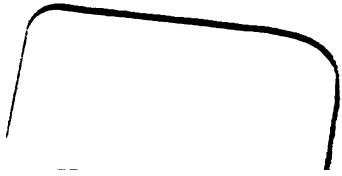

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THE RECOGNITION POLICY OF THE UNITED STATES

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THE RECOGNITION POLICY OF THE UNITED STATES

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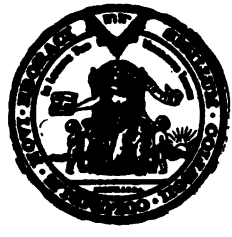

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To

MY FATHER AND MOTHER

PREFACE

It will always be a great problem for the student of international law to determine the mutual relationships of law and policy. In the past, political considerations have invariably been of preponderating importance, and since this is due to the nature of the international system there is no indication that the future will bring any material change. It should be the task of the constructive publicist to establish and perfect the legal precepts which the practice of states has produced to prevent the purely political considerations from maintaining unrestricted sway. This is best accomplished by first an objective analysis of international facts which may then be interpreted on the basis of subjective thought. It is this latter process which strikes me as being of pre-eminent importance; it has puzzled writers and jurists from the time of Grotius to the present day, and satisfactory methods or solutions have never been found. This is due in large measure to historical tradition. Grotius and his immediate successors sought on the basis of a law of nature a purely metaphysical interpretation of the facts of international existence, and the scheme of rights and obligations outlined by them has survived to the present day the most vigorous attacks of those who seek to demolish the natural law system.

Realizing the fact that these concepts, in whatever form they may appear, are always with us, I have sought in the succeeding pages to give them a definite but limited place in the philosophical interpretation of the significance of recognition. At the same time, I have tried not to forget that

the questions with which I am dealing and the principles here evolved bear some relation to the empiric world and that in their determination the historic facts on which they are conditioned cannot be overlooked.

This study will concern itself chiefly with the recognition of states and governments. I have given little or no consideration to the question of the recognition of belligerency because I conceive it to be a matter with but slight relation to the main problem. This is not only for theoretical but also for historical reasons.

The subject of this study was suggested to me by Professor Garner of the University of Illinois, who first stimulated my interest in international law and politics. To Professor John Bassett Moore, whose instruction I have enjoyed during the past year, I am deeply indebted for kindly advice and inspiring counsel. Professor W. A. Dunning has also given me invaluable suggestions and criticisms which I gratefully acknowledge. Finally I cannot fail to express my profound appreciation of the constant help and encouragement which has been rendered me by my father.

JULIUS GOEBEL, JR.

NEW YORK CITY, APRIL 22, 1915.

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PART I

CHAPTER I

Legitimacy, Revolution, and Recognition

The conflict of established authority with inevitable opposition at once calls into being theories to justify the existing order and to repulse the pretensions of those forces which seek to destroy it. In this sense the theory of legitimacy, whether as a principle of international, of constitutional or of private law, represents the definite expression of the existing order. Although this theory is primarily an historical phenomenon and legitimacy as a term of public law is of recent date, the fundamental concept bears an intimate relationship to the ideas of sovereignty, of conquest, of usurpation, of revolution and of restoration. Let me state at the outset, however, that in the succeeding discussion we shall not use the term in the narrow sense in which Talleyrand introduced it at the Vienna Congress, the indefeasible hereditary right of the ruling dynasty to succeed to the sovereignty. It will be used in the broadest historical sense, embracing at the same time the manifold legal characteristics which I have said it possesses. It is in this spirit that Zachariä [1] defines legitimate government as "that government which does not merely depend upon de facto power or usurpation and occupation, but rests upon a legally valid basis by which there may come into consideration, partly, the private law

[1] Zachariä, *Deutsches Staats und Bundesrecht*, § 21, III. A discussion of the early theory is also in Held, *Ueber Legitimität und Legitimitätsprinzip*, and Brockhaus, *Das Legitimitätsprinzip*.

relationship to the previous ruler, partly the constitutional relationship to the state itself, and partly the international relationship to other states." Besides this general sense which describes all violations of existing governmental *status quo* as illegal, we shall have occasion to speak of three particular phases in the historic manifestations of legitimacy. It first appears as a dynastic legitimacy somewhat in the sense in which Talleyrand used it, as the theory which upheld the established hereditary right of a single house against all other individual claimants. Later this theory developed into the broader principle of monarchic legitimacy which maintained the supremacy of monarchic government.[1] Finally, we shall see that the concept passed beyond these special phases into a legitimacy of existing government as against all other forms of government. This is the sense in which it is generally used in international law as a counter-theory to the doctrine of recognition. It is in this connection that we shall briefly survey the history of the doctrine of legitimacy both as a concept of public law and as an historical phenomenon, because its definite connection with the favorite political ideas of the Middle Ages and the fact that it has been deeply embedded in the political consciousness of all time have contributed largely to its strength and have enabled it to survive theories whose historical basis was less firm.

In the early Middle Ages the connection between the doctrine of the divine right of kings and dynastic legitimacy was intimate,[2] but it was really the development of certain economic aspects of the Kingship upon which the latter theory largely depended. The growth of the tremendously ramified feudal system which looked to the

[1] The Talleyrand theory was in reality the result of a combination of these two elements.

[2] *Cf.* Figgis, *The Divine Right of Kings.*

King as the ultimate holder of all the land of the realm, and the contemporaneous appearance of the principle of primogeniture, furnished very material reasons for considering the right to the monarchy as indefeasible. This is emphasized by the fact that in the Empire, where the theory of divine right first acquired political significance, the hereditary principle was of comparatively little importance. The Emperor was elected, and as long as the elective principle survived, even though the choice was confined to a single noble house, a right of dynasty could scarcely develop great strength. But it should be noted that in the component states of the Empire the principle held undisputed sway. Actually it was in England and in France, where powerful centralized kingdoms were established, that the dynastic legitimacy first took firm root. One need but recall the fearful and devastating wars which were waged over French succession to realize that the keynote of the political system was this principle.

If it was necessary that a theory of legitimacy should develop, it took the form of dynastic legitimacy because there was no reason for it to be anything else. The idea of popular sovereignty had with difficulty been kept alive by the scholastics and the jurists, but even they were so thoroughly imbued with the idea of divine right that they deferred to this principle by always subordinating to it the theories of the Roman civilians. Popular movements, motivated by a definite consciousness of the ultimate right of sovereignty, were practically unknown to the Middle Ages.[1] The usurpations of authority, if there were any, were always the acts of individuals or of a particular house. The deposition of Richard II was such an act, and the

[1] It is true there were constant outbreaks like the Wat Tyler uprising and the Rienzo tribunate in Rome, but these were sporadic without definite connection to any deep and widespread political convictions.

long and bloody Wars of the Roses were fought over the contending claims of two branches of the same dynasty. There was nothing reactionary in these conflicts in which legitimacy ultimately triumphed, because there was nothing in the way of liberal theory against which it could react. They were feudal struggles, and in so far as popular consciousness was their support, this, too, was feudal. Certainly the settlement of these causes was not a development in the direction of constitutional law. They were decided more as a matter of private law of the princes themselves.

In a certain sense the theory of divine right which the imperial supporters espoused represented a liberal tendency.[1] It was a definite attempt to emancipate the state from ecclesiastic control, but so essentially medieval in its scope and conception, so utterly royalistic in its disregard of popular participation, that it could not keep pace with the development of political thought, and the dawning reformation found in it the bulwark of the opposition. It was impossible, of course, for such a medieval doctrine to take account of the popular will as a factor in practical politics, and it was just the lack of this element which contributed to its failure to overcome the Papacy. This was preëminently the character of the early Lutheran reform and, in so far as it took account of the individual consciousness, it triumphed where the Royalist divine right and the aristocratic Conciliarists had failed. But it should be noted that no sooner did the Reformation in its political history depart from these precepts and become more purely aristocratic, than it was forced to give way before the reaction.

I have said that the theory of monarchic legitimacy was the outcome of the religious wars of the sixteenth and

[1] Eicken, *Geschichte und System der Mittelalterlichen Weltanschauung*, pp. 250 *et seq.*

seventeenth centuries. The struggle was primarily for the establishment of individual liberties which, if they had ever before been given consideration, were regarded as a part of the indefeasible right of the monarch. The demand for them took the form of an attack on the prerogatives of royalty. This was the indirect result of making the idea of individual consent the basis of religious freedom. It is possible that the reformers who found in the ideas of Marsiglio and Civilian jurists justification for their change of faith, originally had no intention of expanding these theories to include the exercise of political liberty. But history had so identified religious and political ideas, and the resistance made by the existing government was at once so stubborn and so oppressive that theories of government were brought into being, based upon these same individualistic principles, which threatened the demolition of the existing system. It was directly out of these first fierce struggles between awakening popular consciousness and historic right that the doctrine of monarchic legitimacy as contrasted with the earlier dynastic phase was born.

Later developments in the reformation produced the first vicious attacks upon monarchy. The Lutheran doctrine of passive obedience, subsequently elaborated by the Calvinists, although not a theory of divine right, had given to these ancient principles of monarchy a new life. It formed so intimate a part of the religious creed of Protestantism that when reactionary rulers, whose authority had been so upheld, proposed to extirpate the new faith, they found a justification in the dogmas of the heretics themselves. The latter, in order to support their own case, were obliged to find some doctrine upon which they could base their resistance. Luther, and especially Calvin, were in reality opposed to any idea of violent revolution, and the oligarchic polity which the latter had called into being is the

supreme example of the difficulty which early Protestantism had in severing itself from tradition. In France the conflict had been from the first political, for active opposition to the reformation had been made almost from the date of its inception. There was not, as in the Empire, the early period of quasi-toleration in which more purely religious ideas had time to incubate. Political exigencies had called for a doctrine of political resistance, and this was supplied by the school of thinkers known as the Monarchomachs. It is significant that there are numbered in their ranks Catholics as well as Protestants.[1]

Upon the basis of a state of nature, this school not only argued that the subject could very properly disobey the commands of a sovereign which were contrary to the law of God, but that he had a right of resistance against coercive measures of enforcing obedience. The right of resistance was based upon the contract which was made between the king and his people on the one hand, and God himself upon the other, whereby men were lifted from out the state of nature. This was followed by a second agreement in which the king contracted to rule justly and the people to obey his behests. The application of this doctrine to the religious situation was obvious, for if the people should embrace a given form of religion and the prince refused to acquiesce, the latter would be guilty of nonfeasance. On these grounds he might be resisted. But the political significance of this doctrine increased enormously when it was asserted that, since monarchy existed for the benefit of the people and since the latter were themselves sovereign, if the prince acted in opposition to the best interests of the state he might legally be combated. It is in

[1] Dunning, *Political Theories from Luther to Montesquieu*, pp. 46 *et seq.*; also Figgis, *From Gerson to Grotius*, pp. 133 *et seq.*, and Treumann, *Die Monarchomachen.*

this proposition that monarchy depends in the last analysis upon the consent of the people that the idea of monarchic legitimacy is particularly refuted. But, unfortunately for their cause, the Monarchomachs failed to carry their theory to its logical conclusion. Although they succeeded in locating the ultimate right, its exercise was denied when control over monarchic action was limited to the magnates, who acted in the capacity of agents of the people, leaving the latter quite destitute of actual political power.[1]

It is not, however, solely upon the grounds of popular consent that the strongest attacks were made upon monarchy. The Monarchomachs admitted the principle of divine right in declaring that the king was chosen by God, but they at once qualified it by making the choice of God dependent upon installation by the people. It was the contract alone which made monarchy legitimate, yet the fact of a partial admission of the principles of divine right indicates the persistence of medieval ideas. In attacking the economic bases of royal prerogative, the material foundation which was its greatest source of strength, the Monarchomachs threatened more seriously the existing system. Of significance, too, were the views on tyrannicide which were revised after a desultory existence in the Middle Ages and were applied to recalcitrant monarchs in the manner suggested by Aristotle.[2] But here, likewise, the idea of popular control over such matters was definitely denied. There seems, indeed, to have been a distrust of popular capacity to govern, a distrust which is not surprising if we

[1] These arguments were best presented in the *Vindiciae contra Tyrannos,* attributed to Languet.

[2] The academic character of Aristotle's discussions of Revolution is proved by the fact that the seventeenth-century justifications of the revolutionary cause were not based upon the views of the great philosopher but sought a foundation which accorded more with political fact.

remember that the people had never had an opportunity to display their political talents. Even the German jurist, Althusius,[1] whose idea that the unit of society was the corporation, stamps him a modernist, admits the ultimate sovereignty in the individual only to deny its exercise by vesting the control in the larger unit. It is not strange that earlier ideas of individualism and of popular participation which had characterized the religious phases of the Reformation should have been rapidly supplanted by the aristocratic doctrines of the political defenders of its cause. The upheavals of the Continent were all tinged with Calvinism, and the popular consciousness had not been awakened except through the minds of its leaders. It was just this fact that contributed largely to its failure and which, by reaction, reinstated absolutism in a stronger form than ever before.

