded in the Belmont decision that other international accords enjoyed the same legal authority that treaties did, "from the fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." 23 He incorporated into his Belmont decision his elaborate theory of governmental powers in foreign affairs by citing United States v. Curtiss-Wright, 24 an opinion he himself had written just five months earlier. This case is indeed better known than Belmont and is one of the principal constitutional expositions on Presidential diplomatic powers.
Congress had passed a joint resolution on May 28, 1934, that specified conditions when the President could place an embargo on munition sales abroad in order to maintain world peace. On the same day Roosevelt issued a proclamation invoking an arms embargo to Paraguay and Bolivia, which were engaged in the Chaco War (1932-1935). The Curtiss-Wright Export Corporation, an American manufacturer of airplanes, had just signed a $629,000 contract with the Bolivian government for five fighters and four Condor bombers. It delivered the airplanes, but without any armaments. When it sent fifteen machine guns from the Colt factory to be mounted on the bombers in La Paz, the Justice Department sued it for conspiracy to violate the President's arms embargo. The United States Attorney who handled the case was Martin Conboy, who had initiated the Litvinov Assignment cases in New York in 1934.25

Judge Mortimer J. Byers of the Second District Court, however, ruled that the resolution of Congress was an unconstitutional delegation of legislative power to the executive branch. For this reason he dismissed the government's suit on the first of three points of demurrer pleaded by defense.26 Conboy appealed the case directly to the Supreme Court, which heard the case on November 19 and 20, 1936.27

Sutherland delivered the majority decision to reverse
Judge Byer's ruling on December 21, 1936. He rejected the defense argument that the arms embargo was like the National Industrial Recovery Act, which the Court had ruled as an unconstitutional Congressional delegation of power to the President in 1935. He pointed out that the latter had been invalid because it concerned domestic policy which violated the federal system of government. The arms embargo, however, dealt with foreign policy, which Sutherland claimed was not bound by the same constitutional restraints as domestic policy. He reasoned that sovereignty over external affairs had never belonged to the individual states, but had passed in 1783 from the English crown to the United States in Congress. Sutherland further contended that national powers in foreign affairs were not limited to the ones enumerated in the Constitution, but included all sovereign powers enjoyed by the other nations of the international system. Sutherland concluded that Congress could not infringe the sovereign rights of the states in diplomatic questions because the states had no power in this sphere of government.

If the Federal government had extensive powers in the conduct of foreign relations, Sutherland argued, then it was the President who had the principal responsibility for the conduct of diplomacy. He continued his dissertation on foreign affairs by discussing Presidential powers, which
was not directly germane to the case. Sutherland's point was that in this case Congress had supplemented Presidential diplomatic powers rather than delegated to him strictly legislative power. Yet Sutherland's obiter dictum became legal doctrine on Presidential powers, and in some respects his Belmont opinion was an extrapolation of Curtiss-Wright.

Drawing upon his theory of federalism expounded in Curtiss-Wright, Sutherland concluded that the state of New York had no authority to interfere in the conduct of American foreign policy, whether that policy was initiated either by Congress or the President. "In respect of all international negotiations and compacts," he wrote, "and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."30

Sutherland also rejected defense argument that the United States would be taking property without due process of law if it acquired the Metal Works account. He repeated the government's argument that the Belmonts had no vested interest in the fund because they were only custodians of the fund. He refused to invoke the Fifth Amendment as far as it concerned the Metal Works itself. Sutherland reiterated that the Soviet nationalization of the company was an act of state that was not reviewable by the Supreme Court.31
In summary, Sutherland had established a strong constitutional basis for the validity of an executive agreement. Indeed, he had given an authority to it that it had never previously enjoyed: superiority to conflicting state laws. Sutherland ended his opinion with the caution that the Court had only decided that the government did have a chose in action in this case by virtue of the Litvinov Assignment. He refused to prejudice the claims of any others against the same fund. But in reality, Sutherland's opinion was so strongly worded in favor of plenary executive powers that it virtually precluded any claim successfully challenging the government's.

Sutherland presented five premises upon which he built his Belmont opinion. The first was that the courts of one nation cannot review the acts of state of another sovereign. Secondly, the recognition of a foreign state or government is a political rather than a judicial question. Thirdly, the President is the chief diplomatic agent of the United States. Fourthly, executive agreements exist in diplomatic practice and are a legitimate alternative to treaties. Finally, treaties are the supreme law of the land and override conflicting state laws. All five of these assumptions were well grounded in American legal and diplomatic history.

The first proposition is a truism of international
law. All sovereign states are equal to each other, and one state cannot legislate or judge municipal laws for another. Even if that were not so, the Constitution defines the jurisdiction of the Supreme Court in such a way as to forbid it to hear foreign cases.\textsuperscript{32}

The Supreme Court has refused jurisdiction on numerous occasions that raised the question of the propriety of a public policy rather than of merely constitutional procedure. These are "political questions" which the Court tries to avoid. It has included diplomatic problems in the category of political questions.\textsuperscript{33} Rather than impose its own interpretation of treaties and laws concerning foreign relations, the Court tends to rely upon the executive branch to supply the national definition of affairs. An early example is \textit{Foster v. Neilson},\textsuperscript{34} in which Chief Justice John Marshall wrote:

\begin{quote}
The judiciary is not that department of the government to which the assertion of its interest against foreign powers is confided; and its duty, commonly, is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation have been a plain one, its courts would hesitate to pronounce it erroneous.\textsuperscript{35}
\end{quote}

The Court has ruled frequently that recognition of foreign sovereigns is a political function that cannot be questioned by the judiciary. Chief Justice Marshall, who had been Secretary of State in 1800, expressed this rule in \textit{Rose v. Himely} in 1808.\textsuperscript{36} This case brought into question
whether Santo Domingo was still a French colony. Marshall based his decision on the fact that the State Department recognized French sovereignty there, so he concluded that that interpretation was binding on American courts. Ten years later, Justice Joseph Story summarized Marshall's doctrine well:

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 to remain unaltered. 37

The Hernandez case of 1897 therefore was consistent with many precedents for judicial deference to the State Department in matters of diplomatic recognition. 38

The President is the chief diplomatic agent of the United States by the powers conferred upon him by the Constitution. He has the authority to appoint ambassadors abroad (with the Senate's approval), to receive foreign diplomats to the United States, to negotiate treaties (with the Senate's approval), and to be the Commander-in-Chief of the armed forces. 39 It was the intention of the framers to make the President as powerful in foreign relations as the King of England, with the exceptions of declaring war and ratifying treaties without legislative consent. 40 George Washington established several precedents for strong executive leadership in diplomatic
affairs. After a misunderstanding with the Senate in 1789 over its advisory function for treaties, he made the negotiation of treaties a strictly executive duty asking the Senate's approval only upon the signed document. When he received Citizen Edmond Genet as the official French ambassador in 1793, he set the example that the President alone grants diplomatic recognition to foreign governments. 41

The historical trend has been for the President increasingly to dominate Congress in foreign affairs. He controls the administrative machinery and the channels of communication. This concentration of executive power is due to a constitutional problem as well as to personal and political factors. There is a gap in the delegation of power in delineating clearly the responsibilities of the executive and legislative branches in matters of war and peace. This gap has been filled in practice by the historical precedents set by the President for strong executive leadership in foreign affairs. 42

There was a long history of executive agreements concluded in American diplomacy before the Roosevelt-Litvinov Accords of 1933. Sutherland referred to some of these indirectly when he cited Moore's Digest of International Law. What Sutherland did not make clear in his Belmont opinion was that there were different kinds of
executive agreements according to the constitutional authority exercised by the President. The Supreme Court had sustained the Tariffs of 1890, 1897, and 1922 because they had only made the President an administrative agent of Congress when he readjusted tariff rates by reciprocity. While Congress cannot delegate strictly legislative powers to the President, it can authorize him to act as its agent when domestic legislation effects international relations. The President has made many executive agreements concerning tariff rates, copyrights, patents, trademarks, postal conventions, and territorial acquisitions pursuant to Congressional acts.43

The President can make executive agreements without Congressional action only in the areas where he has exclusive constitutional authority: administrative procedure, recognition of foreign sovereigns, and military affairs. This observation had been made in 1906 by former Secretary of State John W. Foster,44 and by constitutional commentators Samuel B. Crandell in 1904,45 John Basset Moore in 1905 and 1906,46 and Charles Cheney Hyde and Quincy Wright in 1922.47

There have been times when the Senate threatened to frustrate an executive foreign policy and the President resorted to an executive agreement as a modus vivandi to avoid the Senate's rejection of a treaty. In 1905, for
example, President Theodore Roosevelt made an agreement with Santo Domingo for American authorities to take over the customs collection in that bankrupt republic. When the Senate obstructed the accords in their treaty form, Roosevelt went ahead and initiated them as an executive agreement. Eight years later, he explained his actions:

The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress.48

Roosevelt also solved the California Japanese school segregation crisis in 1907 by reaching a "Gentleman's Agreement" with Tokyo. Both he and President Wilson used an executive agreement to achieve a political understanding on Asia with Japan.49

Finally, the constitutional doctrine concerning the superiority of treaties to state laws was well established before 1937. It was the intent of the framers in 1787 to make the national government the sole organ for foreign relations.50 The Federal courts from the earliest cases have consistently ruled that the states cannot interfere with the enforcement of national treaties.51

One of the principal authorities on treaty powers was Justice Stephen J. Field, who sat on the Court from 1863 to
1897. In an 1889 case he wrote: "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." He thoroughly explored what a treaty could and could not do in an 1890 case. He contended that the subject matter of treaties was unlimited as long as it pertained to a subject properly a matter of international relations. He asserted that a treaty could not do anything that the Constitution prohibited. Field further noted that a treaty must be liberally construed by the courts to guarantee equality, reciprocity, and fulfillment of its terms. Finally, he concluded that a treaty provision applies to all American territories and states equally.

To explain only the legal and constitutional aspects of Sutherland's Belmont opinion is to tell but part of the story behind it. He was an ardent nationalist, and his life experiences had a profound influence on his interpretation of Presidential powers in foreign affairs.

George Sutherland was born on March 25, 1862, in Buckinghamshire, England. He was the fifth of six Supreme Court Justices born abroad. His father was a Mormon at that time, and in 1863 he moved his family to the Utah Territory of America. Although the Mormon church helped finance the 5000-mile long journey, the elder Sutherland
renounced the faith soon after reaching his new home. George Sutherland grew up in the "Wild West" of Utah. His early life was demanding, but not harsh. He worked hard, and he used whatever money he saved to go to school. As a boy he read the intensely religious and patriotic McGuffey Readers. He graduated from Brigham Young Academy (later University) in 1881 and attended the Michigan Law School for one year.

Sutherland was deeply influenced by his professors. At Brigham Young, he greatly admired Karl Maeser, whom Sutherland recalled later as "that master character builder." Maeser taught his pupils the Mormon doctrine that held the American Constitution a divinely inspired document, a faith Sutherland held all through his life. Maeser was an admirer of the English philosopher Herbert Spencer, and he taught his students the principles of Social Darwinism. Although Sutherland never joined the Mormon church, he did accept its values of rugged individualism, limited government, and personal liberties.

As Maeser was his instructor in personal values at Brigham Young, Dean Thomas M. Cooley was Sutherland's legal mentor at Michigan. Cooley had been one of the three original law professors when the law school opened there in 1859, and he also sat on the Michigan Supreme Court. In 1868 he had written the widely acclaimed Treatise on the
Constitutional Limitations, which became the legal manual for the defense of individual property rights against state regulation. Sutherland acquired from Cooley the ideas of limited government in domestic affairs and broad Federal powers in foreign affairs. Indeed, the idea that international sovereignty had passed directly from the King to the United States as a whole which he incorporated into his Curtiss-Wright opinion came directly from Cooley's Constitutional Limitations. Another law professor who influenced Sutherland was James V. Campbell, who was also a Justice of the Michigan Supreme Court. Judge Campbell lectured that the national government must have every power exercised by every nation in the international system. He also stressed that treaties were political documents beyond judicial review. Campbell's ideas can also be found in Curtiss-Wright.57

Although Sutherland never received a law degree, he was admitted to the Michigan bar in 1883. He returned to Utah, where he had a successful law practice in Provo and Salt Lake City. He was a founder of the Utah Bar Association in 1894 and he acquired a reputation as an authority on the role of the judiciary in society. When Utah became a state in 1896, Sutherland was elected to the first state legislature, where he became chairman of the senate's judiciary committee. He was elected to Utah's one
Congressional seat in Washington in 1900. He served only one term because of political manipulations in Salt Lake City, but he did win election to the Senate by the Utah legislature in 1905. He served two terms as a Senator until his bid for a third term was rejected by the people of Utah in 1916, the first popular election of Senators required by the Seventeenth Amendment.\textsuperscript{58}

Sutherland was a loyal Republican Senator. At first he was a supporter of President Theodore Roosevelt, voting for the major pieces of Progressive legislation sent to Congress from the White House. But Sutherland was no Progressive, and during William Howard Taft's administration he allied himself with the Republican conservatives. He supported Taft in the Ballinger-Pinchot controversy, defended the high Payne-Aldrich tariff, and opposed any income tax. He and Taft became close friends, and Sutherland delivered the Utah delegation to the President in his successful effort for the Republican nomination against Theodore Roosevelt in 1912. He also was instrumental in helping Taft to carry Utah in the election, the only state besides Vermont that Taft carried.\textsuperscript{59}

Sutherland wrote an article on federalism for the \textit{North American Review} in 1910 that expressed ideas that he would write into Supreme Court decisions during the 1920's and 1930's. His basic concept was that the national government was one of delegated powers from the states in
domestic affairs but was absolutely sovereign in foreign relations. He asserted that the Federal government could not infringe upon the authority of the states in matters where the states had not delegated away the power to do so. For example, he argued that Congress could not regulate child labor because this issue was in the domain of the states. Likewise, the states could not infringe upon national powers that were not derived from the sovereignty of the states, such as the conduct of foreign relations. Sutherland paraphrased Cooley's thesis that international sovereignty had passed from the King to Congress, so that national powers in diplomatic intercourse derived from international law rather than from the states. Sutherland's exposition on federalism in this article provided the basis for his later judicial opinions that advocated limited national authority in domestic affairs but plenary powers in foreign relations.  