The doctrines of the Monarchomachs were carried over into England. In France, where these dogmas had been formulated to support the Huguenot revolution, a number of fortuitous circumstances had ended in the accession of Henry of Navarre to the French crown. It was not a victory of the principles of popular sovereignty, but in so far as it was a vindication of the Salic law, was a triumph for dynastic legitimacy. Moreover, the revolt had not been distinctly a war against monarchy as such, but merely for wresting away from the ruler certain rights and immunities. Chance had intervened to prevent its development into a revolution for wider political control and for bringing to a definite issue the principles for which the antimonarchic writers were contending.

In England, on the other hand, where there was an older tradition of popular privilege in the form of aristocratic

[1] Gierke, *Johannes Althusius und die Entwickelung der Naturrechtlichen Staatstheorieen*, pp. 21 *et seq.*

control—a typical exemplification of the systems of Althusius and Languet — the reaction against monarchy as it was based equally upon economic, political and religious grounds, was deeper-seated and gained headway more rapidly. Under Henry VIII, the doctrine of divine right had reached its completest success as a political reality, but it remained for James I in his *True Law of Free Monarchy*[1] to give to it the most famous expression. It is to be noted that the claims set forth by James did not savor so much of the ecclesiastical dogmas of the Middle Ages, but were a definite attempt to find an awe-inspiring basis for a royal prerogative which Parliament had gradually assumed to itself. It was *par excellence* a claim of absolutism and indicates how the divine right idea was being used as the weapon of the new conception of legitimacy. Indeed, this work of James I, for the reason that it provoked in time the first real republican attacks upon the monarchy, represents in England the turning-point in the concept of legitimacy. There had been wrangles before between King and Parliament, but these had been merely feudal disputes. Never had the Parliamentary cause been so firmly grounded in populistic concepts as actually to doubt the right of monarchy to exist.

It is typical of English character that the conflict should commence in the courts. But the doctrines which Coke and his associates laid down were not the expressions of revolutionary doctrinaires. It was the actual rebellion against the Stuarts which brought forth the great vindications of popular sovereignty which were the direct successors to the theories of the Monarchomachs. The peculiar mixture of legal traditions with the new ideas of natural law found expression in the pamphlet campaign of the

[1] James I, *True Law of Free Monarchy, or The reciprocall and mutuall duty betwixt a free King and his naturall subjects* (Lond., 1642).

Levellers and eventually in the celebrated "Agreement of the People." The movement was preëminently popular in character. It is this fact which gives to the English philosophy of the Revolution a practical political significance which that in France did not enjoy. The tendency was inevitable, however, to emphasize the ecclesiastical elements in the controversy and to supplement these arguments by appeals to the law. The rationalistic basis which the eighteenth century supplied to its revolutions was wanting, except in the writings of the great theorist of the Commonwealth, John Milton. Although he followed closely in the footsteps of his French predecessors, Milton made notable contributions to the anti-monarchic theory.

In his *Tenure of Kings and Magistrates*,[1] published after the execution of Charles I, Milton maintained the thesis that it was lawful for any who have the power to call to account a tyrant, to depose him or to put him to death, if the magistrate should fail to do this. It is only where he attacked the legitimist principle that Milton's theory is of interest to us. The familiar doctrines of a free and natural equality of man, and of the compact from which the authority of the king is derived, were laid down. This power, Milton argued, always remained fundamentally in the people; to say, therefore, that a king had as good a right to his crown as any man to his inheritance was to make the individual a mere chattel or a possession. But, even admitting the right of inheritance, Milton conceived that upon the analogy of property and attainder the king himself might be obliged to forfeit his title. The legal rather than the rationalistic basis of this argument is shown, when Milton proceeded to point out that to make the monarch accountable to God alone was to render void all the covenants of coronation and the laws which he had sworn to uphold. In ultimate

[1] Milton, *Prose Works* (Symmons ed., 1806), vol. ii, p. 271.

analysis, the king was but the agent of the people and it was solely by virtue of the laws that he exercised his authority. The same conclusions at which the Monarchomachs had arrived respecting the disposal of the king by deposition or tyrannicide were reached, and Milton declared that it was more in accordance with divine law for a people to depose the tyrant than for the latter to continue to oppress.[1]

I have tried to indicate that Milton made the decision on the subject of tyranny a matter of public determination rather than, as was the case with Languet and Mariana, a matter to be dealt with by the people's representatives. This was the result of the fundamental principles of his political thought. In so far as he developed these more distinctly popular theories, he was in advance of his time and of his own political convictions, for he was at heart a thorough aristocrat. Milton's philosophy was not the narrow anti-monarchic thought of the time, but, like the revolutionary doctrines of a later century, it embraced the right to rebel against any sort of oppressive authority. His political vision extended beyond the mere circumstances which he was seeking to defend and comprehended a larger liberty than that of which the Puritans were conscious.[2]

These attacks against monarchical government, tending more and more toward an actual theory of revolution based upon popular consent, against all government which was oppressive, were developed distinctly out of these conceptions of the source of sovereignty and had little to do with the formal Aristotelian doctrines. As philosophic concepts

[1] Milton, *op. cit.*, vol. iii, p. 149.

[2] In the *Areopagitica* he carries his theories of individual liberty to their greatest theoretical perfection and the demand which it expresses for freedom from governmental control was unprecedented in English political theory.

they were not new, but as a practical political program they were untried. The failure of the English Revolution to give practical effect to these theories proved that they were not sufficiently established in the popular consciousness to produce lasting results. The popular movement inevitably gave way to the aristocratic rule of the army, and ultimately the reaction against the illegitimacy of this régime brought back the ancient order. Established authority naturally tends toward legitimism, and the Commonwealth was no exception to this rule. Calvin's Geneva government had turned out to be a smug legitimacy of the predestined, and Cromwell's régime, where it was not royalistic, at least was an aristocratic legitimacy of the elect. Monarchic legitimacy was triumphant, not because men believed it to be inherently the right system, but because the real solution to the problem had not been evolved.

I have violated the chronologic order of the growth of the opposing theories in order to show the remarkable affiliation which existed between the theory of the Monarchomachs in France and the Puritan revolutionists in England. The theories of monarchic legitimacy were developed long before the ideas of Milton and the Levellers had seen light, but their best expression bore little relation to the groping mysticism of James I and the Royalist reactionaries who followed him. Both Bodin and Grotius, who furnish preëminently the best examples of the new monarchic doctrine, are too intensely rationalistic to be classified among the adherents of divine right. The natural law which they developed, although it necessarily partook of the ecclesiastical element, was grounded upon a distinctly modern conception. The mental and scientific relationships of these two thinkers were essentially different, but it is to their distinctive contributions to the political thinking of the time that we may trace the foundations of the mon-

archic system of the latter seventeenth and eighteenth centuries.

The conception of sovereignty will always be associated with the name of Bodin,[1] for it was he who gave to the vague convictions of earlier writers the first definite form. Defined as the surpreme power over citizens and subjects, unrestrained by the law, Bodin made this power the basis of all authority and gave to it not merely the characteristic of supremacy, but also that of perpetuity. He did not attempt to penetrate beyond the historical fact of the existence of sovereignty, but he admitted that the latter might be vested either in a single person or in a body of persons or in the whole people of a state. He realized that in the last analysis it was the people themselves who were the only perpetual element in the state and that it was in their power to confer the sovereignty. Yet, unless it was given expressly for a determinate period in the form of a limited grant, the conferral of sovereignty was inalienable and unconditional. Conceived of something in the nature of an incorporeal hereditament the transferral might be either in the nature of a bailment or a gift. But the restraints which were placed upon the exercise of sovereignty were not of popular making but were to be found in the natural and divine law which God alone could enforce. Even the *leges imperii* which bore a vague relationship to a constitutional restriction upon the monarch were matters not directly of human agency. In the *plenitudo potestatis* which the sovereignty implied lay the chief strength of the monarchy, the right to declare the law. It is this element of sovereignty which formed the stronghold of absolutism. Despite the fact however, that, once given without condi-

[1] Bodin, *Les Six Livres de la Republique* (Paris, 1599 ed.), bk. i, c. 8, pp. 122 *et seq.;* also Hancke, *Bodin, Eine Studie über den Begriff der Souveränität.*

tion, the sovereignty was inalienable, since it might be derivative and not original it was left open to attack.[1]

It is not surprising that in spite of the academic purity of Bodin's theory of sovereignty, he never divorced his thought completely from the monarchic objective which his writings constantly betray. He was the most eminent member of a group of French thinkers known as the *Politiques* who, on the basis of a religious toleration which naturally disposed of the cause of popular upheaval, sought to build up an unquestionable monarchical supremacy. The adoption of the idea of toleration, if not as a matter of philosophic conviction, at least as a political and economic necessity, marks a tremendous advance in the political thought of the time. It meant in a certain sense a severance of politics from the realm of ecclesiastical dispute, but its consummation inevitably marked the cessation of any growth in popular ideas of liberty. In its place arose the conviction of the inevitability of the monarchic system. It is in this sense that the philosophy of Bodin marked the first attempt to secure a rational basis for this system.

The inception of this movement is in the thought of Bodin, but it is the work of Grotius which gave it definite form not only by the theories of sovereignty and statehood which he propounded, but more particularly by the system of a law between nations which it was his great service to establish and upon which the legitimacy of monarchy was firmly grounded for over a century and a half to come. If the revolutionary religious movements had effected the theoretic transformation of the legitimacy of dynasty into one of the monarchic form, the Grotian system of international law furnished the justification by which it became a vivid political reality. It is of particular significance

[1] Hancke, *op. cit.*, pp. 20 *et seq.*

that in the very theories which were involved as an apology for the system it should later find its ultimate defeat. I shall take occasion to give the Grotian system careful discussion because of the influence of the later international doctrine of recognition upon the theory of legitimacy.

The basis of the theories of Grotius was in the system of the law of nature which he laid down, not as volitional and divine in origin, but as the product of human reason. In his own words, "Natural law is the dictate of right reason, indicating that any act upon its agreement or disagreement with the rational nature of man has in it a moral turpitude or a moral necessity." [1] Not only the things produced by nature, but those produced by man as well, were included in this system. It was so immutable that it could not be changed by God himself. This was grounded in the absolute character of good and evil. By so completely rationalizing natural law, Grotius broke away even more completely than his predecessor Bodin, from the influence of the theory of divine control. It is noteworthy that, in view of the confusion which later crept into the basic conceptions of international law, he made a conscientious effort to distinguish the *jus gentium* from the *jus naturale*. Although in matters of detail this differentiation was concise, yet the broad philosophic distinction was vague and unsatisfying. This is not surprising when we consider the very definite philosophic relationship between the two types of law.

It is upon this legal basis that Grotius outlined his theory of absolute government. Unable to avoid what had by this time become an axiom of political thought, he founded his state in contract. Like Bodin's complete delegation of sovereignty, this contract was an

[1] Grotius, *De jure Belli ac Pacis* (Whewhell ed., 1853), I, i, 10, 1.

absolute surrender to the sovereign, even of the right of resistance; but, unlike Bodin, Grotius refused to recognize even a conditional surrender of rights. What makes Grotius' contract theory difficult to comprehend is the fact that he expressly denied that the sovereignty belongs to the people so "that it has the power of controlling kings and of punishing them if they abuse their power." [1] He did not even admit that all government was for the sake of the people, but expressly asserted that it might be for the benefit of the kings alone. Nor was he impressed with the same awe of the *plenitudo potestatis* as Bodin. This is evidenced in the way in which he divided sovereignty, by analogy to property, as a thing held *pleno jure, jure usufructario*, or *jure temporario*.[2] But although Grotius could thus nonchalantly divide and limit the duration of sovereignty, the element of absolute deposition of rights in the sovereign remained as its most characteristic element. Indeed, from the point of view of internal government, the freedom which the sovereign enjoyed in exercising these rights, since it was limited only by the fundamental natural law, savored strongly of Machiavellianism. The restrictions which Grotius laid upon its exercise came definitely from without in his system of international jurisprudence. The result is that the only effective barrier which Grotius raised against the principle of self-interest, was the principle of international equity.

The real contribution of Grotius to the theory of sovereignty lay not in the subjective conception. When he pronounced the doctrine of the independence and equality of different sovereignties, he broadened the fundamental principles and made possible his system of international

[1] Grotius, *op. cit.*, I, iii, 7, 1; 14.

[2] This conception of the possibility of dividing sovereignty has outlived, in international law, even the modern purist notions.

law. It was because sovereign and sovereignty were to his mind identical that this subjective treatment served as much as the original conception of Bodin to fortify absolutism. His theory of sovereignty had completely excluded any sanction of a violation of this principle in municipal law. It was as immutable as the *jus naturale* upon which it was founded, and its universal acceptance also served to strengthen it as a practical political matter. Behind the unsound basis upon which it was founded lay the definite philosophic truth that the legal order itself can contain no justification for its violation.

It is in his discussion of civil war [1] that Grotius wandered farthest from his absolutist theories. By the *jus naturale* the right to repel wrong was granted to all, but since Civil Society was instituted to preserve public tranquillity and the state had thereby secured a superior right over men, it might prohibit the promiscuous right of resistance for the preservation of public peace and order. Grotius, however, conceived of certain contingencies in which this right would exist in the face of grave and certain danger. Adhering closely to the examples set forth by the Catholic Barclay, he named the instances in which a monarch might be resisted: (1) when the rulers, by the original institution or subsequent compact were subject to the people; (2) if the king abdicated his power, he might be treated as a private person; (3) if the king alienated his kingdom or brought it into subjection to another; (4) if the king acted with a hostile mind to destroy his whole people; (5) if the king forfeited his kingdom when it was bestowed by commission; (6) where the sovereignty was shared by the king and the people; (7) if in the conferring of kingly authority the right of resistance had been expressly stipulated.

[1] Grotius, *op. cit.*, I, iv.

In all of these cases which the great jurist outlined may be found the gist of the Monarchomach theories, and it seems remarkable that Grotius should have made these sweeping admissions. We must remember, however, that all of these cases appeared to him to be remote contingencies. Moreover, where the right of resistance existed there was distinctly no breach, for it was evidently expressly stipulated by the law. The case of the usurper was different.[1]

The usurper, Grotius admitted, might obtain title by prescription or by treaty right, but even as long as his possession remained illegitimate, his acts had binding force, not from his right, which was *nul*, but because it was probable that the legitimate governor would wish that it be so rather than that bloodshed and confusion should result. But when these acts were not necessary and served only to establish him firmly, the usurper was not to be obeyed. By right of war, he might be resisted, or by antecedent right before the usurpation, or by express authority from the legitimate power. Beyond these cases there existed no right, and the author condemned in unqualified terms the slaying of a tyrant as a matter of private right.

It is difficult to understand exactly what character Grotius wished to ascribe to the usurper. He seems to have implied that a legitimate title might be obtained by prescription, but the obvious answer to this would have been the invocation in behalf of the deposed ruler of the ancient maxim, *nullum tempus occurit regi*, a typical expression of legitimate right.[2] The solution may be found, however, in the statement that the acts of the usurper are probably

[1] Grotius, *op. cit.*, I, iv, 15, 1, *et seq.*

[2] It will be readily understood how this principle might be applied to the sovereignty, for Grotius very definitely conceived of it as a private property right of the monarch.

sanctioned by the legitimate monarch, who does this to avoid conditions of anarchy and confusion in his kingdom. This rather naïve method of escaping the dilemma shows that, while Grotius appreciated the necessity of finding some way by which the acts of a firmly established usurper could have a legal character, such a reconciliation could scarcely be effected upon the basis of a system of absolute sovereignty. He was convinced that a reconciliation upon strictly legal grounds of municipal law was impossible. Nor does it seem to have occurred to him that a legitimation might be possible upon the basis of an international arrangement. This is not surprising if we remember the rudimentary character of the international system which he outlined. Furthermore, there were, as a matter of fact, no well-defined precedents from which he could have generalized. The idea of an international legitimation was the outgrowth of the international system of the seventeenth and eighteenth centuries, growing up on the analogy of the process which took place in the municipal law of the country where a breach of the existing order had occurred. During this period it was impossible for such an idea to develop. The restoration of absolute monarchies had led to a sort of interlocking corporation of dynasties to which the rules of international law were exclusively applied. The idea of the absoluteness and equality of sovereignty upon which Grotius had laid so much emphasis was responsible for this. Because it was so exclusive, it became impossible for any breach of this order to find in international law its justification. In a certain sense the Grotian system and the absolute monarchies became mutual cause and effect, and it was only the growth of republican ideas which permitted any definite extension of the principles of international jurisprudence.

It would be impracticable here to trace the growth of

the republican and monarchic ideas in the latter seventeenth and the eighteenth centuries. The complete political collapse of the religious revolutions had indicated that there was something fundamentally wrong with the underlying philosophies. It was the great task of the new thinkers to find a basis upon which the ideals of individual liberty could be perpetuated and given definite reality. The most essential precepts of the earlier revolutionists were made the point of departure, but the way in which they were developed gave them a new signification and a greater practical value. At the same time, however, the monarchic legitimists were busily engaged in further developing their system. The great works of Hobbes, of Spinoza, and of Montesquieu are evidence of this, and the doctrine of absolute monarchic control which they evolved so surpassed in daring the theories of the previous century that the monarchy of Grotius seems weak and insufficient by contrast. This same tendency is evident, too, in the growing schools of international law, and within the limits set by its founder these principles were developed with great refinements. It is here that we shall observe the progress of the legitimist theories.

The rationalism of Grotius found in Pufendorf[1] a worthy successor. This writer made it his distinctive service upon the combined basis of Grotian and Hobbesian philosophy to systematize the law of nations and to add to its abstract character certain elements of good common sense which hitherto it had not always possessed. The troublesome question of internal disorder was settled upon the same basis which previous international jurists had selected, but the theories previously applied to the usurper were greatly extended. Pufendorf appreciated the reality

[1] Pufendorf, *Of the Law of Nature and Nations* (Lond., 1729).

of de facto power, and although he denied that mere possession by force gave birth to a right, he saw no reason for a man to sacrifice himself against the inevitable. "As to such cases," said he,[1] "this seems to be in general the most probable Solution, that he who actually possesses the Sovereignty, by whatsoever means he acquires it, is so long to be acknowledged by the Subjects for their lawful Prince, as there appears no one who can claim the Crown by a better Right. For then it is consonant to Reason that the Possessor's Power shall hold good. . . ." By tacit consent, then, the people yielded obedience, and in support of this the author cited the law of Henry VII which authorized the acts of the de facto king.[2] In the same way, the acts of a usurper who drove out a lawful prince, although his commands were destitute of legality, should none the less be obeyed. The question of conflicting allegiance, Pufendorf disposed of by citing the passage from Grotius which we have already examined. But he characterized it as a definitive release from obligation which restoration then rendered void. Actual possession, therefore, was the true test of obedience. And Pufendorf unconsciously hinted at a recognition question when he followed up the remark by saying: "And much more will this Conduct be justifiable in Strangers, in whom it doth not concern to examine the Titles by which the Sovereignty hath been obtained but who barely go along with the Possession; especially when the Possessor is supported by great Strength and Power."[3]

Of immensely more significance for a de facto theory, however, are the notes of Barbeyrac upon these passages.[4] He followed, in the main, the theories of Grotius and Pu-

[1] Pufendorf, *op. cit.*, VII, viii, p. 9.

[2] *Ibid.*, 10.

[3] *Ibid.*, 9.

[4] *Ibid.*, p. 724.

fendorf, but he repudiated in the strongest terms the idea that sovereignty was a property question. He pointed out in discussing the statute of Henry VII that to be a king de facto there must be a recognition by the people. The same power, said he, which gave validity to the acts performed by the usurper but which were the prerogative of the true king, might also make him king, for the essence of a king consisted in the validity of his acts. Merely taking the title of king, or being set up by a corrupt party, meant that the usurper was *tyrranus de titulo*, but if received by the people and placed on the throne, he was made king de facto and his acts were valid with the same force as law. So far as the statute in question was itself concerned, this was a clear avowal that the power of legitimation lay in Parliament.

It is not to be supposed, however, that, either in the mind of Pufendorf or of his commentator, was there any idea of an international legitimation of the usurper. The principles which they outlined were confined to this process as a matter of municipal law. Although Pufendorf could not give up the idea that a form of sanction of the usurper's right could take place only by the express act of the legitimate ruler, Barbeyrac pointed out the circumstances in which such a legalizing process might take place entirely independent of the private action of the dethroned monarch. This is significant because it shows that the idea of a private law of princes was falling into decay and that the more enlightened political ideas of the century were making some advance even in the restricted spheres of international law. Barbeyrac's outline of legitimation is *prima facie* a postulate of the principle of popular sovereignty, but it in no way supplanted the legitimist principle. This continued as a practical political actuality with unabated vigor. Even Vattel, who stands as the most enlightened exponent of the

international law of the day and who wrote just prior to the first revolutionary outbreaks of the latter eighteenth century, was completely influenced by these ideas. He attained however, a more modern view of the historic method than his predecessors. The recent precedents of the English Commonwealth and the Netherlands gave him a basis upon which to base his conclusions.

The ideas of Vattel [1] on legitimation were developed from the passage in Pufendorf cited above relative to the slight concern which strangers should take in changes within a state. Basing his discussion on the question whether foreign nations might receive or send ministers to a usurper, a query to which the historical events of the past century had given practical significance, Vattel concluded that actual possession must be the rule in cases of this sort, as this was agreeable to the law of nations and to the independence of states. This rule, however, was qualified by the fact that a decision should depend upon whether or not it was to the interest of the state. But, "as foreigners have no right to interfere in the domestic concerns of a nation, they are not obliged to investigate and scrutinize her conduct in the management of them, in order to determine how far it is either just or unjust." [2] A state which has changed its sovereign, therefore, is considered by other states thenceforward as free and independent; indeed, any other course might be looked upon by this state as a *casus belli.* In support of these views, Vattel cited the reception by Mazarin of Lockhart, the representative of the Commonwealth, and the recognition of Charles, Duke of Sudermania, as king of Sweden.

It is clear that Vattel laid down with distinctness a de facto theory of recognition. The historical events of the

[1] Vattel, *Le Droit des Gens* (Leiden, 1758), IV, v, 68.

[2] *Ibid.*

past century had taught that, although the absolute monarch might theoretically deny the right of a usurper or a new government which had come into being through revolution, the exigencies of international intercourse made necessary a relationship with such a government. Vattel, with great appreciation of historical fact, developed the ideas of his predecessors into the theory which we have just examined. This was made possible chiefly by the great stress which he laid upon the independence and equality of sovereignties, a principle which made a de facto recognition a logical conclusion. If we remember, however, that Vattel adhered with great faithfulness to the identity of sovereign and sovereignty as first laid down by Grotius, it becomes evident that a de facto theory in the purest sense was an impossibility. As he himself admitted in his introduction, the law of nations was the law of sovereigns, that it was for them and their ministers that it ought to be written, and he expressly excluded it from the domain of popular application. From this it followed that a recognition of a revolutionary régime was quite without the range of international possibilities. Nor does it appear that Vattel's principles were followed by the rulers themselves. The fact that in the discussion preceding French intervention in the American Revolution no mention was made of these ideas, indicates that they were regarded, if not as subversive of the existing system, at least as removed from the field of public law.

Vattel was the last of the great constructive publicists. Shortly after the appearance of his celebrated work, international law experienced a remarkable change. Hitherto it had been restricted in its development to the speculations of philosophers and jurists within the limits of the existing system of public law and politics. With the outbreak of the American Revolution, it passed more definitely into the

field of political realism. At the same time old ideals and standards fell into disuse, and in their stead were developed new principles such as the changing political conditions demanded. It is not to be supposed, however, that the ideas of the publicists were completely discarded. On the contrary, they formed a basis upon which later policies were evolved. Thus it was with the theory of recognition. I have pointed out the many indications of such a principle in the early history of political thought and of international law. None of them reached a full florescence, because, in spite of the complete theoretical justification furnished by the principles of independence and equality, the one necessary political condition, the sovereignty of the people, was lacking. Legitimacy had forced an identification of sovereign and sovereignty. It was when this confusion was swept away and the idea of sovereignty was definitely severed from personality that a situation was created which furnished at once the necessity and the justification of recognition as a concept of international law and as a matter of practical diplomacy. It is at this stage that legitimacy after a brief revival in its dynastic form became a definite theory of international law, a theory of legitimacy of existing governments and states as against all changes in political form. In this sense it was directly contrary to the principle of de facto-ism, and in this form it has not ceased to reappear.

CHAPTER II

The Theory of Recognition

The element of formal wrong which characterizes the birth of a new state is not necessarily the result of open force. Even where the existence of a new polity is the definite result of peaceful process, it inevitably violates the former order, whether by a constitutional or territorial change, in such a way as to be conceived as extra-legal. Since a norm of law is in itself complete and can contain no provision for its extension and no justification for its violation, the formation of any new political organism necessitates an exclusion of all legal qualification. We have seen how this question of formal wrong troubled the early writers on the subject, and how upon the basis of natural law they sought to find a sanction for a condition not justified by positive human law. The solution which they evolved was one of municipal law, closely bound up with the prevailing ideas of legitimate right which lay at the basis of their constitutional system. In this sense it was not a solution at all, but a confession that they were not able to penetrate beyond the purely objective legal facts. At the same time, an attempt was made to deal with the question upon the basis of international law, but these efforts likewise proved unsuccessful, because even here the influence of the theory of legitimacy was predominant.

The relation of the facts of international life to juristic theories is so faint, for the system is one essentially opportunistic in its nature, that any philosophic justification

which we may evolve for recognition is necessarily only by way of explanation. Because it is an historical growth quite free from *a priori* legal conceptions, the recognition problem is one of such inconsistencies that no rule can be laid down to cover all contingencies. What I aim to do in the succeeding discussion is to find a rational answer to the chief difficulties of the question, upon the basis of purely subjective thought. I do not claim that the solution which I present is final, but it may indicate the general lines upon which the theoretical dilemmas of the case may be settled. I shall first take up the question of the recognition of states, and later show to what extent these principles are applicable to a recognition of governments.