As a senator, Sutherland was an ardent nationalist in questions of American foreign policy. In 1908 he advocated the building of a two ocean fleet in order to better secure the safety and independence of the United States from foreign complications. He called T.R.'s maxim, "speak softly and carry a big stick," a sound approach to international relations. As a member of the Senate Foreign Relations Committee, he was a bitter opponent of President
Wilson's *indecisive* policy toward German submarine warfare before 1917. On the Senate floor he declared:

> I am one of those who desire peace. . . . I would sacrifice much to avoid war . . . but a nation, when all other means fail, that will not resent a flagrant and illegal attack upon the lives of its own citizens is only less detestable than a man who will not fight for his wife and children. . . . It is the duty of a self-respecting Nation to stand, and stand firmly, for the rights of every citizen however humble against foreign aggression from any source however powerful. That is what the Federal Government is for, since the State in which the citizen lives protects him in his domestic rights.62

Sutherland was an influential Washington lawyer from 1917 to 1922. He was elected president of the American Bar Association in 1917. Although out of office, he still spoke out on the important issues of the day. He actively opposed American participation in the League of Nations. He was given an opportunity to expound his ideas in the Blumenthal Lectures at Columbia University in December 1918. These lectures, which were published as a book in 1919, were merely an elaboration of his 1910 article and his numerous speeches in Congress. His central question was whether the United States had the constitutional power to fulfill its role as a major world power. He assured his audience that it did since diplomatic powers derived from the international system rather than from the states. Sutherland told his audience:

> State power and national power are in no wise antagonistic; they are complimentary and together support a political structure as nearly perfect
as human ingenuity has thus far been able to conceive. The primary concern of the states is with individual and local affairs. The primary concern of the Nation is with the interrelations of the states, and their several peoples, and of the sovereign whole with the world outside. Any unwarranted encroachment upon the former or any captious restriction of the latter must be alike avoided, if the symmetry of the great government structure designed by the founders is to be preserved.63

Sutherland believed that the United States had a permanent responsibility to help preserve world stability. He proposed that the country be prepared to resist future aggression by maintaining a large navy and a standing army. But he opposed the whole concept of collective security, which he believed would only be a force for international tyranny.64

Sutherland was a principal campaign advisor for Warren G. Harding in 1920. He exerted a strong influence on the Ohio Senator to abandon the Lodge reservationists on the Versailles Treaty issue and to join the Irreconcilables. After Harding's election, Sutherland acted as his unofficial advisor. In 1921 he served as the chairman of the Advisory Committee to the Washington Arms Conference, and from 1921 to 1922 he represented the United States before The Hague court of arbitrations. What Sutherland wanted was to sit on the Supreme Court. In 1921 Chief Justice Edward D. White died, but Harding passed over Sutherland and gave the post to former President William
Howard Taft. Harding did appoint Sutherland when another vacancy occurred only a year later.65

Sutherland's judicial career was entirely consistent with the principles of government that he had expounded as a Senator and a lawyer. He tended to be conservative on all domestic issues where he believed the Federal government encroached upon the powers of the states. He was also a defender of individual rights, particularly property rights, against regulation from any level of government.66

After the resignation of Taft in 1931, Sutherland became the leader of the conservative bloc on the Supreme Court. He was the leading spokesmen of the bench against New Deal legislation. It was during the mid-1930's that the Court broke into three factions on issue of economic regulation. Sutherland, Van Devanter, McReynolds, and Butler were the conservatives. Brandeis, Stone, and Cardozo formed a faction that generally voted in favor of sustaining the New Deal law. Chief Justice Hughes and Owen Roberts formed a neutral faction that voted with the conservatives, until they shifted to the liberals during the constitutional crisis of 1937.67

It might seem paradoxical at first that Sutherland should write the Belmont opinion in 1937 that accorded broad powers to the President when it was he who opposed Franklin Roosevelt's legislative program for economic
recovery as a usurpation of power. But it is clear from a brief examination of Sutherland's entire career that there was no inconsistency at all. Sutherland had always believed that the Federal government did not have the power to regulate local conditions whereas it did have plenary powers in foreign affairs. His *Belmont* opinion was as consistent with his beliefs as any of the conservative ones he wrote on domestic issues.

One might also conjecture that the Court-packing controversy of 1937 might have influenced some Justices to vote for the government's case in *Belmont*. There is no evidence that Roosevelt's attack on the Supreme Court had any direct relation to the Court's decision. Certainly it had no effect on Sutherland, who had extensive intellectual and personal reasons to write the kind of opinion that he did in the *Belmont* case.

Justice Harlan Fiske Stone agreed with the unanimous Court that that the government's chose in action should be allowed, but he disagreed with Sutherland's written opinion of the case. "I agree with the result, but I am unable to follow the path by which it is reached," he wrote in the first line of his concurring opinion. He believed that the principal issue was one of conflict of laws, rather than international law. Arguing from a narrower perspective than Sutherland, Stone concluded that no public policy
of New York would be violated if the United States litigated its claim against the Belmonts in New York courts.

Stone's first point was that if the object of the suit had been real property located in Russia when it was expropriated by the Soviet government, there would be no legal challenge to its title by confiscation in American courts. He cited the Oetjen and Ricaud cases, as well as Salimoff v. Standard Oil, indicating that he would give due weight to the New York Court of Appeals rulings on Russian property which Sutherland ignored. Stone further noted that a claim to intangible property that was valid at the place of origin would also be valid in New York, provided the New York policy regarding the debtor within its jurisdiction did not otherwise prevent its honoring the claim.

Having presented his principal observations about property law, Stone continued with an exposition on conflict of laws doctrines. He observed that the Court on several occasions had ruled that one state may refuse to honor a transfer of property within its borders made in another state if the transfer conflicted with its public policy. Stone cited five precedents for this, all of which concerned conflict of laws among the American states and had little bearing on international conflicts.69

He contended further that a state may disregard a
transfer of property when the object of the transfer was a chose in action due from a debtor within its bounderies to a foreign creditor. He cited four precedents for this observation. The first three, however, were cases that had concerned questions of private international law, not diplomatic transactions. In *Harrison v. Sterry*, Chief Justice Marshall had ruled that when a transatlantic trading company had gone bankrupt its creditors in the United States would be satisfied first, under American state laws, before foreign claimants could recover any of the company's remaining property in the United States. Likewise, Justice Day had written in *Disconto Gesellschaft v. Umbreit* that the state of Wisconsin was not compelled to release a bank account to a German banking firm if doing so denied the legal satisfaction of a Wisconsin citizen's claim against the account for an unpaid debt. The legal principle was that the courts of the state where the property was situated could decide whether to extend comity to foreign claims or not, depending on the state policy concerning property rights and obligations.

The other two precedents cited by Stone at this point were both New York Court of Appeals cases, which had no binding effect on the Supreme Court of the United States. One was an 1893 case involving the rules of property liens upon an estate in New York to New York citizens, although
the owner of the estate was filing bankruptcy under Wisconsin law. The other case was Vladikavkazsky Ry. Co. v. New York Trust Co., the 1934 case in which the Court of Appeals refused to grant comity to the Soviet nationalization decrees concerning former Russian corporate holdings in New York. That was precisely the issue which was before the Supreme Court in the Belmont case, and Sutherland's opinion had dismissed it by denying the very legal existence of the state of New York in this type of case.

Stone's contention was that a chose in action had a situs within state law. He cited eight sources for this: six Supreme Court cases, one English Chancery decision, and the 1934 American Law Institute's Restatement of the Law of Conflict of Laws. All six Supreme Court precedents involved conflicts among state laws, not international law. Perhaps the only conclusion that could be drawn from these cases was that there was no established way to resolve interstate conflict of laws. In one Justice McKenna had found that a debt was the property of the creditor and controlled by the laws that controlled the creditor himself. This was just the opposite of Stone's assumption that the forum of the property situs determined what laws govern it. In another case, Justice Brandeis had written:

The contract of deposit does not give the bank a tontine right to retain the money in the event
that it is not called for by the depositor. . . . If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged.\textsuperscript{75}

This would have meant that the Belmonts had no claim of their own to the Metal Works' account, but that the account fell either to the American government (by assignment of the Soviet government which had succeeded to the company's property), or to the state of New York for satisfaction of claims against the company from New York citizens, of which there were none.

The English Chancery case was \textit{In re Russian Bank for Foreign Trade} decided in 1933.\textsuperscript{76} The court had ruled that Soviet decrees had ended the juristic existence of Russian banking houses, including their branches in England. After granting that much comity to Soviet law, the court refused to allow Soviet law to invalidate the claims of British subjects against the former bank assets located in England. This seemed to be a just finding in order to protect Englishmen in their transactions with foreign corporations within the Realm, but it did not apply to the Belmont situation since there were no New York residents' claims against the Metal Works' account.

Stone referred to two sections of the \textit{Restatement} of conflict of laws authored principally by Joseph Beale as an attempt to codify this difficult area of the law. The first section cited by Stone held that a state could
exercise authority over the obligor who is within its jurisdiction although it may have no jurisdiction over the obligee.\textsuperscript{77} No one could deny that New York laws covered the Belmont company, but this did not mean that New York law was the only law covering the Metal Works' account with the Belmonts. The other cited section read:

\begin{quote}
The original creation of property in an intangible thing which exists only because it has been created by law is governed by the law of the state which created the original intangible thing and interest therein.\textsuperscript{78}
\end{quote}

Stone interpreted this to mean that New York law applied to the chose in action concerning the Metal Works' deposit in New York City, but "an intangible thing" could also mean the account itself, which was made possible by the laws of Russia under which the Metal Works was incorporated and functioned until 1917.

Stone reasoned that there was no New York public policy that refused to recognize the government's chose in action in the \textit{Belmont} case. The Belmonts were the debtors of the account, and as such they had no right to question the government's claim. Since they did not own the deposit, their burden under law had not been changed and it was not their property that had been confiscated. But whether the New York courts awarded the Metal Works' account to the government as the only claimant to it was a question of New York state public policy. In Stone's
opinion, the New York courts were free to subordinate the Soviet government (and its assignee, the American government), as the successor to the Metal Works, to private creditors. In other words, Stone was saying that the government had a legitimate chose in action in this case, but that its claim might be inferior to other claims against the same account.  

Stone dismissed Sutherland's dissertation on Presidential powers in foreign affairs as irrelevant to the legal facts of the case. He asserted that:

"It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden. . . . There is nothing . . . to suggest that the United States was to acquire or exert any greater rights than its transferrer, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those [New York] laws."

Stone concluded that the Supreme Court's reversal of the Circuit Court's opinion in the Belmont case was correct since it merely established that the United States had a chose in action which did not exclude other claims to the same fund. Yet he added an important last sentence:

"There is no occasion to say anything now which can be
taken to foreclose the assertion by such claimants of their rights under New York law." He correctly realized that Sutherland's opinion had been so broad in its validation of the executive agreement that it implicitly precluded any other challenges to the same account.

The mistaken impression that Stone gave in his opinion was that the Supreme Court had been consistent in its adjudication of conflicts cases. Not even Stone himself was consistent in such matters. For example, he had written in 1925 the Court's unanimous decision in Second Russian Insurance Co. v. Miller that the 1916 Tsarist ukaze forbidding Russians to trade with Germans did not apply to the Second Russian Insurance Company's branch office in the United States. He wrote that to uphold the ukaze's effect here would make unlawful what would be otherwise lawful in the forum, which he believed was extending legal comity too far. Yet in 1932 Sutherland had written the opinion in a case in which he cited several precedents that for taxing purposes the situs of intangible property followed the domicile of the creditor. Stone, however, wrote a dissent for himself, Holmes, and Brandeis, in which he stated that situs was "not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired."
The Supreme Court was not even consistent in conflicts cases during the 1936 term. On the same day that it heard the Belmont case, the Court listened to the arguments in Broseman v. Connecticut General Life Insurance Co., which involved the coverage of a group insurance policy contracted in Pennsylvania by a Connecticut company with Texas workers. Butler wrote for a unanimous Court that the law of Pennsylvania, the situs of the contract, was to determine the obligations of the policy. On April 26, 1937, Stone delivered the opinion for a unanimous Court in First Bank Stock Corp. v. Minnesota, which raised questions similar to those raised in the above 1932 case. This time the Court decided that the stock holdings of a firm chartered in Delaware could be taxed in Minnesota. Stone wrote on this occasion that:

The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respects to tangibles, is in itself meaningless when applied to intangibles, which, since they are without physical characteristics, can have no location in space.