As it was originally conceived, the problem of the recognition of states was simple enough. It grew out of acknowledgments of changes in government, and, following the principles applied in such cases, the act of recognition was merely an acknowledgment of a new state of facts, an indication that the recognizant [1] desired to enter into regular diplomatic relationships with the new polity. This policy was a logical result of the principles of popular sovereignty, and I suppose that if the conviction of the fundamental truth of these principles had continued with unabated vigor, the question of recognition would never have become such a complicated legal question. The principle of legitimacy which had prevented in the first place a solution of the difficulty was developed as a counter-theory in definite protest against recognition in its pure de facto form. This at once brought into question the nature of the recognition process. Was it a legitimation of a status

[1] In the succeeding discussion I shall use this term to mean the state which grants recognition. "Parent state" will apply to the political organism from which the new state originates. "Third states" will refer to all other states.

for which municipal law had no sanction? Was it of constitutive force in making what was not a state, a state? Or did it merely extend to a political body, which by the fact of its existence was a state, participation in the rights and obligations of international law? Some decision must be made before we can proceed to observe the development of the political phases of the question. As a matter of legal theory, the recognition problem involves nearly all the principles which we regard as fundamental to our system of international jurisprudence. Furthermore, since, as I have said, recognition of states as a legal principle owes its development to political exigencies, we must carefully distinguish between these two elements. Stated briefly, our problem is this: What is the juristic nature of the newly created state; what is its relation to the international system; what rôle does recognition play?

In the first place, as I have indicated, a state can never have a juristic origin, but is always the result of some extra-legal process which can find no sanction in existing rules. It is primarily an historic growth to which law later attaches but which it can never create.[1] Such a conception necessarily excludes the possibility of applying a higher law, to which the natural law school traced its origin. It regards the state purely as the result of purely political[2] forces, and in this light it is necessary to ascertain at just what juncture law is supposed to enter into question. The *de facto* existence of a state, if it is to be taken legal cognizance of, can be treated only in the light of its juristic capacities. In saying that the new state is completely formed when all the essential elements which we regard as appertaining to statehood are present and when it is thus

[1] Jellinek, *Das Recht des Modernen Staates*, p. 267.

[2] In this chapter I use political as opposed to legal. The new state is a purely political organism before law attaches.

capable of exercising the functions of a state, we mean that it has passed beyond the status of a purely physical force and that certain legal characteristics have attached themselves to it. It is important to remember that the new state, as we are dealing with it here, is not an entity fully endowed with all those qualities which the abstraction "state" necessarily implies. But as it is in the process of formation, it is rudimentary, a transitional stage in which fact and law are scarcely distinguishable.

There are two constituent factors in the formation of all law.[1] One is the normative force which is contained in the purely factual, the other the exact reverse, the tendency of conviction in abstract norms to be realized in concrete form.[2] As regards the first conception, law is to every people that which is in fact practiced as law. Continuous practice produces the conviction in its normative character until the point is reached where the norm which is produced is looked upon as the authoritative command of the community. This is essentially the nature of customary law. An illustration of the legalizing force of facts is seen in the growth of any fashion. A particular sort of clothing is worn not because of the command of authority, but because constant use has given it a certain obligatory character. It is quite possible that a permanent condition may have as much normative force as a recurring series of facts. In ultimate analysis it is not the recurrence in which the normative quality is inherent, but it is the static element which remains unaffected by the variations of repetition.[3] This is of great importance for the relations of the state to the international community.

[1] Jellinek, *op. cit.*, p. 329.

[2] *Ibid.*, p. 336.

[3] Such variations are precisely the centrifugal forces which inhibit the normative tendency.

In healing the breach of municipal law caused by the formation of a new political organism, our theory of the normative force of fact comes into play in a very effective manner. The theory of legitimate right, whether opposing change in state or of government, relies upon the uninterrupted recognition of the existing state of facts for its support. This continued observance has created the norm which is the legitimist right. The revolution comes about and overthrows this right, for such it has become from universal conviction. It is in this sense that the change is a violation and the new state of facts which it creates is, as against the previously existing right, mere physical force. In the transformance of this formally illegal situation to one of law, the normative force of fact is of the greatest importance. Here lies the only possible legitimation of a purely de facto government from the point of view of the internal constitution. It is noteworthy that in the last analysis both the legitimist claims and those of the de facto-ists rest upon an identical basis. The legitimists insist that the de facto basis of their régime has become invested with a legal character. But they add to this claim of legality the idea of immutability. It is specifically this latter characteristic which the de facto-ist denies. His claims rest upon the principle that once the facts upon which the rule rests are removed, the rule itself is bound to disappear, for it has lost its *raison d'être*. In place of the old situation a new condition of fact has been created, and this alone, by virtue of its normative character, possesses the truly legal quality.

These tendencies do not completely heal the breach. As I pointed out in the previous chapter, the right which the formation of a new state violates is closely allied to the current conception of natural law whence it theoretically derives its indefeasibility. It is precisely this reliance upon

a preconceived law beyond human agency that is meant when we speak of the other factor in legal growth, the tendency to transform into concrete fact a conviction in abstract norm. Thus, as we shall see, the conviction in the sovereignty of the people was realized in concrete governmental form.

Natural law [1] derives its power from the conviction in its validity and, partly through actual legislation and partly through a tacit observance, it becomes positive law.[2] To my mind, the conception of a natural law, in whatever form it appears, is the idealistic element which no other factor in the law supplies. The conviction that such a law is binding, without any judgment upon its fundamental truth, is sufficient to give it legal force. This is exactly the nature of its operation in the development of the theory of legitimacy. We need only recall the rôle played by the *jus divinum* in the Middle Ages to understand how potently *a priori* conceptions of this sort may react.

It is not necessary that these convictions should be limited to the *status quo*. If we accept the view that natural law is the idealistic motive among the law-creating forces, we can understand that not even this, any more than the law which fact produces, can be absolutely permanent. This is illustrated by the fact that while legitimacy remained firmly embedded in European public law both as a result of actual circumstances and the conviction of its moral binding character as a higher law, there was a concomitant growth of another natural law ideal, the sovereignty of the people.

[1] *Cf.* Bergbohm, *Jurisprudenz und Rechtsphilosophie* for a good discussion of what natural law means to our present systems.

[2] We cannot look upon the conviction of a higher law as a medievalism which historical jurisprudence has successfully abolished. Call it what you will, the natural law is an ever present element in the legal forces of to-day. Legal science may explain and deny its existence, but it can never destroy its potency.

When the final struggle comes between any *de jure* or legitimist régime and the new de facto order, there is not merely a struggle between contending facts, but also a definite clash between the higher law upon which each party bases its right. The outcome of this latter struggle is dependent primarily upon the settlement of power. It must be noted, however, that in the case of the legitimist, the divine right and other medieval paraphernalia have been by historical process transformed into a definite legal order. This is not the case with the opposition, for it must depend upon its de facto existence in order to give to the abstractions upon which it in turn rests, reality as law. The strength of legitimism is that it is established. Inherent right springing from a higher law and gathering political reality by historical process, is the character of the norm which any change in the established order inevitably overthrows.[1]

Any violation of *status quo* is revolutionary, and if its justification depends solely upon that which is contained in the law which fact creates, we should have a constant procession of changing rights, each of which produced a self-contained justification.[2] This would absolutely prohibit any legal continuity. In its place there would be a lapse into a chaos of conflicting rights. It is the fact that the opposing as well as the existing order contains the conviction of its necessity which operates to heal the breach and to cure the formal wrong with which a change is inevitably accompanied. We must note, however, that here is the prime difficulty which attends any process of legitimation. The refusal to admit the legal quality of the new justifica-

[1] It is precisely this element which was of great importance in earlier history. In more recent times the tendency has been to emphasize the element of fact.

[2] Jellinek, *op. cit.*, p. 344.

tion impliedly affirms the illegitimacy of a new régime. It is only through the acceptation of the ultimate right of the latter that legitimation as a matter of internal law actually takes place.[1]

It is upon these grounds, therefore, that changes in the existing internal régime are legitimized. These may be either changes in state or in government. In either event the legitimist principle is active, and the same process is necessary. The private right which may be violated in the case of a monarch does not concern us here, for it has lost its original historical significance and bears no relation to our problem. It is of greatest importance, however, to the international side of this question that we appreciate the exact nature of the process of legitimation. To summarize, I have tried to show that from a purely formal point of view a legitimation is excluded, but that, by legal process, although the legal order may be violated, this violation is self-healing by virtue of the two great motive forces, the normative power of facts and the transformance into political reality of abstract legal principles. Furthermore, the process which goes on is necessarily a rapid one, for in the case of a political organism the necessity of immediate legitimation is overwhelming.

Up to this point in the discussion I have indicated only the breach of internal order, but this break is not confined merely to the state itself. From the very nature of world society, it is inevitable that some disturbance should take place in the existing international system. This is true not so much from the juristic nature of this society as from the historical heritage of the days of the early publicists. I pointed out in the last chapter the exclusive nature of the family of nations during the seventeenth and eighteenth

[1] We may note that no sooner is this process accomplished than the new régime itself becomes legitimate in the narrow sense.

centuries. Even until late in the nineteenth century it retained its ancient feature of restriction to the Christian nations of the earth.[1] An intimate part of the system was, of course, the principle of legitimacy. The tendency of sovereigns to exclude from international law those governments or states which had violated this system was not overcome either by the American or the French Revolution. Indeed, this principle, generally repudiated and condemned, has been expelled from international law, but with wonderful persistence has clung at least to the diplomacy of the present day, and *de jure* governments or parent states feel themselves no less injured by the "recognition" of new orders than they did a century ago. For these reasons it is inevitable that the idea of legitimation should creep into international law and that some writers should go even to the extent of attributing this function to the recognition process. This is not altogether unjustifiable, but on strictly legal grounds there is no violation of legitimate right in international law, for legitimacy exists only as a theory of policy and not of law. As I have tried to point out, the whole process takes place within the state itself. No international right is violated and it is clear that the new state enters upon its existence as a new juristic person. The legitimizing process which has gone on in its own law has definitely severed it from the previous régime both in internal and external relationships. In so far as its status in international law is concerned, since it has not proceeded beyond the mere de facto, there must be a period of transition in which the law is indeterminate.[2]

In the period between the destruction and the establish-

[1] Turkey was not formally admitted until 1856.

[2] Jellinek, *op. cit.*, p. 346, also *Gesetz und Verordnung*, pp. 297 *et seq.*; *contra* Laband, *Das Staatsrecht des Deutschen Reichs*, vol. iv, p. 537.

ment of the new order, despite the normative quality of the new state of facts, it is inevitable that there should be a period of comparative lawlessness, a period in which political forces alone predominate. No one can deny that de facto relations must always precede the norm which they produce. If a province secede from the parent state, the disruption creates a condition of bare political fact until law finally attaches. It is, of course, problematic just to what extent there is a complete break in internal order. Certainly, in the case of a secession by revolution, even if the same organs of government continue to function under the new régime as under the old, the legal break [1] would be none the less real despite the continuation of the exercise of functions from the point of view of fact. An order of things in which there was no legal break would be in complete contradiction to actual political life. But no sooner is a provisional government established than this break is mended.

There is an analogy between the breach in municipal law and that which takes place in the international order. In the latter case the break is more noticeable because the international system is loosely jointed. This results from the nature of international law, for the system depends in last analysis upon the self-imposed restriction of sovereign will by the subjects and not, as is the case in municipal law, upon the commands of superimposed authority. It is only by these restrictions that a subject of international law is created. Previous to this process there must have been a period when obligations were indeterminate.[2] I can

[1] A *complete* break is conceivable only theoretically, but there is in reality only a partial break because certain functions are resumed almost simultaneously.

[2] This is emphasized by the fact that "recognition" is regarded as having a retroactive effect.

think of no better illustration of this preliminary period of lawlessness than the problem which the question of state succession presents, a problem which clearly indicates that there can be no inheritance of the international obligations which the state may have enjoyed in any previous form or political manifestation.

I have said that as a rule states come into being either as the result of violent disruption from an existing political body, or by the union of several sovereign elements into a single sovereignty.[1] It is quite clear that, if we admit that there is a complete succession to the general international rights and obligations as well as to the treaty obligations of the parent or constituent states, there can be no break in the legal continuity of these relationships; and that, as a matter of fact, the new state continues in the same status as its predecessor. If we admit, however, the definitive severence of the old municipal law relations of the new state and the parent state or states, it follows as a logical necessity that the international relations have likewise come to an end, because international law is essentially individualistic. Since its restrictions are the restrictions of a self-controlled will, it can only apply to what this will controls. This is further illustrated by the fact that where, by reason of violent disruption from the parent state, the new state has enjoyed under the law of war certain objective international relationships, these relationships immediately lapse upon the cessation of hostilities, and hence would bear no connection to the succession of previous international obligations of the parent state.

There are occasions when the new state will be obliged to perform international duties which were binding upon

[1] Huber, *Die Staatensuccession*, tries to develop a sweeping rule of succession, pp. 136 *et seq.*

the parent state.[1] It does not succeed to them in the character of a legal heir, because all connection with the parent state has ceased, but in the character of a new legal subject. They are binding upon the new state because it has agreed to accept them, for, as a matter of law, the latter does not obtain its sovereignty from the parent state.

It appears from the foregoing that there is a period in the life of a new state when the formal law is indeterminate. It is here that the question of recognition is of significance. I have already said that the recognition process is not one of legitimation, because this takes place within the state itself. Nor am I inclined to go as far as those writers who, basing their views upon theories of natural law,[2] seek to give recognition a constitutive force, an institution by which the state is raised from a condition of pure lawlessness into one of legality. Furthermore, I do not think that we can relegate the recognition process to the category of a mere formality, a consecration of what it already possesses. It is neither a right of the new state nor a free act[3] on the part of the state which grants it. In other words, since all depends on the situation of the new organism directly after it becomes, from the point of view of its own law, an independent political entity, this period is neither one of anarchy nor is its legal character at once defined. It is in reality a period of transition, the ultimate result of which depends upon what I have already indicated as the nature of the international subject.

We assume as fundamental to our discussion the necessity of international relationships.[4] Long ago the theory

[1] Schoenborn, *Staatensukzession*, pp. 71 *et seq.*

[2] Pre-eminently Pradier-Fodéré, Lorimer, Phillimore, Bonfils and Fiore.

[3] Jellinek is the most eminent representative of this view. Also Le Normand, *La Reconaissance Internationale.*

[4] Jellinek, *Die Lehre von den Staatenverbindungen*, pp. 93 *et seq.*

of the isolated state fell into disrepute, and to-day even those writers who are most susceptible to the influence of natural law cannot admit that a state may exist apart from surrounding political bodies. All states in the proper sense are sovereign, but none of them enjoy its unrestricted use. It is the realization of the fact that the basis of society is not one state, but a collectivity of states, that has brought about a self-imposed restriction upon the unlimited power which the sovereignty implies. It is the self-denial of unrestrained political power, born of the consciousness of the community of states, which creates the law upon which international relationships rest. It is important to note that this law is self-imposed and that it is only by this self-sanctioning process that it is binding. This is the tribute which international law pays to the doctrine of sovereignty.[1] The fact that international law depends on the will of the subjects does not affect the absolute obligation of the norm which it creates, for no matter how often a state may violate a norm of this system it would never dare deny its validity. Since the norms of international law are not the result of some power above the state, states cannot be qualified in the same way that individuals in a state are.[2] Hence, although we admit the inevitability to any state of the international order, we cannot say that a state is born into a society of nations in the same way that a person is born into the world with necessary adherence to the *status quo*. It is possible that civilized states may exist in a community of uninterrupted continuity,[3] as history has shown to be the case, and we may argue that for this reason the

[1] It is in no sense a mutual give-and-take of the rights of sovereignty as it is often described. This is a point of great importance.

[2] Jellinek, *System der Subjektiven Oeffentlichen Rechte*, p. 300.

[3] *Ibid.*, p. 298. The inevitability of the international system is in no sense the inevitability of "social forces," as Huber describes it.

international system is as independent of the wills of the single members as a state is independent of the conscious will of the individual, but this explains only the historical phase and does not answer the legal problem of the extent to which the will of the participants is to be taken into account. It is exactly this dilemma, the inevitability of the international system, the right of the state to adopt this order as an act of free will, which makes the international position of the newly created state so difficult to comprehend. It shall be our task to ascertain the exact character of the situation. The problem is intimately connected with the nature of international laws themselves.

Regarding the general character of these rules, we may distinguish first those which may be denoted as the general customary rules of international law, and second, those which depend upon agreement.[1] Although the ultimate explanation of all law may be the fact of agreement to it, the psychologic process varies. An agreement is made because the parties wish to bind themselves, but a norm is customary because the participants believe themselves already bound by it. This difference is further emphasized by the fact that adhesion to a customary rule is never by agreement, because this of necessity implies an element of mutuality. It is solely by a recognition of the existence of the rule and a declaration to be bound thereby. Furthermore, in agreement there is an element of creative

[1] Heilborn, *Grundbegriffe des Völkerrechts*, pp. 37 *et seq.* This classification is rejected by Triepel (*Völkerrecht und Landesrecht*, pp. 88-89) on the ground that, since in ultimate analysis all norms of international law are dependent upon some form of agreement, even those norms which we usually regard as customary cannot be distinguished from those which depend upon some more formal sort of agreement. Triepel's view is not without some justification, but he fails to grasp the basic difference between customary law and that based upon agreement.

will which in the case of customary law is of no significance. It is important to keep this distinction in mind, because it forms the basis for the solution of our problem.

I have already said that the favorite description of recognition is that only after this process a state becomes a state in the international sense. To my mind, we cannot give to the recognition process any such constitutive force, for it implies that there is a period of lawlessness, the length and extent of which corresponds as little with theory as it does with fact. Furthermore, it is a denial that the system of international law is a self-imposed obligation of states and seeks to make what must necessarily be the act of the individual state the result of the act of third states. It would give it the character of a super-imposed legal order. The logical outcome of the dilemma is that in so far as international law is the result of custom and not of agreement, and hence does not require a mutual expression of adhesion, it must be by the free act of the state; and in so far as other states are concerned, their participation in the entrance of the new state into this legal status is to acknowledge this fact and to bind in accordance therewith their own wills.

It is precisely this act which produces a legal community from the purely political de facto.[1] It is not necessary that this acknowledgment be express or formal, but it may follow simply from practice. This is by virtue of the principle of the normative force of facts. I have shown how the violation of formal right is healed as a domestic matter by this principle. In a certain sense it applies equally to the break in international continuity. Two elements, the nature of international obligation and its necessity to the state combine to reinforce this principle and to make the

[1] Jellinek, *System der Subjektiven Oeffentlichen Rechte*, p. 299.

new political organism a member of the international community. The international relationships which affected the people or the territory of the new state under the old régime were legal because of the facts which conditioned this status. So far as the new state is concerned, these facts having been swept away and new circumstances having arisen in their place, the old law has likewise been abolished. By virtue of the normative quality inherent in the new situation, the international order, so far as it is dependent upon the will of the state itself, because of its necessity becomes binding.[1]

[1] It has been pointed out by Huber (*Jahrbuch des Oeffentlichen Rechts*, vol. iv, p. 51) that in the establishment of the modern international system the conviction that the legal community rested upon the recognition of the common law by the states has passed away. The common law, says he, has become objectivated and is looked upon at the present time as a unified complexity of legal principles, so that "the totality of the subjective rights and duties governed by objective common law passes over in the newly-organized state." He holds with other writers that the recognition which consummates the admission of the new state into the society of nations is not primarily a recognition of common international law, but a recognition of the new state personality on the part of existing states. The recognition of the norms of customary law is a mutual process and is a matter of secondary importance, taking place by tacit implication. The only compulsions which Huber recognizes are the so-called social forces which contribute to the formation of international law. These, he thinks, are of sufficient force to override completely the subjective nature of participation in international law. It will be noted that Huber's views are contra to the ones which I set forth. His great error rests in making the nature of international relationships social rather than political or legal. Although I recognize the significance of these forces, they cannot explain the legal phenomena of the international system.

The social forces furnish the base upon which the subjective rule is conditioned. To assert that here is the ultimate source of relationship is to seize the obvious without regard for its basic justification. The state is essentially a subjective unity, although it has in society its objective reality. Its relations with other subjective unities must be of this subjective character. This is the nature of the international relations between states. It is primarily a legal relationship, for only thus

The position of the new state in relation to the international system is not one of admission into a society. This is the fundamental error into which Huber and a great many other writers have fallen, and as long as this view persists we cannot understand the true relationship. When the new state has come into being there is, as has heretofore been pointed out, an indeterminate situation in the existing international order. From the purely juristic standpoint, the whole subsequent relationship between the new state and the existing system is an attempt to reestablish the legal continuity. The most potent argument in favor of the participation of the new state itself in this process is the fact that the period between its existence as a state from the point of view of its internal constitution and the so-called recognition by third states cannot be, as far as policy is concerned, a period totally devoid of law. To accept the doctrine of creative recognition is to deny this proposition. A protracted period without law in the international sense would mean what outlawry means in private law, that the new political entity might be subjected to violence at the hands of other states and in general be treated as beyond the pale, without such treatment being in any way a violation of the international obligation of the third state. This is the theoretic dilemma into which the principle of creative recognition necessarily leads us, particularly where it is regarded as equivalent to an introduction into an existing society. Moreover, the fact that informal relationships are always maintained between the

does the subjective element find its fullest expression. Huber's system excludes the element of the self-imposed restriction of will and attaches to itself a character of super-imposed law inevitably propelling a state into relations with other political bodies irrespective of its own will. It is difficult to see wherein his "social forces" differ from the higher law of the natural law writers of a previous century.

new state and members of the existing system indicates that it is not only theoretically impossible for such an interval of absolute lawlessness to exist, but also that international relations make some legal connection imperative. We find the explanation for this in the fact that the international community in the juristic sense is not an order which exists for individual states, but is a general legal system complete only in universal participation.

It is clear from the foregoing that it is impossible to leave out of consideration some participation by other members of the international system in the legalization of the de facto community. These states are an integral part of this system and must inevitably be affected by the assumption by the new state of international rights and obligations. This latter process has taken place as a matter of internal development, just as legitimation of the new régime is accomplished from within and not by international acts. Although this is true, the effects are not limited to the state itself, as in the process of municipal legitimation, but from their nature include other states in their operation. In a certain sense, therefore, the participation by third states in the complete legalization of the de facto community is not only an acknowledgment of the fact that the internal process of transformation is over and that the new state by its acceptance of the customary rules of international law is a legal equal, *but its definite juristic meaning is that in so far as a third state is concerned, it will recognize to be binding upon itself those obligations which the new state has assumed.* As a secondary effect, this process also serves to extend to the new state, so far as it itself assumes them, those norms of international law which are dependent upon agreement. Hence, just as the action of the new state in accepting the rules of international law has been a definite restriction of its own will in conformity with the

existing order, the second part of the process of legalization is a similar binding by the members of the international order to respect the new state in the capacity it has assumed.

This is the only interpretation of the recognition process which conforms to the principles underlying international law. Recognition is not, however, in any sense an agreement.[1] It has been said that agreements in international law may be either in the nature of contract treaties or those which are declaratory of law.[2] In the former case there is a union of wills for the object of satisfying conflicting purposes, and for establishing a concrete legal relationship. Such an agreement would be a commercial treaty or consular convention. In the agreement declaratory of law, the purpose is a common one and the union of wills seeks to establish an abstract rule for the lasting relationship of states. The prohibition upon privateering by the Paris Declaration of 1856 may be cited as an example. The practical importance of this distinction is that the rules of contract would apply in the first case, but are of no significance in the agreement declaratory of law. In both cases, because agreement is the expression of a union of wills, the possibility of rescission is implied. For what one sets up one can destroy. It is the result of the element of

[1] This is the view of Triepel (*op. cit.*, p. 102). He bases his case upon what we have already seen are his views on the nature of international rules. The distinction drawn between agreements here, is a much controverted question. Bluntschli (*Das Moderne Völkerrecht*, p. 5) was the first to indicate the difference between the two forms of international agreement. In his footsetps followed Bergbohm and Binding and a host of other jurists. The opposition to these views is strong and because of its possible deep international effects the doctrine promises to be a disputed point for years to come

[2] *Cf.* Heilborn, *op. cit.*, p. 40; Triepel, *op. cit.*, pp. 49, *et seq.* Jellinek, *System der Subjektiven Oeffentlichen Rechte*, p. 193.

mutuality upon which agreement is founded. Although the object at which each type of agreement is directed is different, in either event rescission is possible.

Recognition bears little relation to these theories, for it is the result of an entirely different psychological process from that by which an agreement is reached. It is in essence an independent act on the part of all the parties concerned, and partakes at no time of the element of mutuality or of the union of wills. Whether it is the act of the new state or of the third state in restricting their respective sovereign wills, in either case this act is directed solely to the satisfaction of the interests of the state which imposes such an obligation upon itself. In other words, since the underlying purpose of recognition is one of self-interest, it is unaccompanied by those psychological factors which are necessary to agreement. I can think of no stronger argument to urge against the agreement theory of recognition than the fact that it is not an act which admits of the possibility of rescission. If it were such, we would have the strange situation of a state refusing to be bound by the international rights and obligations which it had recognized in the other party. This is what is generally spoken of as a withdrawal of recognition, a matter which the theory of constitutive recognition would readily admit. The relation once established is perpetual, conditioned only by the existence of the states which participate therein. Hence it cannot be changed by the act of any state concerned. Even in the event of a state's going to war with another, this does not deny the perpetuity of the relationship, but on the contrary serves only to strengthen it.