Yet only one week later Stone argued in his concurring Belmont opinion that a bank account and a chose in action (both intangibles) did have a situs. Was Stone perhaps employing "a convenient fiction which may be judicially employed or discarded, according to the result desired"?

As for the question of international debts which
Stone had ignored, the Supreme Court had ruled consistently that this was strictly a diplomatic affair. Chief Justice Hughes had ruled for a unanimous Court in *Russian Volunteer Fleet v. United States* that a private Russian corporation could sue in the Court of Claims for monetary recovery of ships seized by the American government during World War I. Stone cited this case in his *Belmont* opinion to show that the Fifth Amendment did protect aliens from unlawful American confiscations. But this case involved a private claim, not a claim between sovereigns. In another case, also written by Hughes, the Court ruled that an American state and a foreign sovereign could not settle a debt through the courts, but by national diplomacy "through treaty, agreement of arbitration, or otherwise."

The *Russian Volunteer Fleet* case was distinguished in *Cummings v. Deutsche Bank*, decided on February 1, 1937. Butler ruled for a unanimous Court (Roberts and Stone not participating) that the Justice Department, pursuant to the Trading with the Enemy Act of 1917 and the Settlement of War Claims Act of 1928, could sequester German property in the United States that had been seized in World War I, pending the satisfaction by Germany of claims against it by American nationals. Butler further contended that this was not a violation of the Fifth Amendment. Several of the Justices realized by 1937 that
there was no reason to protect alien property in the United States which could be applied legally to foreign debts to American claimants.

Stone's opinion in the Belmont case did not strongly argue his contentions as to rules of law which govern intangible property rights and choses in action. If he was contending that the forum must decide for itself the rules which govern intangibles, he was granting much local autonomy to adjudicating property cases. Certainly in matters involving international transactions and the property claims of sovereigns, one should proceed cautiously in subordinating national policy to local legal interpretations. Stone apparently believed that Sutherland's opinion granted the national government an unjustified constitutional authority over the states to govern property within their jurisdiction.\textsuperscript{91}

Interestingly enough, Stone approved of Roosevelt's reversal of the sixteen year policy of non-recognition of the Soviet Union. As early as 1931 he had been exposed to the opinions of John Bassett Moore, who expressed to Stone nothing but contempt for a foreign policy that ignored the established regime in Moscow and abided by the actions of the defunct Kerensky representatives in the United States.\textsuperscript{92} A week before Roosevelt's recognition of Moscow, Stone wrote to Felix Frankfurter (who was in England)
about his favorable anticipation of the diplomatic event. He told Frankfurter that he believed the non-recognition policy was one of the worst in American diplomatic history. Stone was more concerned with the legal effect of recognition than the practical, since he saw little immediate advantage for the United States in resuming relations with the Russians. He believed that it was important for the government to follow the principle that recognition was due to any stable foreign government, although he rejected the idea that recognition should be construed as an approval of the recognized regime.  

Stone, however, did not adhere to Sutherland's ideas of plenary government powers in foreign affairs. He regretted that he had not participated in the Curtiss-Wright and Deutsche Bank decisions because of a serious illness which incapacitated him from October 1936 to February 1937. He later wrote to Yale Professor Edward Borchard that he had strongly disapproved of Sutherland's opinion in the Curtiss-Wright case.

It is impossible to determine why each Justice voted as he did in the Belmont case. Statistically, it was highly probable that Van Devanter, McReynolds, and Butler would vote in accord with Sutherland. The cohesion factor of these four men during the 1936 term was .89. In non-unanimous decisions, Van Devanter agreed with Sutherland
93%, Butler agreed with Sutherland 87%, and McReynolds agreed with him 74% (Butler and McReynolds agreeing with each other 87%).

Chief Justice Hughes and Justice Roberts formed an independent faction between the four conservatives and the three liberals. Their factor of cohesion was .88. They agreed with each other in 81% of the nonunanimous opinions. Perhaps the most important man in determining the Court's decision in the Belmont case was the Chief Justice. Hughes dissented only twice during the 1936 term, so he assigned the written opinion in thirty-three out of thirty-five split decisions. As a former Secretary of State (1921-1925) and a judge on the Court of International Justice (1928-1930), he took a special interest in cases involving international law and foreign policy. Certainly as one of the architects of the non-recognition policy towards Soviet Russia, he must have felt a personal interest in the Litvinov Assignment cases. He himself wrote the decision in the first of these cases, United States v. Bank of New York & Trust Company. It is very interesting that he assigned both Curtiss-Wright and Belmont to Sutherland. Perhaps he thought the opinions would have greater weight having been written by a conservative who otherwise opposed governmental interferences with property rights. Or perhaps he was extending a kind gesture to one who had such strong feelings on national
powers in foreign affairs. It is also significant that Hughes did not write a separate opinion of his own in the Belmont case.

Hughes, like Sutherland, was a nationalist in international affairs. He had opposed the Versailles Treaty in 1919 because he believed that the United States would surrender its diplomatic flexibility and the primacy of its national interest to the League of Nations. Yet, he was highly successful in negotiating multilateral agreements that safeguarded American interests, like the Washington Naval Arms Limitation Conference in 1921. And he opposed the recognition of Soviet Russia until it was willing to acknowledge its international debts and restore confiscated property to foreign nationals.

Hughes expressed his opinions on the national powers in foreign affairs in his famous 1928 study of the Supreme Court. He favored strong executive powers as the nation's chief diplomat and Commander-in-Chief, and he expounded a broad constitutional interpretation of the treaty power, quoting at length Holmes' opinion in Missouri v. Holland. He also asserted that it was the job of the political branch rather than the judicial to make value judgments for society, and that there were no absolute rights to property or contracts beyond the controls of organized society. Both of these were in question in the Belmont case.
Hughes further elaborated on the treaty power at the meeting of the American Society of International Law in 1929. Following a paper delivered by Charles Henry Butler, Hughes joined in a discussion of the constitutional limitations to the treaty power. He argued that the states exercised no sovereignty in foreign affairs and had no power to interfere in treaty obligations. The only limit to the treaty power that he saw was that it could not violate an expressed prohibition of the Constitution and that it could not deal in subject matter with a domestic issue that was not properly a question of international relations.104

The most famous of all quotations by Hughes was that "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution."105 He made this statement as the Governor of New York at Elmira on May 3, 1907, and although he was speaking of the New York constitution his comments apply to the Constitution of the United States as well. There is nothing about the force of executive agreements in the Constitution, but it is constitutional according to the judicial practice of the Supreme Court. Sutherland wrote the doctrine of executive powers in questions of diplomatic recognition in the Belmont decision, and Hughes, the
authority on that subject, chose to voice no different conclusion.

Stone, Brandeis, and Cardozo formed the liberal wing of the Court. Their factor of cohesion during the 1936 term was .90. Brandeis agreed with Stone in 91% of the nonunanimous opinions, and Cardozo agreed with Stone 100%; likewise, Sutherland and Stone agreed only 35%. It was statistically probable that Stone would have a different opinion than Sutherland, that the three conservatives would vote with Sutherland and the two liberals with Stone, and that Hughes and Roberts would vote together on one side of the split or the other.

Another Justice who had a personal interest in the Belmont case was Cardozo, who had participated in the Russian corporate property cases in New York as a member of the Court of Appeals from 1913 to 1932. His views on these cases were examined in detail in Chapter II, and it can be assumed that these views influenced his judgment in the Belmont case. He explained his position to Stone in a memorandum dated April 21, 1937. Cardozo told him that he agreed with the result of the majority decision because he believed that the Soviet nationalization decree was not in conflict with New York public policy in this case since no creditor or stockholder of the Metal Works was involved in this suit. Cardozo further stated that New York did have
the right to refuse to enforce a foreign confiscatory law if it prejudiced the rights of claimants in New York. He listed numerous precedents, several of which Stone used in his written opinion.\textsuperscript{108} Stone's separate opinion gave Cardozo the opportunity to concur with the result without identifying himself with Sutherland's opinion.

There was little public reaction to the Belmont case. Except for legal journals, it went almost unnoticed. There was a small report of the decision in the New York Times.\textsuperscript{109} The Wall Street Journal gave only eleven lines to it.\textsuperscript{110} The Chicago Tribune gave thirty-nine lines to it, but misreported that the Court had awarded the Metal Works account to the government.\textsuperscript{111} The Belmont decision went unreported in the Washington Post until Franklyn Waltman wrote a column on it on May 6. Waltman accurately stated that Sutherland's opinion had far greater significance than just its meaning for the Litvinov Assignment. He feared that the decision could mean that the national government could regulate minimum wages, maximum hours, and working conditions through its foreign relations power and its involvement in the International Labour Organization.\textsuperscript{112} This was a false but often repeated fear, since the Belmont dealt only with the legal effect of diplomatic recognition of a foreign government.

The Belmont decision received favorable reviews in
the Yale Law Journal, Harvard Law Review, University of Chicago Law Review, and the Texas Law Review. The George Washington Law Review concluded that the decision would apply only to alien rights and would not affect American property. The Rocky Mountain Law Review correctly predicted that the government would eventually acquire the entire Metal Works' account as a result of Sutherland's opinion. The Virginia Law Review, on the other hand, reported that Sutherland's dicta was unnecessary to resolve the case and that Stone's opinion was legally the more correct one. The California Law Review was very critical of Sutherland's opinion, calling it without basis in principle or practice.

The most critical reviews of the Belmont case appeared in the prestigious American Journal of International Law by editors Philip C. Jessup of Columbia University and Edwin Borchard of Yale. Jessup criticized Sutherland for ignoring the difficult question of situs, which he believed was very important in determining the case. He also criticized Sutherland's reliance on the Oetjen case, which Jessup contended was incorrect in its assertion that recognition was legal validation of the recognized country's laws and irrelevant to the Belmont case since the property was located in the United States rather than abroad. Jessup further examined the legal
technicalities of the case, concluding that Sutherland's opinion had not satisfactorily answered the question as to what extent the national foreign relations power extended to property rights, or whether American citizens still had any claim against the Soviet Union for confiscation of their holdings.118

Borchard was even more censorious than Jessup. His basic objection was that Sutherland's decision tended to subordinate property rights to governmental policy judgments, which he strongly opposed. He asserted that the Soviet nationalization decrees had applied only to property located in Russia and had no extraterritorial effect. Borchard also claimed that the Oetjen case was mistaken to give the granting of recognition any legal effect beyond establishing diplomatic relations. He refused to concede that the Belmont case involved anything more than a property right. He pointed out that for sixteen years the United States had refused to recognize Soviet Russia because of its expropriation of American property, yet this decision would legally validate exactly what the State Department had objected to for so long.119

Borchard was so concerned that the Belmont case might become a dangerous precedent for nationalization of foreign property in international law that he initiated a correspondence with the State Department and Justice Stone. He
wrote to Assistant Secretary of State R. Walton Moore that the government was following a bad policy to prosecute the Litvinov Assignment cases. He bemoaned the fact that the United States was too eager to profit from Soviet confiscations, which it had condemned for sixteen years. He warned that the result of such a policy would seriously damage American property interests abroad.  

Moore had received other such letters attacking the government's litigation of the Litvinov Assignment cases. He had explained in one response that the United States neither condoned nor condemned Soviet confiscations of Russian property, as Moscow had the right to do whatever it wanted to do in its own territory. He reassured the inquirer that the suits in New York courts did not concern the negotiations with the Soviet Union for the recovery of American property in Russia. 

Borchard repeated the same objections in his letters to Stone. He feared that Belmont would only perpetuate the error of Oetjen. He warned Stone that the Belmont decision would jeopardize over $100 million of American claims against Soviet Russia for only $8 million of Russian property in the United States. Borchard also expressed his doubts as to the legal effects of an executive agreement. In addition, he sent to Stone a draft of his editorial for the American *Journal of International Law*.  


Stone responded to Borchard's letters with much cordiality. He, too, doubted whether an executive agreement, or a treaty, could deprive a state of its constitutional right to regulate property within its own jurisdiction.123

In conclusion, Sutherland and Stone viewed the Belmont case from different perspectives. Sutherland saw it as a constitutional test of executive powers in foreign affairs. He had had a long history as a nationalist who advocated strong government powers in international relations, and he must have felt very gratified to expound his ideas in a forum that carried such great authority. Interestingly enough, he had intended to resign from the Court in January 1937, but he did not for fear that it would appear as a concession to Roosevelt's attack on the Court during the controversy of 1937.124 If he had resigned, he would never had written the Belmont decision. Stone, on the other hand, emphasized the domestic legal and property aspects of the case. He abhored the idea of unlimited government in any area, and he believed that Sutherland's opinion had gone too far in upholding Presidential powers in diplomacy. Yet, it was Sutherland's opinion that became the accepted constitutional interpretation of executive agreements, and its effect had significance far beyond the Belmont suit itself.
CHAPTER IV: NOTES

168 U.S. 250 (1897), 246 U.S. 297 (1918), and 246 U.S. 304 (1918), respectively.

2 Facts of the case reported within the decision.


4 Ibid.

5 Facts of the case reported within the decision.


7 Ibid., p. 304.

8 The Constitution, Article VI, paragraph 2.

9 224 U.S. 583 (1912).


12 Article IX reads: "The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . [and] entering into treaties and alliances. . . ." Article VIII reads: "Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them." Article VI also forbade the states to make treaties or agreements with foreign sovereigns without congress' consent.


14 3 Dallas 199 (1796).

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17 *Ware v. Hylton*, p. 281.


19 252 U.S. 416 (1920).


21 265 U.S. 332 (1924).


24 299 U.S. 304 (1936).


26 The defense argues demurrer when it agrees with the facts presented by the plaintiff but refuses to answer the charges because the facts presented do not constitute an action in law.


32 Article III, Section 2 reads: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority. . . ."

Peters 253 (1829).

Ibid., p. 307.

Cranich 241 (1808).

Gelston v. Hoyt, 3 Wheaton 246 (1818).


Article II, Sections 2 and 3.

Federalist No. 64 (John Jay), and Federalist No. 69 (Alexander Hamilton), in Clinton Rossiter, ed., The Federalist Papers (New York, 1961), pp. 390-96 and 415-23, respectively. Also see Charles C. Thach, Jr., The Creation of the Presidency, 1775-1789 (Baltimore, 1922), pp. 159-65.


Corwin, President's Control of Foreign Relations, p. 5; also see pp. 35-46, 205. Also see Elbert M. Byrd, Jr., Treaties and Executive Agreements in the United States (The Hague, 1960), pp. 7-15.


49 Ibid., pp. 377-84. The two executive agreements were the Root-Takahira agreement of 1908 and the Lansing-Ishii agreement of 1917.


51 Henfield's Case, 11 Fed. Cas. 1099, Case No. 6,360 (1793); Chisholm v. Georgia, 2 Dallas 419 (1793); Ware v. Hylton; Holmes v. Jennison, 14 Peters 540 (1840).


54 Joel Francis Paschal, Mr. Justice Sutherland (Princeton, 1951), pp. 3-20; David Burner, "George Sutherland," in Leon Friedman and Fred L. Israel, eds., The Justices of the United States Supreme Court, 1789-1969, 4 vols. (New York, 1969), III, 2133-34.

55 George Sutherland to Richard R. Lyman, March 12, 1941, George Sutherland Papers, Library of Congress.

56 Sutherland to Mrs. Jeannette A. Hyde, May 28, 1936, Sutherland Papers; "A Message to the 1941 Graduating Class of Brigham Young University from Mr. Justice George Sutherland," Sutherland Papers, pp. 2-13; Paschal, Sutherland, pp. 5-13; Burner, "Sutherland," pp. 2133-34; Alpheus Thomas Mason, "The Constitutional World of Justice Sutherland," American Political Science Review, XXXII, 3 (June 1938), pp. 443-77.
57Paschal, Sutherland, pp. 16-20, 226-29; Alan Jones, "Thomas A. Cooley and the Michigan Supreme Court, 1865-1885," 10 American Journal of Legal History 97 (1966); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (Boston, 1883), pp. 7-8, 25.

58Paschal, Sutherland, pp. 20-48.


60Sutherland, "The Internal and External Powers of the National Government," The North American Review, CXCI (1910), pp. 373-89. This article was also published as Senate Document No. 417, 61st Congress, 2nd Session (1910).


64Ibid., pp. 166-91.


67Paschal, Sutherland, pp. 152-233. For accounts of the Supreme Court in the 1930's, see Robert H. Jackson, The Struggle for Judicial Supremacy (New York, 1941), Erik McKinley Eriksson, The Supreme Court and the New Deal (Rosemead, 1940), Edward S. Corwin, Constitutional Revolution, Ltd. (Claremont, 1941), and C. Herman Pritchett, The

United States v. Belmont, p. 333.


Cranck 289 (1809).

208 U.S. 570 (1908).


L. R. 1933, Ch. Div. 745.


Ibid., pp. 302-303.


which ruled that a Norwegian citizen by virtue of the American-Swedish and Norwegian treaties of 1783, 1816, and 1827 did not enjoy property rights in Nekraska that were not also enjoyed by Nekraskan residents. This was a case of private international law, not diplomacy.

81 Ibid., p. 225.
82 268 U.S. 552 (1925).
The cases cited were Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); and Beidler v. South Carolina Tax Commission, 282 U.S. 1 (1930).
85 301 U.S. 196 (1937).
86 301 U.S. 234 (1937).
87 Ibid., p. 240.
88 282 U.S. 481 (1931).
90 300 U.S. 115 (1937).
92 John Bassett Moore to Stone, April 30, 1931, and January 23, 1932, Stone Papers.
93 Stone to Frankfurter, November 9, 1933, Stone Papers. On October 1, 1933, Frankfurter had informed the President that Justices Stone and Brandeis favored a new foreign policy toward Soviet Russia, Roosevelt and Frankfurter. Their Correspondence, 1928-1945. Annotated by Max Freedman (Boston, 1967), pp. 159, 707.
95 John D. Sprague, Voting Patterns of the United States Supreme Court (Indianapolis, 1968), p. 103.

96 Pritchett, The Roosevelt Court, p. 242. Van Devanter had a unique advantage in the Belmont case as he was the only Justice who had visited Soviet Russia. Van Devanter to Major Paul M. Chamberlain, October 15, 1935, Willis P. Van Devanter Papers, Library of Congress.

97 Sprague, Voting Patterns of the Supreme Court, p. 103.

98 Pritchett, Roosevelt Court, p. 242.


101 Perkins, Hughes, pp. 96-115; Pusey, Hughes, II, 453-522. For a critical analysis of Hughes as Secretary of State, see Glad, Hughes and the Illusions of Innocence.

102 Hughes, Supreme Court of the United States (Garden City, 1936), pp. 102-110, 111-17.

103 Ibid., pp. 155-56, 195, 205.


106 Sprague, Voting Patterns of the Supreme Court, p. 103.

107 Pritchett, Roosevelt Court, p. 242.

108 Benjamien N. Cardozo to Stone, April 21, 1937, Stone Papers.


117 26 California Law Review 125 (1937). The Belmont case was also reviewed in 22 Minnesota Law Review 114 (1937), and 23 American Bar Association Law Review 125 (1937).
120 Borchard to R. Walton Moore, May 13, 1937, DSF 411.61 Assignments/155.
121 R. Walton Moore to Joseph A. Conroy, October 19, 1936, DSF 411.61 Assignments/125.
122 Borchard to Stone, May 6, 1937, and July 9, 1937, Stone Papers.
124 Sutherland to Nicholas Murray Butler, January 13, 1938, Sutherland Papers.
CHAPTER V

LEGAL AND DIPLOMATIC CONSEQUENCES OF

THE BELMONT DOCTRINE

The Belmont decision has had an effect far beyond the issues upon which the Court had to judge the case. It became the basis for later decisions concerning the Litvinov Assignment claims, and became the key precedent for the judicial interpretation of cases arising from American foreign policy. While it has had an enduring legal effect, the Belmont decision has had greater influence on practical diplomacy. President Roosevelt used the executive agreement as his principal tool of foreign policy during World War II. Since 1945 the American Presidents have used executive agreements to commit troops abroad in political struggles without Congressional consent. The way that the executive branch has used international agreements extends far beyond the modest issues involved in the Roosevelt-Litvinov Accords of 1933.

The immediate effect of the Belmont decision was to encourage the Justice Department to continue its litigations to recover all former Russian corporate assets in the United States. During 1937, the Justice Department had
collected $206,443.37 from the Litvinov Assignment and was pleading eleven cases before state and federal courts. In the following year, it collected $1,500,000 and was handling forty cases.

The State Department helped in the Justice Department's suits as much as it could without jeopardizing Soviet-American relations. One Justice Department official requested that George F. Kennan read Stone's opinion in the Belmont case and get the Soviets to make statements that would refute every negative point that Stone had raised. Kennan thought that that was a bad idea and did not do it. Yet the State Department did arrange for David E. Hudson to go to Moscow in the summer of 1939 to discuss the Litvinov Assignment cases with Soviet legal officials. And it was responsible for bringing Marc Plotkin, the Soviet legal advisor to the Foreign Affairs Commissary, to the United States to testify in legal actions in New York cases.

There was still the problem of what to do with the funds collected from the Litvinov Assignment. The White House decided that the funds should be applied to private American claims against the Soviet government. On June 5, 1939, FDR sent a message to Congress recommending an act to authorize a commission to settle American claims against the Soviet Union. Two months later, Congress, by joint resolution, provided for such a commission, thereby technically approving the Litvinov Assignment.
The next major case after the Belmont one was the suit against the Guaranty Trust Company of New York, initiated on September 21, 1934. The referee appointed by the New York Supreme Court heard extensive testimony on claims during the spring of 1935, including the depositions by Serge Ughet (the Russian representative to the United States recognized by the State Department until November 16, 1933), former Russian Ambassador Boris Bakhmeteff (who had become a professor of civil engineering at Columbia University), and Dimitry G. Ter-Assatouroff, a former official of the Russian Ministry of Finance. Ughet reported that the Russian government had had an account of $5,001,849.79 with Guaranty Trust prior to November 8, 1917, but that the bank had refused to release the fund to him. Stuart Patterson of Guaranty Trust testified by affidavit that the bank had decided on February 25, 1918, that it would freeze this account since the Soviet government had confiscated $9 million of its assets in Russia (although the bank had reported a claim to the State Department of only $1,650,000). Ter-Assatouroff reported that the bank had refused to release the funds in 1922 for the American famine relief project to Russia. When the New York referee ruled against the American government's claim to the fund, the Justice Department sued the Guaranty Trust Company in United States District Court.8
Judge Francis G. Caffey dismissed the government's complaint on its merits on November 2, 1936. He ruled that the six year statute of limitations of New York had run out against a claim for this fund with Guaranty Trust. The judge reasoned that the State Department had recognized Bakhmeteff and Ughet as bona fide representatives of the Russian state in the United States, and since they had failed to bring a suit against Guaranty Trust before 1933 the government had no case against the bank by means of an assignment by the Soviet Union. He also ruled that diplomatic recognition was not retroactive to the effect of voiding all business affairs of Russian nationals in the United States prior to 1933.

The government was granted an appeal to the Circuit Court on February 3, 1937. The Circuit Court heard the case on June 8 and rendered its decision on August 16, reversing Judge's Chaffey's dismissal. Judge Swan delivered the divided Court's judgment that was largely based on the Belmont precedent. An even more strongly worded concurring opinion was written by Manton, who elaborated on sovereign immunity as being superior to state statutes of limitations. Judge Chase voted in favor of sustaining Chaffey's ruling, but he did not write a dissent in this case.

John W. Davis filed a writ of certiorari on November
9, 1937, and the case was accepted by the Supreme Court for review. The Court heard the argumentation on March 28 and 29, 1938, delivered by Solicitor General Robert H. Jackson and John W. Davis. The Justices decided unanimously to reverse the Circuit Court decision that the New York statute of limitation did not run against a sovereign. The decision was delivered by Justice Stone on April 25, 1938. Stone took the narrow approach to this case as he had in the Belmont one, stating early in his opinion that the central issue was the effect of New York law over property within its jurisdiction, not the diplomatic nature of the Litvinov Assignment. He insisted that when a sovereign appears voluntarily in court as a suitor it abandons its immunity from suits against it, according to the laws and procedures of the forum. Since the Department of State had recognized the two representatives of the Provisional Government as legal agents of the Russian state until 1933, the courts were open for fifteen years for suit against the Guaranty Trust Company. Stone conceded that recognition was a political rather than a judicial question, but he reserved to the courts the right to judge the legal consequences of recognition in handling litigations before them.11

What shocked Stone most was the idea that the recognition of the Soviet Union in 1933 should invalidate sixteen
years of business transactions between Americans and the previous Russian representatives in the United States. Having already stated that diplomatic recognition was a political question, he went ahead and expressed his judicial interpretation of it:

The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.12

Did Stone believe that diplomacy existed only to facilitate international business? Contrary to what either Stone or Borchard may have believed, recognition is the political act of establishing diplomatic relations for principally political reasons. To what extent the State Department wishes to facilitate American business interests is a policy decision based more on international expediency than principles of domestic property laws.