I do not think that we can regard the recognition by third states as a declaration of status. This would imply an obligation of superimposed will, which does not accord with the fundamental ideas of international law. It is true

that in practical operation the process amounts to this—a declaration of fact—but the essential element in the legal development is the declaration by the third state in turn to be bound thereby. The mere declaration of fact does not affect the legal situation. It is the second declaration which serves to establish between the new state and the state which makes it, the final formal relationships necessary to the conduct of international affairs.

In the sense that the declaration by the third state is itself an imposed obligation of will, it must be a formally free act on its part. This does not affect the de facto relationships which are carried on before this act takes place. Just as there is a certain international necessity which compels the new state to bind its will, so this same compulsion operates upon third states. This is illustrated by the fact that a third state may lay itself open to retaliation for a persistent refusal to acknowledge the existence of a new state and to declare itself bound by this fact.[1] Finally, so far as the norms are concerned which are dependent upon agreement, it follows that when the process of legalization is complete the basis is present for the mutuality

[1] An illustration that the new state possesses complete international capacity before the declaration by third states is the case where "recognition" is made by treaty. It would be a contradiction of fact to say that only at the completion of the treaty was the new state completely legalized, for unless it possessed in the first place international capacity, the third state could not deal with it as a legal equal. Hence the conclusion of a treaty would *ipso facto* be impossible. Moreover, we must remember that the synonym of recognition is the descriptive term "acknowledgment of independence". This in itself expresses the fact that the new state at the time of the final act by the third state exists in a legal capacity. Finally, I may indicate the fact that the corollary of the de facto principle is the principle of non-intervention. This principle is based on the thought that the new state has in its own hands the ordering of both its national and its international destiny and that no other state on the theory of self-restriction of sovereignty may interfere with it.

which adherence requires. This is, however, an effect of the final declaration by the third state and does not affect the main problem. To sum up, recognition by third states is a self-imposed obligation to regard as binding those processes which had gone on within the new state itself. It is this act by which the legal breach caused by the creation of the new state is formally healed.

There is one more point to be settled before we have disposed of the recognition of states. This is the question of conditional recognition.[1] It can be readily understood that such a process is impossible under the system which I have outlined. Excluding the element of the independent expression of will of the new state, it reduces the process to one of complete constitutive force, and makes of it an instrument for enforcing the demands of the recognizant state. This is something which recognition should never be and which is, in my mind, a total repudiation of the fundamental nature of the process. It may be noted that on what is generally supposed to have been the greatest occasion of its use, the recognition of the Balkan States by the Treaty of Berlin of 1878, the condition was a condition of guarantee and not a conditional recognition.

The question of the recognition of governments is a matter quite different from the recognition of states.[2] We have present a breach of constitutional law, but there is no break in the legal continuity of international relationships. So far as the explanation of the facts relating to the formation of new states is concerned, they do not apply here. To my mind, the recognition of governments is purely a

[1] Rivier makes a nice distinction between modal and conditional recognition. *Principes du Droit des Gens,* vol. i, pp. 60-61.

[2] The best discussion of this is in Rougier, *Les Guerres Civiles et le Droit des Gens,* p. 483 *et seq.; cf.* also Funk-Brentano and Sorel, *Precis du Droit des Gens* (3rd ed.), p. 209, who go much too far.

formality, and attempts to make it something different are born of a misconception of the relations between the state and government. Changes in governmental forces are merely changes in the internal order, and although governments are the direct bearers of international rights and obligations, they are not a part of the international system in the sense that states themselves are. For this reason changes in the form of a state cannot affect the obligations themselves, a truth which is contained in the ancient maxim, *forma regiminis mutata non mutatur civitas ipsa.* It follows from this that the only international question to which a change of government gives rise is, what authority is vested with the capacity to carry on international relations? It is important to note that this question can occur only where there is a conflict of authority. Where there is no struggle between the old and the new régime, the international relations should proceed as if there had been no change. It is usually the case, however, that there is a conflict between the government which has been ousted and the new order. Third states must in their own interest decide which body represents the state in its international capacity. Preëminently a matter of policy and expediency, since the juristic entity is unaffected, changes in government are treated generally as questions of fact. The old order is to be followed in so far as it is capable of continuing previous functions. If the new government is a body which in fact alone can carry out the international obligations of the state, it should be recognized as legally charged therewith. This is the essence of the so-called de facto theory of recognition. It takes as its basis of judgment the power to carry out international obligations. It ignores the legality of the government and it is not necessary that a greater part of the nation render obedience. The rapidity with which governments sometimes change has

given rise to the necessity of a distinction between *de jure* and de facto governments, a distinction which places the burden of proving the better right upon the new order. This division, which is of some political importance, is of no legal significance, but it shows how easy it is for the principle of legitimacy or its modern form, legality, to maintain its sway in the field of diplomacy.

As we shall presently see, the de facto theory of recognition developed as a theory of governmental recognition and is an excellent example of how an abstract legal concept may be realized in fact. Even the earliest instances of its existence show it as a deduction from abstractions like the sovereignty and independent right of the states. The theory of legitimacy, with which it naturally came into conflict, represented the right based upon fact; and if it had not been that the de facto theory had foundation in something more than abstraction, it might have met with less success. As it was, it coincided more with the changing international conditions. Legitimacy often in the guise of legality has made its last stand in the theory of the better right of the *de jure* government. It is just this fact that the *de jure* government is believed to have the better right which has led to the misuse of the process of recognition, causing me to wonder whether it would not be well definitely to limit it or to do away with it so far as governments are concerned. It is but natural that there should be a feeling of conservative solidarity among existing governments, and that they should dislike any change in the *status quo*. For this reason their opinion always favors the *de jure* government. Because recognition of governments, though a mere formality, is generally considered to be a necessity, foreign powers by making recognition of new governments conditional, frequently extort from new de facto organizations concessions which they otherwise would

not obtain. This policy gives to an almost meaningless process a constitutive force which it does not and should not possess, and which is inconsistent with the facts of international existence. Moreover, during governmental changes, relations are continued informally in the same manner as if no change had occurred. This indicates the absurdity of laying too much stress upon recognition of governments.

I have tried to make clear the distinction between the recognition of a new state and a new government. The law now governing the former is historically an outgrowth of the latter, and for this reason confusion often arises which is difficult to explain. Briefly, the difference is that in the case of the state the process is one of deep legal significance in which both the new state and the powers of the existing system share. The recognition of governments is a question of policy, a diplomatic formality without any underlying juristic portent. Finally, I may repeat what I have already said, that the theories which I offer, in ultimate analysis, are merely an attempt to find the satisfying explanation for legal phenomena which grew up or were evolved to fit given circumstances without reference to any underlying justification, in such a way as to have little of the fixity which we regard as necessary to law. It is only by lifting recognition from the realm of unrestricted policy and giving it a more definite legal significance that we can sever it from the principle of legitimacy and can assign to it its proper place in international jurisprudence.[1]

[1] I have avoided discussing promiscuously the theories of publicists. This was well done by Le Normand. The theories which I do take up, are those which appear to me the most dangerous or which are the most recent. I have also, purposely, left out the hackneyed discussion of premature recognition, and the relation between the parent state and the new organism. These points have been argued over until they have become axiomatic.

PART II

CHAPTER III

Intervention and Recognition in the American Revolution

The originality which has characterized American diplomacy, both in the conception and in the development of its policies, is nowhere better illustrated than in the evolution of the doctrine of recognition. The same naïve but vigorous theories of individual and political freedom which found their first concrete expression in the foundation of our state were the point of departure of a theory of international individualism which has dominated our foreign policy for the past century, and which has frequently had a profound effect in shaping the destinies of other states. The advent of the United States into the family of nations brought simultaneously a demolition of time-cherished traditions which had governed both the internal and external politics of European courts with almost the same infallibility as the law of gravitation; but in their place were raised new ideals of law and of diplomacy which, as their fundamental principles were more widely accepted, became an acknowledged part of international jurisprudence. Nor is it strange that a nation which had come into being through a violation of the principle of legitimacy should govern its future conduct by this fact and make its international mission the propagation of doctrines which would completely supplant the ancient system of European public law. This has been the significance of American diplomacy in the nineteenth century. By consistent practice it has lent to philosophic abstractions a normative force which

they seldom enjoy, and has given to the policies by which it has sought to promulgate these principles a permanency which has lifted them from out the sphere of mere opportunism. It is true that temporary deviations have frequently occurred, but these have usually been mere phases of development, the result of momentary exigencies, and in the end the original *motiv* has been returned to.

These tendencies stand out very early in our history as an independent nation, and they seem all the more remarkable to us now when we consider the almost primitive state of the law and of diplomacy of the period just preceding. This is a fact which is not generally appreciated and there has been a disposition to misconceive the significance of the Revolutionary diplomacy as affecting our later history. This has been particularly true of the recognition question. It has been traditional among historians and publicists to regard the acknowledgment of the independence of the American colonies by France, if not as a perversion of the recognition principle, at least as a very fine example of premature recognition which presaged the growth of the de facto theory. This belief has had a pernicious influence, not only upon all discussions of this question, but also in some instances upon the action of states themselves. The question of recognition never was a clean-cut issue either as between the negotiating parties or as between Great Britain and France. No one thought of a simple recognition without associating it with active intervention and participation in the affairs of the belligerents. When the acknowledgment of independence itself was finally made, the two ideas were so inextricably inter-related that they were not distinguishable. As I have pointed out, recognition as a separate concept was a thing unknown not only to the law, but also to the diplomacy of the time. The effect which the action of France had upon later develop-

ment in international law would never have taken place but for the inaccurate beliefs which have persisted for so long without correction. It is, therefore, chiefly to correct these views and to indicate the state of the recognition concept previous to the establishment of the American republic that we shall examine the intervention of France into the War of Independence.

To understand fully the political events of the American Revolution, and especially its diplomatic history, it is necessary for us to comprehend first of all the character of the legal system which was supposed to govern the relations between the European states. This system was, as we have seen, in the nature of an exclusive set of rules which applied merely to the states of western Europe. These rules were rigid, and lacked anything like consistent application. In fact, the whole diplomacy of the time aimed to evade or to violate them as much as was consistent with political safety, with the result that there existed a régime of policies rather than of laws, and one which pretended an observance of forms rather than the spirit of international equity. This state of affairs was conditioned chiefly by the fact that the governments of the time, even in their most liberal manifestations, were centered in certain small groups of individuals. We find a narrow egoistic political system in which personal animosities and family ties were of prime importance and in which the idea of nationality and popular consent to which modern international law owes so much, was of very little consequence. But if, on the one hand, the legal system itself was rigid, on the other hand the restraints upon political manipulations were inconsequential, and we have a freedom of diplomatic manoeuvre which has rarely been excelled and which would eventually have produced a profound effect on the development of law but for the desultory fashion in which it was carried on.

Whenever the principle of self-interest unalloyed by ideas of national self-abnegation exists, there is a natural trend toward political opportunism. In eighteenth-century Europe, however, this system did not run to the excesses to which such a *laissez faire* conception naturally leads, but was controlled by the powerful convictions which existed in the theory of legitimacy. I have already indicated the rôle which this doctrine played in the history of European thought and political action, and it was still the keynote of the system of international jurisprudence when the first revolutionary conflict began.

The Seven Years' War was brought to a close by the Treaty of 1763, by which France surrendered practically her entire possessions in the Western Hemisphere and in return was left with only a burning desire to be avenged for her losses. This feeling at first found no violent expression, for the war had left her in a weakened condition, having seriously crippled both her military and her naval strength. But these material considerations did not prevent her from nursing her grievances and looking forward to the day of reckoning. In 1774, Count Gravier de Vergennes was installed as Minister of Foreign Affairs, and he set about to find some means of satisfying the national honor.[1] The policy of Count Vergennes portended essential changes in the map of European alliances. The Seven Years' War had left France and Spain still closely united with Austria as a more distant and less enthusiastic ally. On the other side were ranged Prussia and Great Britain, with neutral Russia tending more toward these countries than towards France. Count Vergennes, who cherished no illusions concerning the sanctity of international friendships, foresaw that England was to be success-

[1] *Revue Historique*, vol. xiv, p. 241; vol. xv, p. 1. Also Wharton, *Diplomatic Correspondence of the American Revolution*, vol. i, § 50.

fully combated only by isolating her from her Prussian ally and leaving her in as vulnerable a position as possible. This task was not difficult, for the Anglo-Prussian friendship was cooling and Frederick the Great, with his evident leanings toward Gallic culture and thought, proved open to suggestion. Count Vergennes became an enthusiastic Prussophile, and his Austrian-loving master, Louis XVI, was left to support this alliance for which he himself felt little sympathy and which accorded little with his plans. It took two years to accomplish these schemes, but the diplomacy of Count Vergennes was so successful that the outbreak of the American Revolution found England without any warm friends on the continent to whom she could turn for support, but with a great many enemies who would be glad to contemplate her humiliation. At the same time, in the Colonies themselves, French agents had been active, and when actual hostilities at length began Count Vergennes was surer of the political complexion of America and of the probable trend of events than anyone in Europe or in that country itself. Indeed, his policy toward the Colonies was so definitely outlined even before they declared their independence that it awaited merely the development of events to bring about its consummation.