The result of the Guaranty Trust case was that the Supreme Court denied the government its claim to over $5 million in a New York bank because of the New York statute of limitations. On the surface, the decision was correct in its legal technicalities. This case was the legal result of the State Department's own confused Soviet policy from 1917 to 1933. And it is interesting to note that the
Secretary of State who had advocated the non-recognition policy was the Chief Justice in 1938 who concurred with Stone's opinion. Technicalities aside, the Guaranty Trust case was probably a bad decision. The Guaranty Trust Company had no right to settle its claims against the Soviet government unilaterally by its own confiscation of Russian state assets it controlled. That the bank got away with its private confiscation was the fault of the State Department, which should have recognized no Russian government after 1917 and froze all Russian property in the United States, as it had done with German holdings after 1917.

Stone only cited the Belmont decision once, choosing to ignore the Court's previous sanction of an executive agreement as overriding state property laws. He also chose to ignore Hopkirk v. Bell, an 1806 precedent that established that a state statute of limitations was not a barrier to international claims in the face of a diplomatic contract.

It might have appeared in 1938 that the Court had reversed its decision in the Belmont case. Certainly it had rejected the government's contention that the Belmont decision had given its claim to Russian assets superiority to all other claims. The immediate paradox between the unanimity of the Belmont case and the unanimity of Guaranty Trust, however, cannot be explained by just the changes of
personnel on the Court. Six of the nine Justices who had sat on the Court during the earlier case also sat for the latter. Van Devanter had retired, being replaced by the liberal Hugo Black, and more importantly Sutherland had retired in January 1938, being replaced by Solicitor General Stanley Reed. Reed disqualified himself in the Guaranty Trust case (since he had initiated it), and Cardozo, who had suffered a serious heart attack on January 8, 1938, did not participate either. This meant that Butler and McReynolds of the conservative bloc, and Hughes and Roberts had changed their attitudes toward the validity of the government's claims in the Litvinov Assignment cases.

The Guaranty Trust case only dealt with the government's claim to former Russian state assets; it did not concern its claims for former Russian corporate assets. For these funds, the Justice Department took its cases to the New York courts. The Appellate Division of the New York Supreme Court had dismissed the government's complaint against the Manhattan Company, which was holding in trust $245,307.60 for the two surviving directors of the Northern Insurance Company of Moscow. Upon review, however, the Court of Appeals reversed this dismissal on January 11, 1938. Judge Harlan W. Rippey ruled for the majority that the Belmont case had established that the United States did have a chose in action concerning all former Russian corporate assets in New York, including the defunct insurance
companies' deposits which had been turned over to the Superintendent of Insurance. Whether the government's claim was superior to all others, Rippey said, was not at question here, but "Prima facie, at least, plaintiff may be entitled to the whole fund."^15

On the merits of the government's claim, the Court of Appeals divided 4-3 in 1939 in a case involving over $1 million of the Moscow Fire Insurance Company. Chief Judge Irving Lehman, who had written a dissent to the previously mentioned case, wrote the majority decision, while Rippey wrote the dissent. His main line of thought was based on Stone's opinions in Belmont and Guaranty Trust: while the acts of a sovereign in its own territory are not adjudgable in the courts of another nation, the extraterritorial effect of them can be determined by the laws of the forum wherein a case arises involving foreign legislation. Even though expert witnesses had testified to the contrary, Lehman decided that the Soviet confiscatory decrees were never intended to effect Russian corporate property outside of Russia. He even referred to the rights of the company's creditors and stockholders living in Russia, as though the Soviet government had no claim based on nationalization even in Russia. He concluded that since the Soviet government had no valid claim to corporate property in New York, neither did the American government by assignment. Therefore, Lehman ordered that the assets of the Moscow Fire
Insurance Company, domestic creditors having already been satisfied, be distributed to the surviving creditors and policyholders of the parent corporation (which had been in Moscow before 1918) who were neither American citizens nor claimants to the branch bank in New York.16

The Supreme Court upheld the Court of Appeal's ruling in the Moscow Fire Insurance case on February 12, 1940, by a 3-3 divided Court. The Court record showed that Stone, Reed, and Frank Murphy (Roosevelt's second Attorney General who had replaced the deceased Butler in November 1939) did not participate in the decision. It is impossible at present to know which three Justices voted to reverse the New York decision. They were probably the three Roosevelt appointees Hugo Black, Felix Frankfurter, and William O. Douglas. If this were so, it meant that Hughes, McReynolds, and Roberts voted against the government's claims, based largely on the Belmont decision with which all three had concurred in 1937.17

Yet, the government won a case in Ohio, which proved that the New York courts were not being copied in other states. A group of lawyers in Columbus had a $20,000 claim for legal fees against the Northern Insurance Company, which had a $100,000 deposit with the Ohio Superintendent of Insurance in order to do business in that state. The lawyers refused to take $10,000 which Justice Department lawyers offered them, and sued for the entire amount. The
Court of Common Pleas in Columbus on September 26, 1936, found in favor of the plaintiffs for $20,960.56. The government had filed an intervening petition, and appealed the decision. The Ohio Supreme Court decided on August 10, 1938, that the Soviet government had nationalized this insurance company in 1918 and that the plaintiffs had performed no legal services for a company that had ceased to exist in the place of its incorporation. So the Columbus lawyers got no money at all.18

The last, and deciding case arising from the Litvinov Assignment was United States v. Pink.19 This case was the government's suit against the New York Superintendent of Insurance, Louis Pink, for over $1 million of the First Russian Insurance Company after satisfaction of local creditors. Justice Aaron J. Levy of the New York Supreme Court had dismissed the government's complaint on June 29, 1939. His judgment was sustained by the Appellate Division and the Court of Appeals. Solicitor General Francis Biddle petitioned for a writ of certiorari and the Supreme Court granted it. The Court heard the oral arguments on December 15, 1941, only a week and a day after Pearl Harbor, and rendered its decision on February 2, 1942.20

That the Court had granted the writ of certiorari in the first place was an indication that it was not satisfied that Guaranty Trust and Moscow Fire Insurance were the last words on the Litvinov Assignment. By 1942, there were only
two Justices left on the bench who had been there for the Belmont case only five years before. McReynolds, the last of the 1936 conservative bloc, retired on February 1, 1941. Roosevelt appointed Senator James Byrnes of South Carolina to take his place. Then Chief Justice Hughes resigned on July 1, 1941. The President chose Harlan Fiske Stone to become the eleventh Chief Justice of the United States. To replace Stone's Associate Justice position, the President appointed Attorney General Robert Jackson. This was now a Supreme Court of "bright young men," most of whom had reached the Court by the rewarding graces of FDR. In contrast to the earlier Court, a majority embraced a positive theory of government, one that held government should help individuals by providing direct services and exerting regulatory powers over the economy. And in foreign affairs, the Justices were outspoken off the bench in their support of the President's policy to aid Great Britain short of war against the Nazis.

The Court voted 5-2 to reverse the Court of Appeals ruling in the Pink case, thereby sustaining the government's claim to former Russian corporate assets on the strength of the Litvinov Assignment as a valid exercise of the President's powers in foreign relations. Black, Douglas, Frankfurter, Murphy, and Byrnes were in the majority; Stone and Roberts, in the minority. Both Reed and Jackson, who
had been Solicitors General during the preparation of the Litvinov Assignment cases, disqualified themselves from participating. Since both the Chief Justice and the senior Associate Justice were in the minority, the Pink decision was assigned to Douglas by the second Associate Justice in seniority, Hugo Black.

Douglas wrote a twenty-four page opinion that was a strongly worded endorsement of the President's exclusive constitutional powers to recognize foreign sovereigns. He used the Belmont decision as the foundation for his opinion, citing it no less than fifteen times. He first analyzed Guaranty Trust and Moscow Fire Insurance, asserting that they were not determinative in the specifics of this case. The only precedent he recognized was the Belmont case, which he interpreted to mean that no state could deny the government's claims by the Litvinov Assignment by questioning the validity of an executive agreement. He then reviewed the Belmont case in thirty-seven lines. Douglas also reviewed the diplomacy involved in the case. He, as had Sutherland, placed the issue within its international political context rather than in its narrower domestic legal one.23

Douglas also used the Belmont precedent to dismiss the argument that the government would be violating the Fifth Amendment by acquiring this fund to the sacrifice of the insurance company's creditors and stockholders. He pointed
out that the domestic creditors of the New York branch of this company had already been satisfied by the Superintendent of Insurance. While the government had the responsibility to protect the claims of its citizens, it had no obligation to respect the claims of aliens arising from transactions with the parent corporation in Russia. "There is no Constitutional reason why this Government need to act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts," he observed. He saw no reason why New York should legally protect foreign interests while the government was trying to collect assets in order to compensate American claims against the Soviet government.24

Turning to the issue of Presidential powers, Douglas strongly reaffirmed Sutherland's views in the Belmont case. He wrote:

The powers of the President in the conduct of foreign relations include the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. . . . That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objectives to recognition are to be addressed to the political department and not to the courts.25

In the next few lines, he reviewed the verdict of the Belmont case that the Litvinov Assignment was an executive agreement that had the force of treaty in binding the
state's to the national policy. To enforce the results of the *Moscow Fire Insurance* decision, Douglas contended, would allow New York courts to aggravate the very international conflicts that the Roosevelt-Litvinov Accords had sought to solve. He concluded that the Court could not allow this:

> We hold that the right to the funds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors. The judgment is reversed and the cause is remanded to the Supreme Court of New York for proceedings not inconsistent with this opinion.26

Douglas had written his opinion using his vast knowledge of corporate law to sustain the government's claim even on narrow domestic legal terms. Justice Frankfurter wrote a concurring opinion justifying the government's claim on a broader plane:

> Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.27

Frankfurter lambasted the Court of Appeals for following a judicial policy after 1933 that was in conflict with the national foreign policy. "When courts deal with such es-
sentially political phenomena as the taking over of Russian businesses by the Russian government by resorting to the forms and phrases of conventional corporate law, they inevitably fall into a dialectic quagmire," he observed.\(^{28}\)

The critical question for Frankfurter was not that of state property laws but the functioning of the national foreign policy as determined by the President. He insisted that the Roosevelt-Litvinov Accords must not be read as an explicit business contract, but rather as a diplomatic note whose implicit intent was more important than its precise wording. Frankfurter concluded from the extra-legal evidence that the intent of the Litvinov Assignment was for the American government to acquire these funds in question, and no domestic state policy was relevant to the international debt question involved.\(^{29}\)

Chief Justice Stone wrote a fourteen page dissent which was consistent with his views in the Belmont and Guaranty Trust cases. Taking issue with Douglas' opinion, he insisted that the Belmont case had only decided that the government had a chose in action, but that Guaranty Trust (which he himself wrote) was determinative of the priority of the government's claim in relation to others. He dismissed Sutherland's comments on executive power in Belmont as merely *obiter dicta*, which was neither binding as precedent nor undistinguished by Guaranty Trust. He again put
the case within the context of state property laws rather than the international frame of reference. "The only questions before us," he maintained, "are whether New York has constitutional authority to adopt its own rules of law defining rights in property located in the state, and, if so, whether that authority has been curtailed by the exercise of a superior federal power by recognition of the Soviet Government. . . ."30 His answer to the first part was positive, and to the second, negative.

Stone's principal legal thought was that state courts apply foreign laws by comity, and where there was no treaty commitment, there was no federal legal question. Here, Stone refused to acknowledge Sutherland's equation of an executive agreement with a treaty. He argued that the act of diplomatic recognition by the President carried no implied power to deny state courts the right to deny the effect of a transfer of property within its jurisdiction. Stone further contended that the courts did have the power to interpret for themselves the legal consequences of diplomatic recognition:

Recognition opens our courts to the recognized government and its nationals. . . . It accepts the acts of that government within its own territory as the acts the sovereign, including its acts as a de-facto government before recognition. . . . But, until now, recognition of a foreign government by this Government has never been thought to serve as a full faith and credit clause compelling obedience here to the laws and public acts of the recognized government
with respect to property and transactions in this country. 51

In contrast to Frankfurter's opinion, the Chief Justice insisted that the Court must interpret the Litvinov Assignment at face value. He interpreted the phrase "that may be found to be due" to mean that it was up to the courts to decide what funds belonged to the Soviet government and its assignee. But what Stone objected to most of all was the idea that the executive alone could abridge state constitutional authority by a diplomatic transaction:

Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention. . . . The practical consequence of the present decision would seem to be, in every case of recognition of a foreign government, to foist upon the executive the responsibility for subordinating domestic to foreign law in conflicts cases, whether intended or not, . . .32

As was expected, Jessup and Borchard were very critical of the Pink case. Borchard thought that it was a dangerous inroad into the constitutional guarantees to freedom of property. Most of all, Borchard regretted that the Supreme Court had given a precedent in international law to validate Soviet confiscatory domestic law. Of course, what he did not choose to see was that the Supreme Court of the United States did not have the responsibility to make objective international law, only to function in order to enforce a subjective American foreign policy that
was grounded on friendly Soviet-American diplomatic relations in face of their common enemy, Nazi Germany.\textsuperscript{33}

Not only was Borchard upset about the result of the Court's legal interpretation of the Litvinov Assignment, but he was also disturbed by its validation of an unusual executive agreement. He felt that even a treaty could not constitutionally do what the Litvinov Assignment had done to private property rights. He wrote to the Chief Justice that the Court had offered the President potential dictatorial powers in foreign affairs.\textsuperscript{34} Stone replied in agreement that he detected a political movement in the administration to bypass the Senate by substituting executive agreements for treaties.\textsuperscript{35} Coincidently, Borchard was a good friend of Justice Douglas, who had been a law professor at Yale, too. Borchard was dismayed that his old friend could write an opinion that was so counter to what Borchard thought was sound legal reasoning.\textsuperscript{36}

Jessup's criticism was just as sharp as Borchard's, but more farsighted. He speculated that the Pink decision could mean that the President could acquire German Jewish property rights in the United States from Hitler, since Nazi Germany had expropriated all Jewish property. This would have been a far-fetched development for political reasons, but Jessup did not consider political prohibitions on the Presidency on the same exalted plane as constitu-
tional ones. Yet, he realized that Pink could allow American courts to honor the property nationalizations of the Dutch and Norwegian governments-in-exile designed to aid the Allied war effort. Indeed, Jessup's criticism sounded as though he judged the Pink decision in terms of what was judicially desirable in 1942.37

The effect of the Pink case was that the Treasury Department did eventually acquire $9,114,444.66 of former Russian property holdings in the United States.38 The largest single source of this fund was the Guaranty Trust Company, which surrendered over $3,500,000 in 1947 and 1948. One small part of the total collected was $25,225.68 from the estate of August Belmont, Jr. Following the Supreme Court's ruling in the Belmont case in 1937, the government's claim to the Petrograd Metal Works' deposit was tied up in New York courts for five years. Two months after the Pink case, the United States District Court for the Southern District of New York order the account turned over to the government.39

The Belmont decision has been cited in approximately one hundred cases in various state and federal courts since 1937.40 In Bacardi v. Domenech,41 the Court ruled in 1940 that the General Inter-American Convention for Trade-Mark and Commercial Protection applied to Puerto Rico, an American territory, as well as to the United States proper.
Only a month later, Justice Black referred to the Belmont case in reference to resolving conflict of laws when the national foreign relations powers were involved. This case was Hines v. Davidowitz, in which the Court overruled a Pennsylvania alien registration law in favor of a national alien law.\textsuperscript{42}

The Court has reviewed an executive agreement in only three major cases since 1942. In Chicago & Southern Air Lines v. Waterman Steamship Corp.,\textsuperscript{43} the Court had to review an order of the Civil Aeronautics Board, which under Presidential authority had barred Waterman Steamship from international air commerce. Justice Jackson wrote for the majority that the Court could not review the diplomatic and military acts of the President since such questions were of a political rather than a judicial nature. Therefore, he concluded that the Court could not interfere with the decisions of the Civil Aeronautics Board. Justice Douglas dissented, arguing that the Court had the responsibility to review executive actions in order to protect private rights.\textsuperscript{44}

The Waterman case did not involve a diplomatic transaction with a foreign nation. The Court reviewed such an international agreement made unilaterally for the United States by the President in United States v. Capps. In 1948 Congress passed an Agricultural Act that required for
the President to limit food stuff imports into the United States when there was a domestic surplus of the same commodity. The Department of State negotiated an executive agreement with the Canadian government so that the latter would forbid the exportation of potatoes to the United States, except for seed potatoes. Shortly after, the Justice Department brought a suit against a Florida importer of Canadian seed potatoes, because he had allegedly sold them to A&P grocery stores as table potatoes. Judge Bryan of the District Court upheld the validity of the executive agreement, but dismissed the government's suit for lack of evidence to prove the charges correct. Judge John J. Parker, the Chief Circuit Judge of the Fourth Circuit, upheld the dismissal, but on the basis that the executive agreement was an unconstitutional abuse of Presidential powers. The Supreme Court had the first opportunity since the Pink case to review the constitutional issue of executive agreements in 1955, but refused to do so. It unanimously upheld the dismissal on purely technical grounds, refusing the pass judgment on Judge Parker's opinion.45

The Supreme Court has only once invalidated an executive agreement, but only because the matter at hand involved due process of law in a capital criminal case. After World War II, the American government made a military commitment to defend Western European countries from Soviet
Russia and to establish military bases abroad for the first time in American peace time history. The President reached an executive agreement with several of these nations that criminal offenses committed by American military personnel, and their dependents, on these bases would be tried under the American Uniform Code of Military Justice. When Mrs. Clarice Covert murdered her husband, an Air Force sergeant, on an American base in England, she was tried by a court martial, found guilty, and sentenced to life imprisonment. Mrs. Covert appealed her conviction to a domestic American court on the grounds that she had been denied due process of law since she was not tried by a civilian court. The Supreme Court twice heard the case, along with a similar case from Japan, and on the second time in 1957 it reversed the court martial by a vote of 7-2. Justice Black wrote the majority decision that found that the executive agreement in this matter was invalid, since it had compromised the rights of an American civilian guaranteed by the Constitution. While he conceded that states must yield to national diplomatic contracts, no governmental power could infringe on fundamental personal liberties, of which Black included criminal due process. Frankfurter wrote a concurring opinion in which he concluded that no court martial could try a civilian in a capital case in times of peace. Justice Tom Clark, joined by Harold Burton, dissented in favor of Presidential
power to control the armed forces personnel of the United States.\textsuperscript{46}

In questions of diplomatic recognition, foreign property confiscations, and settlement of international claims, the Court has sustained the \textit{Belmont} and \textit{Pink} decisions. In 1955 the Court reviewed the legal status of Nationalist China in the United States in the face of the President's refusal to recognize Communist China. Frankfurter wrote for the majority that "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."\textsuperscript{47} In a 1968 case, the Court overthrew an Oregon probate law on the escheat of personal property willed by an Oregon citizen to an alien. Douglas wrote for the Court that Oregon could not deny this property to an alien because no state could invade the powers of the national government in international questions. Justice Potter Stewart in a concurring opinion made a strong statement for the federal prerogative in foreign affairs.\textsuperscript{48}

A case very similar to substance to the \textit{Belmont} and \textit{Pink} cases was \textit{Banco Nacional de Cuba v. Sabbatino},\textsuperscript{49} a 1964 case that involved the Cuban confiscations of American property after the Castro revolution. In 1960 Farr, Whitlock & Company, an American brokerage firm, contracted to buy Cuban sugar from a subsidiary of Compania Azucarera
Vertientes (C.A.V.), a Cuban corporation almost wholly owned by American stockholders. In retaliation for President Eisenhower's reduction of the Cuban sugar quote for political reasons, Castro nationalized several American firms in Cuba, including the C.A.V. When the Farr, Whitlock & Company sugar reached New York, it was seized by the New York court appointed receiver for C.A.V. assets in New York. A legal battle ensued over title to the sugar, which Farr, Whitlock & Company had acquired from a Cuban government agency after the nationalization of the C.A.V.

The Supreme Court upheld the Farr, Whitlock & Company claim to the detriment of C.A.V. creditors in America. Justice John M. Harlan wrote the majority decision. He observed that the breaking of diplomatic relations, which the State Department had with Cuba, did not suspend Cuban government legal rights in the United States, because non-intercourse was not legally the same thing as non-recognition. He dismissed the argument that the right to this sugar shipment had a situs in New York and was thereby controlled by New York since the sugar itself was located in Cuba when it was confiscated. Harlan then reaffirmed the act of state doctrine, citing Underhill v. Hernandez, the Oetjen and Ricaud cases, and the Belmont and Pink decisions. He concluded that American courts could not unilaterally judge cases based only on international law,
as that would be judicial interference in diplomacy, and the Supreme Court should do nothing to embarrass the President in his conduct of foreign relations.\textsuperscript{50}

The constitutionality of executive agreements as a tool of the President's foreign policy has had a greater diplomatic and political effect on recent American history than its legal consequences in the courts. Franklin D. Roosevelt utilized the executive agreement to an unprecedented extent, expanding the executive prerogative in military affairs further than had Lincoln and his diplomatic prerogative further than had Theodore Roosevelt. The basic reason why he resorted to a unilateral Presidential policy in 1940-1941 was a general Congressional hostility to American intervention in the Second World War which FDR believed was both necessary for American security and inevitable. During his first two terms in office, Roosevelt had had only one major legislative defeat on Capitol Hill: his Court-packing plan of 1937. He would not risk another defeat in the sphere of foreign policy.

Secretary of State Cordell Hull acknowledged in his memoirs how important the executive agreement was to the conduct of Roosevelt's policy. He believed that the constitutional requirement that a treaty be approved by two-thirds of the Senate was too stringent, because it gave a veto power over treaties to a one-third-plus-one Senate.
minority, as well as totally ignoring the House. Hull had been a fervent supporter of President Wilson and the League of Nations in 1919, so little wonder he should oppose the two-thirds practice. The Secretary advocated the use of executive agreements when timing was important and when a powerful Senate minority threatened to frustrate the President's desired policy. He further pointed out that executive agreements had been more extensively used in diplomacy than treaties. For example, from 1889 to 1939 there had been 917 executive agreements as opposed to 524 treaties.51

The generally hostile reaction to Roosevelt's "Quarantine Speech" in Chicago on October 5, 1937, underlined for the President that there was a vocal faction that opposed American involvement in European politics. This negative response prevented the President from pursuing a preventive foreign policy against the European dictators.52 Even after the fall of France to the German blitzkrieg in May 1940 and the beginning of the Battle of Britain, a majority of American voters opposed American intervention in the European war. A Gallup Poll of July 19, 1940, showed that 85% of those sampled opposed war. Another Gallup Poll early in October, only one month before the election in which Roosevelt was seeking an unprecedented third term, thirty million voters opposed entering the war in contrast to seven million in favor. Gallup discovered that the
policy most favored by the polled public was to assist the Allies short of American intervention. By September, 1940, 52% polled voters were willing to aid Great Britain even if it might risk war with Germany. This was the policy Roosevelt chose to follow in the autumn of 1940.

As early as May 15, 1940, British authorities had approached the State Department with a request to purchase American destroyers. Roosevelt's answer was that he could not do this without Congressional authority. The British Ambassador, Lord Lothian, beseeched Hull again in early August to sell destroyers to Britain. Prime Minister Winston Churchill wrote to FDR on August 15 that "The worth of every destroyer that you can spare us is measured in rubies." Twelve days later Attorney General Robert Jackson rendered his official opinion that the Presidential sale of certain old destroyers would be legal. He informed the President that executive military and diplomatic powers enabled him to exchange outdated naval equipment in return for leases for American bases on British territorial possessions without Congressional authorization. The "Destroyer Deal" was culminated in an executive agreement between Roosevelt and Churchill on September 3, 1940. For fifty destroyers, Roosevelt acquired ninety-nine year leases on bases in Newfoundland, Bermuda, Bahamas, Jamaica, British Guiana, Trinidad, St. Lucia, and Antigua. For Churchill the significance of the United States committing
"a decidedly unneutral act," which might bring the United States into the war against Hitler, was greater than the destroyers themselves.\textsuperscript{56}

While the Destroyer Deal gave the United States bases for defense against any Nazi penetration into the Western Hemisphere, it also drew the country deeper into the Anglo-German naval war in the North Atlantic. Roosevelt had taken a step that endangered American neutrality, and he had done it despite public opinion and Congress. For this reason, some prominent constitutional and legal authorities, including Edward Corwin of Princeton and Yale's Edwin Borchard, criticized the executive agreement as being unconstitutional.\textsuperscript{57} The legal issue became academic when Congress passed the Lend-Lease Act on March 11, 1941, that put into Roosevelt's hands the financial means to aid the Allies based on the exchange of relative strategic value formulated in the Destroyer Deal. During World War II, FDR controlled over $50 billion of Lend-Lease, and the terms thereof, to the Allies.\textsuperscript{58}

The Destroyer Deal was not the only military executive agreement made by Roosevelt before the United States entered the war late in 1941. On August 18, 1940, he made the Ogdensburg Agreement with Canadian Prime Minister Mackenzie King to coordinate Canadian and American national defenses. This constituted virtually a unilateral Presi-
dential commitment to the security of Canada from a German
attack. Also, from January 27 to March 29, 1941, secret
Anglo-American staff talks, under the authority of FDR and
Churchill, drew up master strategic plans for eventual
military cooperation in the war. The President sent
troops to occupy Greenland after a Danish-American execu-
tive agreement signed on April 9, 1941. He made a similar
arrangement with Iceland three months later. Then Roose-
velt met with Churchill in person on naval vessels anchored
at Placentia Bay, Newfoundland. The result of their talks
was the Atlantic Charter, the ideological basis for the
Allied war effort. This executive agreement was signed on
August 12, 1941, four months before the United States
entered the war.59

Roosevelt consistently directed the wartime diplomacy
at the summit level. From August 1941 to February 1945,
he met with Churchill eleven times to discuss grand strat-
egy. Churchill has reported that he sent FDR 950 messages,
and the President sent him 800.60 Their personal friend-
ship was the moving spirit of the Anglo-American war effort
in Europe and Asia. As Churchill commented, "My relations
with the President gradually became so close that the chief
business between our two countries was virtually conducted
by these personal interchanges between him and me."61 The
United Nations Declaration, which was signed by twenty-two
nations at war with Hitler, put into effect the principles
of the Atlantic Charter. It, too, was an executive agreement which was never submitted to the Senate for its approval.