Two memoranda which were drawn up in March, 1776, will throw light on the general outlines of French policy.[1] One of these papers, which Doniol[2] attributes to Maurepas, embodied certain general principles by which French policy was to be guided. In the first place, England was to be kept quiet at the start to avoid the growth of hostilities to France, but indirect aid was to be furnished by the

[1] Stevens, *Facsimiles of Manuscripts in European Archives Relating to America*, 1773-83, nos. 1320 and 1316.

[2] Doniol, *Histoire de la Participation de la France à l'établissement des Etats-Unis d'Amérique*, vol. i, p. 284.

latter to the American insurgents, and preparations were to be made for active and open participation in the struggle by getting into shape both the army and navy. No treaty, however, was to be concluded with the rebels until they had declared their independence. Finally, the memorandum indicated that steps must also be taken for dealing with the British in India. The other document which was drawn up by Count Vergennes was a careful study of the political situation and its probable consequences, and the advantages which would accrue from the independence of the colonies. His conclusion was that in almost any event war with England would be inevitable, and his outline of policy was practically identical with that attributed to M. Maurepas. In addition, however, the Count pointed out that it would be incompatible with the dignity of the King, as well as with his interests, to enter into a treaty with the insurgents. Apart from the fact that such an arrangement would be of value only in the event that they became independent, it would necessarily depend upon the disposition of the Americans to abide by it, and upon the changes in British administration which would eventually lead to a reconciliation on the basis of the Act of Navigation. "Such an arrangement," he concluded, "can only be solidly founded on respective interests, and it seems it would not be time to examine this question until the liberty of English America has taken positive consistency."

The memorandum of Count Vergennes was sent to Turgot for an opinion,[2] which he rendered April 6, 1776. The Comptroller-General, who was not influenced by the same phantasms of patriotic revenge as his colleagues, urged many objections against a quarrel with Great Britain, chief

[1] Stevens, *op. cit.*, no. 1316.

[2] Turgot, *Oeuvres* (Daire ed.), vol. ii, p. 551.

of which were the economic reasons. His views were plainly not in accord with those of his colleagues, but his paper, which was certainly the soundest of the three, was without lasting effect on the situation.

In America it was believed that France's desire for revenge would outweigh every other sentiment; and the anxiety to secure her support was increased by the expectation that the negotiations would comprehend Spain as coadjutor, a rôle which the apprehensive Bourbon then on the throne steadfastly refused to perform, although he maintained a nominal adherence to the Family Compact. The Continental Congress, however, decided to send to France an agent, and selected for this purpose Silas Deane, of Connecticut. The instructions given by the Committee of Secret Correspondence, in which was vested the conduct of foreign relations, left nothing to be desired in the way of explicitness.[1] He was directed to appear in Paris in the rôle of a private merchant and arrange for an audience with Count Vergennes, to whom he was to present his letters of credence and

> then acquaint him that the Congress, finding that in the common course of commerce it was not practicable to furnish the continent of America with the quantity of arms and ammunition necessary for its defense (the ministry of Great Britain having been extremely industrious to prevent it) you have been dispatched by their authority to apply to some European power for a supply. That France had been pitched on for the first application, from an opinion that if we should, as there is a great appearance we shall, come to a total separation from Great Britain, France would be looked upon as the power whose friendship would be fittest for us to obtain and cultivate.

The commercial question was to be expatiated upon, and

[1] Wharton, *op. cit.*, vol. ii, pp. 78 *et seq.*

in case the Count should appear reserved, Deane was instructed to make his visit short.

If at some future conference, he should be more free, and you find a disposition to favor the Colonies, it may be proper to acquaint him that they must necessarily be anxious to know the disposition of France on certain points, which, with his permission, you would mention, such as whether, if the Colonies should be forced to form themselves into an independent State, France would probably acknowledge them as such, receive their embassadors, enter into any treaty of alliance with them for commerce or defence or both?

Despite the detail into which these instructions went, it is obvious that the actual powers given Deane were very small indeed. As a matter of fact, he was sent out as a sort of advance agent to prepare the way for such negotiations as the Congress might in future see fit to make. The most interesting part of his instructions refers, of course, to the question of recognition. At the time when this paper was drawn up independence had not yet been declared and there existed some doubt as to whether this measure would be resorted to. Indeed, it appears to have been referred to as a remote contingency for which France's attitude would be of some moment in determining. The fact is also to be noted that the acknowledgment of independence was treated as intimately related to the question of alliance—a matter which will stand out more prominently as we proceed.

Deane arrived in Paris in July and undertook his duties with much enthusiasm and some success. He at once entered into relations with the celebrated intriguer and dramatist, Beaumarchais, who was then serving in the capacity of confidential agent of the government and who until the arrival of Franklin had exclusive charge of shipments of

arms and supplies to the warring colonies. Beaumarchais initiated the newly-created diplomat into the politics of the court and introduced him to M. Gérard, principal secretary to the Council of State and an intimate of Count Vergennes, who had been designated as the chief go-between in the negotiations. Deane's interview with the Minister of Foreign Affairs himself took place on the 1st of July. In this, as he later informed the Committee of Secret Correspondence,[1] he followed the lines which his instructions had laid down. Count Vergennes refused to commit himself definitely on any subject. He admitted the advantages of commerce and indicated that the court had ordered the ports to be open equally to Americans and to the British and that, although the war-like shipping could not be openly encouraged, no obstruction of any kind would be put in the way. As to independence, however, "it was an event in the womb of time and it would be highly improper for him to say anything on that subject until it had taken place. . . ."

Deane seems to have been thoroughly satisfied with the results of his interview, and he continued to carry on commercial projects and to enlist the sympathies of the French people and the court in the progress of events in America. His diplomatic negotiations were severely handicapped, however, by the scarcity of instructions and of news from home. This is a dilemma in which the agents of new states frequently find themselves because of the inexperience of new governments in foreign affairs. There are many instances in which negotiations have suffered practically a suspension from the want of proper intelligence from the petitioning state.

In the meantime unofficial reports of the declaration of

[1] Wharton, *op. cit.*, vol. ii, pp. 112 *et seq.*

independence reached France, reports of sufficient certitude to cause a change from the hitherto apathetic policy of the government to one of greater vigor. The great concern of Vergennes now became, since the event for which he had been waiting had actually occurred, to prevent on the part of England a recognition of this independence and a reconciliation on this basis; for such a policy would not only destroy all chances for commercial preferment, but would effectually postpone the opportunity for revenge. This stands out both in his instructions to the ambassador at London [1] and in the "Considerations" read to the King in committee on August 31, 1776, on the course to be followed toward England.[2] This document was, perhaps, the first definite political result which the declaration of independence produced in France. It followed in the main the same outline as the previous memoranda of Maurepas and Vergennes, but contained a lengthy disquisition on the subject of intervention, the logical necessity of which both the European and the American situation favored. This discussion was, however, a mere review of policy; legal questions, including any possible violation of international law, were conspicuous by their absence. There is no indication of how these views were accepted by the council, but that they were less favorably received by the King than is generally supposed [3] is evidenced by the fact that a month later a new memorandum was prepared by the celebrated Pfeffel, jurisconsult in the Foreign Office, on the right of the colonists to revolt and the right of France to assist them.

[1] Stevens, *op. cit.*, no. 1351. Instructions to the French representative at London.

[2] *Ibid.*, no. 897.

[3] Doniol, *op. cit.*, vol. i, p. 577.

This flow of arguments, of "reflexions" and "considerations," addressed to the King indicate that, although Vergennes had prepared his plans with great care, he had not succeeded in fully winning over the King who, as I have said, was pronouncedly Austrian in his leanings and was opposed to any scheme of the prime minister which would mean a separation from these old ties. In fact, the rôle played by Louis XVI has often been disregarded as insignificant, yet he held in his hands the right of decisive action, for until his consent was given the ministry could not take action.

Deane likewise contributed his share to the documents intended for royal advice and counsel. He prepared a number of memoirs which were presented to the King. One of these pretended to be a project[1] for a treaty between France, Spain and the United States, and was drawn up by him, without instructions, from certain ideas of his own. It is interesting to note that this project contained also a stipulation for the recognition of the colonies, which is significant for its conception of the obligation which this act entailed upon the recognizant state: "The Thirteen United States of North America shall be acknowledged by France and Spain and treated with as independent states, and as such shall be guaranteed in the possession and dominion of all that part of North America on the Continent which by the last treaty of peace was ceded and confirmed to the crown of Great Britain."

While Deane was carrying on his publicity campaign, events in America were moving with great rapidity. On September 26, 1776, the Congress proceeded to organize a regular commission[2] to effect the recognition by France of the newly declared independence, and for this purpose

[1] Stevens, *op. cit.*, no. 595; *cf.* also 594.

[2] *Journals of the Continental Congress*, vol. v, p. 827.

Deane, Franklin and Jefferson were chosen; the latter, however, refused the charge and in his stead was selected Arthur Lee. The instructions which were given the new commission were definite. Briefly, their mission was to secure not only an acknowledgment of independence and the conclusion of a treaty with France, but they were to secure the same from other European states. In regard to this the instructions read: "You shall endeavor when you find occasion fit and convenient to obtain from them [European states] a recognition of our independency and sovereignty and to conclude treaties of peace, amity, and commerce between their princes or states and us, provided that the same be not inconsistent with the treaty you shall make with his most Christian majesty." [1] In addition, Franklin was furnished with the draft of a proposed treaty with France, the negotiation of which he was to secure and which purported to be a purely commercial treaty. The treaty of alliance was left to the discretion of the envoys with the sole restrictions which had been placed upon them by the instructions relative to the commercial treaty. It is really strange that such latitude was given the commissioners in this matter when the commercial treaty, which was indeed of comparatively little political significance, had been labored over by Congress for many months. In the original draft of instructions which had been debated in Congress there were a number of paragraphs which had dealt with these questions, but these passages were either thoroughly altered or completely expunged.

Early in December, Franklin arrived in Paris and was joined shortly by Lee. The work of winning over the French government began in earnest, and in the negotiations the chief part was played by Franklin. Deane busied

[1] Wharton, *op. cit.*, vol. ii, p. 172.

himself more particularly with commercial transactions in contracting for arms and for supplies, while Lee, whose talents were apparently appreciated by neither of his colleagues, made it his business to create dissension between the commissioners, until he was finally gotten rid of by being sent first to Madrid and later to Berlin. On December 23d, the American representatives formally requested [1] an interview of Count Vergennes, and five days later they were received at Versailles in secret interview. It does not appear that any definite promises were made, but the report sent to the Secret Committee was that the meeting was satisfactory. Shortly thereafter a request for a formal interview was made, but this was refused.

It would be tedious to recount minutely the progress made by the commissioners toward a recognition of their republic.[2] The interviews held with the Minister of Foreign Affairs and the Count d'Aranda, Spanish ambassador at Paris, were frequent, and the memoirs and memoranda prepared for the consumption of Council and King were even more numerous. At this time the decided reverses to Colonial arms in the regions about New York were perhaps the most serious obstacle to securing French aid. Count Vergennes was ready to disregard any questions of de facto existence despite the material effect of the defeats of the Colonials, but the other significances which these defeats contained were of more moment to him. Victorious England meant, in his eyes, speedy reconciliation, and the grave doubts which he entertained as to the sincerity of the enthusiasm for independence served to check any premature action on his part.

On December 21, 1776, the commissioners were in-

[1] Wharton, *op. cit.*, vol. ii, p. 239.

[2] Doniol, *op. cit.*, vol. ii, pp. 118 *et seq.*, for detailed account.

formed [1] by Congress that all views of accommodation with Great Britain were at an end, except on principles of peace as independent States and in a manner perfectly consistent with the treaties the commissioners might make with foreign states. On the 30th the commissioners were urged to secure at once the recognition which they had been sent to petition: [2]

Upon mature deliberation of all circumstances Congress deem the speedy declaration of France and European assistance so indispensably necessary to secure the independence of these States, that they have authorized you to make such tenders to France and Spain as they hope will prevent any longer delay of an event that is judged so essential to the well-being of North America. Your wisdom, we know, will direct you to make such tenders to France and Spain as they hope will procure the thing desired on terms as much short of the concessions now offered as possible. . . .

As these instructions did not reach the commissioners until long after they were written, they served merely as confirmatory authority for what the commissioners had already done. I have indicated that the recognition question had never been a clear-cut issue, but that even during the Deane mission, when the political issues were less distinct, it had been vaguely bound up with the idea of a political intervention. Neither had this question been of preëminent importance. What Deane had been instructed to effect was a commercial understanding. Franklin's mission was to realize this in treaty form and to secure the active interference of France. Nevertheless, previous to the arrival of the latter in Paris, the recognition question may have been of some formal significance, for it had been

[1] Wharton, *op. cit.*, vol. ii, p. 229.