As Commander-in-Chief, Roosevelt made military decisions which had political consequences of the first importance. At Casablanca in January 1943, FDR and Churchill announced the unconditional surrender ultimatum to Germany, which meant that the Allies would fight until the total collapse of the Nazi regime. Roosevelt's rejection of Churchill's proposal of an Allied invasion of the Balkans in favor of a two prong invasion of France in 1944 meant that Eastern Europe would be occupied by Soviet troops. And at the Teheran Conference in November 1943, and the Yalta Conference of February 1945, Roosevelt, Churchill, and Stalin agreed to the military division of Germany, Soviet concessions in China, and military occupation of the liberated countries. All of these wartime conferences had great political consequences for the future of Europe, and they were commitments made by the United States in the form of executive agreements.62

President Roosevelt's conduct of diplomacy during the war created a spirited legal discussion of executive agreements during the 1940's. Wallace McClure wrote a major work in 1941 that defended the broad use of executive agreements in diplomacy, which he saw as a viable alternative to the clumsy constitutional requirements for treaties.
His basic argument was that American constitutional law evolved like the common law, rather than being static like continental legal codes; hence executive agreements were constitutional since their use was well established in diplomatic history. McClure maintained that executive agreements with Congressional approval by a majority vote of both houses could replace the treaty in the conduct of American foreign relations. A Department of State official, Honore Marcel Catudal, discussed executive agreements in a 1942 law journal article and explained that they were constitutional by rulings of the Supreme Court, citing the Belmont and Pink cases. Green Haywood Hackworth, the legal advisor to the State Department, wrote an extensive section on executive agreements for the Digest of International Law in defense of their use by the President.

In 1944 a constitutional amendment was introduced in Congress to reform the treaty system. There were several different drafts proposed, but the common element was that a treaty would be approved by a majority vote of both Senate and House. The amendment proposal was endorsed by such different personalities as Nicholas Murray Butler, John W. Davis, Philip Jessup, and Quincy Wright. It was opposed by Edwin Borchard. Although this was the fifth time since 1888 that there had been an amendment to liberalize the treaty process and a Gallup Poll of May 17, 1944,
showed that 60% of those questioned favored a change in the
treaty process, this amendment was defeated in Congress.\textsuperscript{66}
The practical result of its defeat was that the executive
agreement remained the most expedient alternative to
treaties when a minority of the Senate opposed the Presi-
dent's foreign policy.

In the legal discussions of this amendment, Borchard
was the most outspoken critic of replacing Congressionally
approved executive agreements with treaties. "A treaty
should be convincing enough to command a two-thirds vote,"
he asserted. He was very critical of Sutherland, who, he
claimed, had given "moral support to the new cult which
attributes the force of a treaty to an executive agree-
ment." Borchard said that he was not against all executive
agreements, but only those which would make commitments by
the United States without Senate approval, like the
Destroyer Deal.\textsuperscript{67}

A defense of executive agreements came from Quincy
Wright, Henry S. Fraser, and Myers S. McDougal and Asher
Lans. Wright concluded that the President could make an
executive agreement alone if the subject matter was within
his administrative, military, or diplomatic powers. The
constitutional problem that he identified was in areas
where both the President and Congress have a responsibility.
He concluded that the limits of Presidential power was
political—his ability to win votes in Congress and his public support—rather than legal. Fraser also concluded that it was the subject matter of an executive agreement, not its importance, that determined whether it was constitutional. He asserted that if the subject fell within the President's exclusive military and diplomatic powers it was binding under international law. If an agreement involved questions of powers which Congress controlled, it would have to be ratified by the Senate in the form of a treaty. McDougal and Lans wrote an extensive article on executive agreements. After reviewing the diplomatic and legal history of them, they concluded that they were not only constitutional but desirable. At stake was whether the United States would be part of a post-war international organization if one-third-plus-one Senators chose to defeat a conventional treaty. Their argument with Borchard was more a matter of policy than method. They accused Borchard of wanting to "retire beyond the Jericho-like walls of his own version of the nineteenth century juristic conception of neutrality." Borchard's reply was consistent with his earlier denouncements of unilateral Presidential powers.

When Harry S Truman succeeded Roosevelt as President on April 12, 1945, the concept of strong Presidential leadership in foreign affairs continued. He believed that since the President was the only national representative
elected by the whole people he had a responsibility to assert control of the national policy. "The civil servant, the general or admiral, the foreign service officer has no authority to make policy," he wrote in his memoirs in 1956. This statement had particular significance when Truman dismissed General Douglas McArthu...
Justice Hughes this very question in a meeting on May 7, 1944. Hughes' opinion was that under the UN Treaty and the Commander-in-Chief powers, the President could commit troops into action without prior Congressional authorization. Such a question arose in reality when North Korean troops invaded South Korea on June 5, 1950. Truman felt that the 38th parallel division of Korea was a tacit agreement between Moscow and Washington which Stalin was instrumental in violating. His response was the commitment of American forces in the Korean War.

Truman's alleged usurpation of Congressional powers was one of the principal reasons for the famous Bricker Amendment. Senator John Bricker (R., Ohio) introduced his first resolution for a constitutional amendment on February 20, 1952. It was a strongly worded amendment that would sharply curtail the effect of executive agreements and treaties on American domestic law. One section forbade the President to use executive agreements in lieu of treaties, and such agreements would have force for only one year after the President who made it left office, unless extended by act of Congress. This draft died in the Democratic controlled Senate Judiciary Committee. On January 7, 1953 Bricker reintroduced the amendment, although toned down in its restrictions on the Presidency in order not to embarrass the new Republican Chief Executive, Dwight D. Eisenhower. The ensuing battle was more a mat-
ter of politics than a battle over the constitutionality of Presidential powers.\textsuperscript{77}

The Senate Judiciary Committee favorably reported a further rewording of Bricker's second amendment proposal on June 4, 1953. It stipulated that no treaty provision would have any effect if it conflicted with the Constitution, no treaty would become internal law unless by act of Congress, and "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization."\textsuperscript{78} The amendment was supported by numerous pressure groups, including the American Bar Association, American Legion, Veterans of Foreign Wars, American Farm Bureau, American Medical Association, Daughters of the American Revolution, and the American Council of Christian Churches. Opposed to it were the Americans for Democratic Action, American Jewish Congress, American Federation of Labor, and the American Civil Liberties Union. But most importantly, Secretary of State John Foster Dulles and Attorney General Herbert Brownell objected to Congressional restrictions of the President's prerogative in foreign policy.\textsuperscript{79} President Eisenhower announced on July 22, 1953, that he opposed the Bricker Amendment in favor of an even milder worded resolution by Senator Knowland of California.\textsuperscript{80} There was even another amendment offered as an alternative to Knowland's. The Senate defeated both amendments on February 26, 1954, the
last one missing the necessary two-thirds vote by only one. 81

The Bricker Amendment represented a political revolt against American commitments abroad which might upset the domestic order of the United States. Supporters of the amendment often expressed the fear that the United States could be forced to accept socialism by treaty commitments, that sovereignty could be surrendered to the UN, and that treaties could abridge the Bill of Rights. 82 The Bricker supporters also feared that what could be done by a treaty could also be done by an executive agreement, which was treated in the same wording as treaties in the several drafts of the Bricker Amendment. Former President Herbert Hoover was one who was very critical of executive agreements. He condemned the Roosevelt-Litvinov Accords, which he claimed "opened the headgates for a torrent of traitors," and the Tehran and Yalta agreements, which he asserted had bargained millions of people into communist tyranny. "The real issue," he declared, "is whether the President, through declaration or implication or by appeasement or by acquiescence, or by joint statements with foreign officials, can commit the American people to foreign nations without the specific consent of the elected representatives of the people." 83

One of the issues during the debate over the Bricker Amendment was the Supreme Court's decision in the Pink
case. Frank E. Holman, a past president of the American Bar Association, claimed that that decision had meant that an executive agreement could override the Bill of Rights. If an executive agreement could compromise property rights in New York, Holman warned, it could destroy the other constitutional guaranties of the First and Fifth Amendments. When Senator Bricker referred to the Pink case as one in which American citizens had lost their property due to an executive agreement, he was rebuked by, of all persons, Louis H. Pink. He pointed out that the government had chosen to sue for the deposits of former Russian corporations in the United States, rather than being compelled to do so by agreement with Moscow, and that no American citizen was deprived of his property. Pink concluded that "If we are to try to amend the Constitution every time there is a Supreme Court decision with which we do not agree we may be kept pretty busy."85

The controversy created by the Bricker Amendment has not seemed to inhibit Presidents from making foreign commitments by executive agreement. A few examples are Eisenhower's agreement with Spain that guaranteed American military protection of that country in return for bases in 1953. The Presidents have repeatedly met in person with foreign leaders and have made both expressed and tacit agreements. When John F. Kennedy met with Nikita Krushchev in Vienna in 1961 they agreed mutually to back away from
their involvement in Laos. Richard M. Nixon made several executive agreements with the Soviet leaders in Moscow during his visit in May 1972. The President has twice avoided a confrontation with the Soviets over the Washington-Moscow "hot line": first during the Cuban Missile Crisis when Kennedy and Khrushchev reached an understanding on Cuba, and in 1967 when President Lyndon B. Johnson and Alexis Kosygin agreed not to get involved in the Israeli-Arab Six Day War in 1967.

The most controversial Presidential commitment to a foreign nation in recent times is the one to South Viet-Nam. Shortly after the Geneva Accord of 1954 that divided Communist North Viet-Nam and Western-oriented South Viet-Nam, President Eisenhower wrote a letter to South Vietnamese head of government Ngo Dinh Diem. He pledged American aid to make South Viet-Nam a viable state, strong enough to resist military subversion or aggression from the North, if Diem's government would give assurances to "the standards of performance it would be able to maintain in the event such aid were supplied." President Kennedy reaffirmed the American commitment to South Viet-Nam in an exchange of letters with Diem on December 15, 1961. The result of these understandings was the President's dispatch of American troops to South Viet-Nam to assist Diem's government against internal Communist subversion. When the South Vietnamese government was on the verge of collapse in
1965, President Johnson escalated the war to the point where by 1968 he had sent over 500,000 troops to fight in a bloody war and had ordered the continuous bombing of North Viet-Nam. Johnson made his own commitment to Saigon in the Declaration of Honolulu on February 8, 1966. For the third time, an American commitment had been made to South Viet-Nam by the President without the approval of the Senate.

The Presidential policy in Viet-Nam, begun under Eisenhower and continued to the present by Nixon, has been repeatedly attacked in Congress as a constitutional usurpation of power. One principal critic has been Senator J. William Fulbright (D., Ark.), the Chairman of the Senate Foreign Relations Committee. Prior to the Viet-Nam War, he had been an advocate of strong Presidential leadership in foreign affairs, but in 1967 he introduced a resolution to curtail the power of the President to commit American troops abroad without Congressional consent. He reintroduced the resolution on February 4, 1969, and it was endorsed by his Foreign Relations Committee. Reviewing the history of Presidential use of troops abroad without a Congressional declaration of war, the Committee concluded that the President had abused his powers as Commander-in-Chief by making policy decisions on war and peace without seeking the approval of Congress. The resolution, which was more of a Congressional plea for participation in
foreign affairs than a legislative invasion into the executive branch, was passed by the Senate on June 25, 1969, by a vote of 70-16. Although this was a warning to the President not to disregard the sensitivities of the Senate, Nixon has continued the post-war practice of nearly monopolizing foreign policy decisions in the White House.

The Viet-Nam War has raised the legal issue of Presidential powers as well as the political ones. The Supreme Court, however, has consistently avoided ruling on the constitutionality of the American war effort in Southeast Asia. In 1967 it refused to review the conviction of a man who refused to enter the armed services by the draft because he believed that the war was illegal. It also refused to review the case against some soldiers already trained by the army but who refused to serve in Viet-Nam.

In 1970 the Massachusetts legislature passed a law that would forbid citizens of that state to participate in any war by direction of the President without a declaration of war by Congress. The Supreme Court refused to allow Massachusetts to file a bill of complaint against the Secretary of Defense to enjoin him from sending any more troops to Southeast Asia. Justices Harlan, Stewart, and Douglas dissented in favor of granting the motion. As far as Douglas was concerned, "The issue in
this case is not whether we ought to fight a war in Indo-
china, but whether the Executive can authorize it without
congressional authorization."\textsuperscript{101} Douglas, the Justice who
had written the opinion in the Pink case that upheld the
constitutionality of executive agreements nearly thirty
years before, wanted the Supreme Court in 1970 to review
the constitutional powers of the President to order Ameri-
can troops into combat, which would have again raised the
constitutionality of executive diplomatic contracts. The
Court refused to hear the case, leaving the Pink case
unchallenged for the time being.

As demonstrated above, the Belmont decision had an
impact on constitutional law far beyond the importance of
the immediate litigation the Supreme Court had to adjudi-
cate. Sutherland's exposition on executive diplomatic
powers, which he had written as a theoretical basis for
reaching his conclusions in that case, have been frequently
cited in cases totally dissimilar to the circumstances of
the Belmont case. Sutherland's opinions in Belmont and
Curtiss-Wright are probably the most often cited recent
Court dissertations on the constitutional powers of the
President in foreign affairs. Likewise, it provided a
legal foundation for the President to conduct foreign poli-
cy by executive agreements. Perhaps the greatest impact of
the Belmont decision has been its subsequent application by
the White House to make diplomatic commitments to foreign
nations.
CHAPTER V: NOTES


3 Memorandum of October 31, 1937, DSF 411.61 Assignments/169.

4 DSF 411.61 Assignments/263-64.

5 Samuel E. Whitaker to Robert F. Kelley, May 27, 1937, DSF 411.61 Assignments/156.

6 Congressional Record, Vol. 84, Part 6, 76th Congress, 1st Session, pp. 6553, 6638.

7 53 Stat. at L. 1100, Chap. 421.

8 Transcript of Record, Guaranty Trust Company of New York v. United States, No. 566, pp. 1-184, 259.

9 Ibid., pp. 1, 257-74.


12 Ibid., pp. 140-41.

13 3 Cranch 454 (1806).

14 Philip C. Jessup, "The Litvinov Assignment and the Guaranty Trust Company Case," 32 Am J. I. L. 542 (1938). Jessup was pleased with the result of this case, but not with the idea that foreign nations do not enjoy unlimited immunity in domestic courts.

15 United States v. President and Directors of the Manhattan Co., 276 N.Y. 396 (1938); quote on p. 407.

(1939). For Chief Judge Lehman's opinion, see pp. 298-314; for Judge Rippey's dissent, see pp. 315-25. Lehman had sat on the Court of Appeals since 1925, and he was familiar with the earlier cases concerning Russian corporate assets. He was also a very close friend of Cardozo, who died in Lehman's Albany home on July 9, 1938.

17United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940). In only three years, from 1937 to 1940, there were five new Justices on the Court. Hugo Black replaced the retiring Van Devanter in 1937, and Soliciter General Stanley Reed replaced the retiring Sutherland in January 1938. Harvard Law professor Felix Frankfurter took Cardozo's seat after he died on July 9, 1938. William O. Douglas took the retiring Brandeis' seat in February 1939, and Attorney General Frank Murphy replaced the deceased Butler later that year. Both Frankfurter and Douglas had strong beliefs in the power of the President in foreign relations, as will be seen in the Pink case. During the 1938, 1939, and 1940 terms, Black and Douglas agreed with each other 100% in nonunanimous opinions. Pritchett, Roosevelt Court, pp. 243-44. Black also voted with Douglas in the Pink case. Hence, it is logical that it was Black, Frankfurter, and Douglas who favored the government's argument in the Moscow Fire Insurance case, and Hughes, McReynolds, and Roberts who opposed it. Roberts also joined Stone's dissent in the Pink case. The same conclusion was reached in Michael H. Cardozo, "The Authority in Internal Law of International Treaties; The Pink Case," 13 Syracuse Law Review 544 (1962).

18Bettman v. Northern Ins. Co. of Moscow, 134 O.S. 341 (1938). Details of the case were provided by Mr. Paul McNamara of Columbus, Ohio, who was one of the plaintiff attorneys in this case.

19315 U.S. 203 (1942).

20Transcript of Record, United States v. Pink, pp. 1-73; United States v. Pink, 259 App. Div. 871 (1940), 284 N.Y. 555 (1940); writ of certiorari, 313 U.S. 553 (1941); also see United States v. Pink, pp. 210-15.


22"The U.S. Supreme Court Delivers Unanimous Verdict for Roosevelt's Foreign Policy Against Hitler," Life, 11 (October 20, 1941), pp. 47-50.
Douglas was a close personal friend of the President, which may or may not have subtly influenced Douglas’ views on Presidential powers. He was also one of FDR’s political advisors for the 1940 election. As for foreign affairs, he advocated preparedness, aid to Great Britain, and strong Presidential leadership. See *Secret Diary of Harold L. Ickes*, II, 601, 614; III, 53, 172-73, 342-43, 514, 614, 614-15, 617-18; Wesley McCune, *The Nine Young Men* (New York, 1947), pp. 124-26.

Frankfurter believed deeply that the United States had a mission to destroy Nazi tyranny. Besides his intellectual commitment to personal freedoms, his being an Austrian born Jew may have influenced his views on Adolf Hitler. He believed in the executive prerogative in foreign affairs, and he had a great faith in FDR. As a Presidential advisor, he helped shape foreign policy by his assistance in drafting the Lend-Lease bill in January 1941. See *Roosevelt and Frankfurter*, pp. 166, 626, 628-32, 641; *Secret Diary of Harold L. Ickes*, III, 149, 199, 486, 509; Francis Biddle, *In Brief Authority* (Garden City, 1962), p. 129; Liva Baker, *Felix Frankfurter* (New York, 1969), pp. 198-201, 249-53.

Roberts thought that Stone's dissent was unassailable, Roberts' memo to Stone on the back of the proof sheets of Stone's dissent, Stone Papers.


Borchard to Stone, February 9 and March 14, 1942; other documentary citations cannot be given for legal reasons.

Jessup, "The Litvinov Assignment and the Pink Case," 36 Am. J.I.L. 282 (1942). Also see Jessup, A Modern Law of Nations (New York, 1948), pp. 43-67. Judge Jessup has written to the author that he still maintains that the Court decided the Pink case on an incorrect understanding of international law, June 7, 1972. For a more recent evaluation of the Pink case, see Cardozo, "Authority in International Law of International Treaties."

Congress created the Soviet Claims Fund in 1955, which received 4,130 American claims against Soviet Russia for over $3.5 billion. The fund eventually paid over $38 million.


311 U.S. 150 (1940).

312 U.S. 52 (1941); Biddle, In Brief Authority, pp. 110-12. Stone wrote a dissent that was joined by Hughes and McReynolds.

333 U.S. 103 (1948).

Jackson's opinion was joined by Justices Frankfurter, Murphy, Burton, and Chief Justice Fred Vinson, ibid., pp. 104-111; Douglas' dissent was joined by Black, Reed, and Rutledge, ibid., pp. 114-18.

46 Reid V. Covert, 354 U.S. 1 (1957); Black's opinion, pp. 3-41; Frankfurter's, pp. 41-64; also see Earl Warren, "The Cold War, Judicial Review, and the Military," 37 New York University Law Review 181 (1962).


48 Zschernig v. Miller, 389 U.S. 429 (1968); Douglas opinion, pp. 430-41; Stewart's, pp. 441-43.


50 Ibid., pp. 400-439; the only dissent was by Justice Byron White, pp. 439-72.

51 Memoirs of Cordell Hull, I, 212-13 Figures cited by Hull.


55 Opinions of the Attorney General, 1940, pp. 484-96.

56 Churchill, Their Finest Hour, 398-416; also see Philip Goodhart, Fifty Ships That Saved the World (London, 1965).


Churchill, Their Finest Hour, p. 23.

Ibid.

For a thorough discussion of these wartime conferences, see Herbert Feis, Churchill, Roosevelt, Stalin (Princeton, 1970), and Churchill's six volume History of World War II. Also see Robert E. Sherwood, Roosevelt and Hopkins (New York, 1948), ad passim and James F. Byrnes, Speaking Frankly (New York, 1947), pp. 21-45, and James MacGregor Burns, Roosevelt: The Soldier of Freedom, 1940-1945 (New York, 1970), passim.


Hackworth, Digest of International Law, Vol. 5 (1943), 390-433.


Borchard, "Shall the Executive Agreement Replace the Treaty?," 53 Yale L.J. 664 (1944); quotes on pp. 667 and 671, respectively.


Henry S. Fraser, "Treaties and Executive Agreements," An Analysis Prepared for the (Senate) Committee on Foreign Relations, Senate Document No. 244, 78th Congress, 2nd Session (September 21, 1944).

Myers S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: interchangeable Instruments of National Policy," 54 Yale L.J.
181 (1945) and 54 Yale L.J. 534 (1945); quote on p. 191. The total length of this article is 151 pages.


75Memorandum of Hull-Hughes conversation, May 7, 1944, Hughes Papers.

76Truman, Years of Trial and Hope, pp. 317, 331ff. For a criticism of Truman's conduct of foreign affairs, see Senate speech by Robert A. Taft, Congressional Record, Vol. 97, Part 1, Senate, 62nd Congress, 1st Session, pp. 54-61.


78Ibid., p. 25A.


84Holman, Story of the "Bricker" Amendment, pp. 107-11.


95"National Commitments," Senate Report No. 797. Committee of Foreign Relations, 90th Congress, 1st Session


101 Ibid., p. 893.
CONCLUSIONS

As Robert H. Jackson observed in the introductory quotation, "This is government by lawsuit." Constitutional controversies are fought in the national courts, and with one great exception (the Civil War) the courts usually have been successful in solving disputes by defining constitutional exercises of power. The Justice Department's suit against the Belmonts was an action to recover only $25,000. Yet the suit itself was a contest of power between the Federal government on the one hand and state regulatory authority and private property rights on the other. The significance of the Belmont case was not so much that the government did recover the disputed $25,000, but that in the judicial process the Supreme Court further defined executive powers in foreign affairs.

The governmental act preceded the constitutional doctrine as has often happened in our legal history. Franklin Roosevelt concluded his agreement with Maxim Litvinov in 1933 according to the diplomatic necessities of the moment. The agreement was concluded in the form of an executive agreement because it involved an act of conditional diplomatic recognition which precluded a treaty legally. Roosevelt was not primarily concerned with legal technicalities--they could be worked out by lawyers later. In
this situation, however, the Justice Department capitalized upon the accords in American courts to a greater extent than could the State Department in their debt negotiations with Moscow.

There was a history of executive agreements before the Roosevelt-Litvinov Accords of 1933. Most of these had been negotiated by the President pursuant to Congressional authorization. The President, however, presumably always had the power to make executive agreements on subjects where he had exclusive constitutional authority as chief diplomat and Commander-in-Chief of the armed forces. This was because he is not only the head of government in our system but also head of state.

Yet rarely had the chief executive ever tried to administer a foreign policy by executive agreement in the face of a hostile Senate. Theodore Roosevelt was such a President, because his great popularity and political power afforded him the base to conduct an executive foreign policy. Franklin D. Roosevelt was also that kind of President.

It was not until the Belmont case in 1937, however, that the Supreme Court affirmed the executive power to make agreements on its own constitutional authority without the Senate's advice and consent. This case arose from the President's recognition of a foreign sovereign, and the terms thereof, and the Court upheld the obligations of
those terms as properly within the executive function. In this circumstance, Justice George Sutherland wrote that the agreement was as legally binding domestically as though it were a formal treaty.

It is significant that the Belmont decision was written by Sutherland. He was a man who had expounded strong opinions on the government's foreign relations powers all through his political and legal career. As early as 1910 he had presented a theory of federalism that was restrictive in domestic powers but plenary in diplomatic powers. He adhered to his theory throughout his judicial career on the Supreme Court during the 1920's and 1930's. His broad constitutional approach to the writing of the Belmont case was as much in character as the very narrow construction of New Deal economic regulatory laws that he authored in the same period. That George Sutherland wrote the Belmont decision unquestionably affected the presentation of the Court's ruling in this case.

The novel conclusion that Sutherland sponsored was that an executive agreement had the same legal effect as a treaty: it was binding not only on the Federal government, but superior to conflicting state laws. This ruling has caused much fear that the President could supercede state government and usurp constitutional liberties by executive agreement with other nations. This fear may be an exaggerated reaction to the Belmont case, since it applied only
to the executive act of diplomatic recognition, and it did not concern American property rights but only the claims of aliens to pre-Soviet Russian corporate assets laying dormant in New York.

Justice Stone's concurring opinion viewed the facts of the case in a much narrower perspective: that of state property laws and private property rights. He abhorred broad grants of power to the President, which he believed Sutherland had done in his decision. Stone's opinion was an alternative model for deciding such cases which he followed in the Guaranty Trust and Pink cases. The majority of the Court accepted his position in the former but rejected it in the latter.

No doubt the national security fears following the Japanese surprise attack on Pearl Harbor influenced the majority of the Court in 1942 to support strong Presidential powers in foreign affairs. In times of crisis and national danger (whether from militarist Japan, Nazi Germany, or expansive Communism), the American President has assumed enormous powers, often with the acquiescence of Congress and the courts.

Sutherland's opinion in the Belmont case is still the accepted constitutional doctrine on executive agreements. Whether it continues to be so in the future will depend on how the Supreme Court will weight the perils of national
security that demand strong executive powers with the need to protect civil liberties and individual rights in our society.
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