[2] *Ibid.*, p. 240.

referred to in the discussions. But after the first meeting with Count Vergennes the negotiations passed very clearly from out this embryonic stage and were conducted on the basis of active interference. It is to be remembered, therefore, that subsequent references to recognition were in fact references to intervention, and that if a recognition question *per se* had ever existed it had long since disappeared.

In a memorandum [1] prepared by Franklin, Deane, and the Abbé Nicolini, elaborately arguing the question of French intervention, there are some illuminating remarks on this subject. Said the paper:

But if, after all, the government of France should choose to depend on accident for *safety*, rather than *secure* it, by a short and successful war, the wisest plan of conduct will be to engage some of the powers of Europe to recognize the Independency of the Colonys; perhaps the Emperor, the King of Prussia with the Grand Duke of Tuscany, might be induced to Concur with France in making such a recognition. Were it, however, made by but a few of these powers, they would be too many for Great Britain to Quarrel with together, and if made in the same manner and the same time by them, their offense would be so far equal, that she could not have pretence for resenting it against any one of them separately. Such a recognition would encourage the Colonys so as that they would reject any offer of accommodation with Great Britain, all Europe would moreover, see by it that she had for ever lost Her Trade and possessions in America and consequently that she must hereafter be unable to pay even the Interest of her Publick Debt. It would therefore destroy her credit and disable her from not only beginning a war in Europe, but from prosecuting that which she is prosecuting in America. This recognition would, therefore, be attended with no danger to the

[1] Stevens, *op. cit.*, nos. 149 and 150.

powers which should concur [1] in it but on the contrary it must contribute to their security; and as it would cost nothing but words the Colonys might certainly expect so much countenance and aid from those who will profit so highly by their separation from England. But should it be otherwise determined and should Great Britain be thereby left to become the first state which acknowledges the Independence of the Colonys, they may think lightly of their obligations to other Powers, and may again admit her to a greater share of their Commerce and Friendship than will consist with the prosperity or safety of France and Spain.

The terms in which this document was drawn up substantiate what I said above about the existing conception of recognition and its relation to intervention. An acknowledgment of independence was not at the cost of a few words, a formality which gave to the subjects of the new states rights hitherto not enjoyed by them and to the state itself a prestige which strengthened its international position. It was essentially a declaration that the recognizing state extended to the new organism certain definite guarantees of existence. If we keep this in mind, we can understand what a tremendous step in international development took place when these two conceptions were separated. But this was a service rendered only after the foundation of the American republic.

In the negotiations which were carried on simultaneously with Spain and Prussia, more particularly the latter, the recognition question was not so inevitably bound up with that of intervention. Here the colonists did not seek to establish an alliance, but sought rather for recognition of their political existence in return for commercial preferment. The situation differed, however, in each case. The affairs of Spain were bound up to some extent with those

[1] This word is almost illegible in the facsimile.

of France, and there existed a general certitude that the course taken by France would be adopted by her ally. Count d'Aranda,[1] Spanish minister at Paris, was quite in accord with the plans of Vergennes; but the court of Madrid, after vainly attempting to act on its own initiative, was finally drawn in with France. At first it participated in the loan which Vergennes made to the colonies and showed a favorable disposition toward the revolution, but as the war progressed and the revolt revealed itself to be deep-seated, Spain attempted to escape from the alliance which was proposed for her by France, but wherein she saw the danger of sanctioning principles the establishment of which would mean her own undoing as a colonial power. The sending of Lee to negotiate with Spain was not a particularly fortunate choice, but the commissioners were anxious to be rid of him, and the general opinion was that

[1] There is a prevailing impression among historians that Count d'Aranda was violently opposed to the independence of the United States. The basis of this belief in the celebrated memorial which d'Aranda presented to the King of Spain upon his return to Madrid, in which he deplored the independence of the colonies and the action of France in assisting them, alleging that he himself had advised against such a course. This document is a complete denial of any activity by the Count in aiding the colonists' cause. There are many notes and despatches which prove the contrary. Montmorin writing to Vergennes, January 28, 1778, of an interview which he had had with Florida Blanca communicating the resolution of the French government to enter into alliance with colonies, quoted Florida Blanca as saying, "M. de Aranda is of your opinion, he has contributed much to make you adopt the resolution which you have taken. Well, let him come and take my place, but it is true that the King, my master, will never consent to it." Montmorin then proceeded to remark, "His Catholic Majesty and M. de Florida Blanca are very embittered against M. de Aranda; there is a conviction that he has urged you as much as he could to the course which the King has taken." (Stevens, *op. cit.*, no. 1850.) There is no doubt but that d'Aranda played a double game, first supporting the colonial cause in Paris, but later, finding opinion at home against him, completely reversing his position.

the real seat of negotiations would be in Paris. Lee never reached Madrid, for he was met at Vitoria by the Spanish minister, Grimaldi,[1] to whom he had presented a memorial asking for Spanish recognition and interference. The reply made by the Duke, as recorded by Lee, was an emphatic refusal, which he explained first because of the war then going on with Portugal, secondly by the unpreparedness of France, and finally by the fact that the treasure ships from South America had not yet arrived. He indicated, however, that probably in a year these reasons would cease. It is interesting to note that similar explanations were given to France.

The United States did not allow the matter to rest. Diplomatic bait was held out first in the promise to invade the Floridas for the benefit of Spain, and later, when the anxiety for an alliance reached a high pitch, in the offer to assist in the subjugation of Portugal. But Spain never recognized the colonies, although she participated in the war against England. It was only after the conclusion of peace that she entered into official relations with the United States.

Tht Prussian situation was of a different character. I have indicated that Vergennes had succeeded in alienating Prussia from England, a task which had been facilitated by the natural dislike which Frederick had for his English allies. Prussia, however, from the beginning appears to have decided upon a neutral position, although on various occasions[2] it was announced that her action would conform with that of France. When Lee arrived in Berlin, however, he was informed by Count Schulenburg that Frederick was bound by his treaty with Great Britain not

[1] Wharton, *op. cit.*, vol. ii, p. 282.

[2] *Ibid.*, vol. i, p. 445; vol. ii, pp. 457 and 473. These assurances were given even after Lee's papers were stolen, but they must not be taken as defining the attitude of Prussia.

to interfere in the affairs of the colonies or to have any relations with them which would imply an acknowledgment of their independence.[1] If Frederick had any disposition to encourage Lee, this was rendered impossible by the theft of the latter's papers by the British minister, and although Lee loitered around the Berlin court for some time after this, he accomplished nothing.

To return once more to the principal negotiations. I have already said that the commissioners at Paris had from the very first made demands for intervention. On February 1st, as a result of the dispatch to America of new troops of mercenaries, a fresh application[2] for active participation of France was made. But this, with the pleas preceding it, was refused by Vergennes, who was awaiting patiently the propitious moment. The colonists had reassured his fears regarding a possible reconciliation with Great Britain, so that now the chief reason for delay was, first, the unpreparedness of France, and secondly the necessity of greater success to colonial arms to give the ostensible justification for recognition. England had from the first protested against the reception of the commissioners, and a host of clever spies kept the British government supplied with most minute and accurate information as to the progress of negotiations. The replies of Count Maurepas to the protests of Stormont[3] were a bland disavowal of any unfriendly intentions. In April he said to his lordship:

We have repeatedly told them [the United States], you call yourselves an independent State, but you are not so; when Great Britain has *acknowledged* that Independency, then we will treat with you, but not before; at present you are at War

[1] Wharton, *op. cit.*, vol. ii, pp. 350 and 370.

[2] Stevens, *op. cit.*, no. 659.

[3] *Ibid.*, no. 1512. Stormont to Weymouth.

with your Sovereign who by no means admits the Independency you assume, if you become a free independent State like Holland we will then make any Treaty of Friendship or Commerce, that shall be for our mutual Advantage, such a Treaty under these Circumstances would be agreeable to the Law of Nations, to every Principle of Good Faith, but it would be contrary to it now.

The final result was not, however, long to be postponed. Two events occurred in close succession which brought the French policy to a head. The first of these was the news of the surrender of General Burgoyne's army at Saratoga in October, the first great military triumph of the revolution; the second was the growth of a strong reconciliation movement in Great Britain, which later culminated in the Commission sent over in 1778 to effect a settlement. The victory at Saratoga gave Vergennes the chance which he had long been awaiting, to declare the de facto existence of the new republic, and the movement in England gave him cause to hasten his intended action, to prevent the upsetting of his plans by a prior recognition of American independence by Great Britain. Now, if ever, the time was ripe for recognition.

This resolution was reached early in December. In a statement dated December 6, 1777,[1] in the hand of Count Vergennes and approved by the King (which Doniol describes[2] as the memorandum of a conference between the two), it was pointed out that up to this time circumstances had prevented formal negotiations with the Colonies, but that as they now appeared favorable to the establishment of an understanding between the Crown and the United States, "His Majesty will not be averse to listening to

[1] *Stevens*, op. cit., no. 1762.

[2] Doniol, *op. cit.*, vol. ii, p. 625.

such proposals as the Deputies may have to make for him, to examine them and to lend himself so far as the state of things will permit, to giving them and the United States marks of his affection and interest." The possibility of joint action with Spain was also discussed. A few days later Vergennes, writing to Montmorin,[1] remarked that the first power to recognize the Colonies would reap the fruits of its action, and hinted that the surrender of Burgoyne might induce England to give up the war. For these reasons the King had decided to establish regular relations with the Colonies, but desired to act only with the coöperation and sanction of the King of Spain: "The recognition of American independence, if it is to be published, will only take place at the time which will suit his Catholic Majesty's interests." The hoped-for coöperation with Spain did not, however, materialize, and on December 17th M. Gérard[2] informed the commissioners, as they later reported: "by order of the King that after long and full consideration of our affairs and propositions in council it was decided, and his Majesty was determined to acknowledge our independence and make a treaty with us of amity and commerce; . . . that his majesty was fixed in his determination not only to acknowledge but to support our independence by every means in his power." Following this event the negotiations both by the treaty of commerce and the treaty of alliance proceeded apace. The English government at once got wind of the whole affair, but when Lord Stormont demanded explanations, Count Vergennes vigorously denied the establishment of relationships with her colonies.

The treaties of alliance and commerce between the

[1] Stevens, *op. cit.*, no. 1769.

[2] Wharton, *op. cit.*, vol. ii, p. 452.

United States and France were signed February 6, 1778.[1] There was no direct reference to recognition in this treaty, but in the secret treaty of alliance the King of France bound himself to guarantee the independence, sovereignty and liberty of the United States in exchange for a reciprocal agreement. The right of Spain to adhere to the treaty was reserved by special article.

It is not necessary to expatiate upon the international character of this agreement. I have already pointed out that the recognition question had sunk into oblivion from the very moment that negotiations were begun and that it was at no time the actual *point de départ* of the negotiations. Although it seems to have been frequently referred to, intervention is what was meant. The jurist of the time, if he thought at all about the matter, could separate the two conceptions only when there was an acknowledgment of independence by the parent state itself. This was due, as has been indicated, first, to the narrow scope of international law, and secondly to the fact that the idea of legitimate right was not only a basic principle of European public law but was a political reality which appeared to be indisputable. From the moment, therefore, that France evinced a certain disposition to recognize the insurgents, she was warned by Great Britain that her act would be an interference in the domestic concerns of another nation. Nor do I doubt but that, even if the Colonies had in fact established their military supremacy and the contest had been in its last stages, Great Britain would have resented with equal persistence the acknowledgment of independence. In other words, the state of the law of recognition necessarily implied that the initiative rested with the parent state and that any action on the part of another state was a violation

[1] Wharton, *op. cit.*, vol. ii, p. 490.

of international obligation. In the present case, however, a de facto principle was avowed to some extent by the fact that France felt obliged to withhold her intervention until the Colonists had achieved some signal success. At the same time, this point must not be emphasized too greatly, for the necessity of a victory was of greater significance to the diplomacy than to the legal aspects of the question. This case, then, does not stand as a precedent either for recognition or for premature recognition, but was from the very first a matter involving simply the doctrine of intervention. I must therefore urge strongly against any pretence such as has been frequently made to treat this case as an example of premature recognition, for this is ascribing to it a character which it never possessed.

The same points which characterized the French negotiations stand out in the transactions with other nations. I have already indicated how matters stood in Prussia and Spain. In the latter state new agents were later sent, but the basis of negotiations was upon intervention and aid, since Spain was at war with Great Britain at the time. In Russia, Austria and Tuscany, American emissaries met with cool receptions. In the former state Dana was permitted to reside, but Russia absolutely refused to recognize the new republic.[1] Even the pleasure of a residence was denied by Austria and Tuscany, who could see in a recognition only the sanctioning of the abhorrent principles of revolution.

The only other state to recognize the United States during the revolutionary war was Holland. This recognition was brought about by such peculiar circumstances that it cannot be distinguished from an act of intervention. From

[1] Wharton, *op. cit.*, vol. iv, *passim*.

an early period in revolutionary diplomatic activity agents, chief among whom was the indomitable Dumas, had been busy in the Netherlands endeavoring to raise money and to interest the States in the American revolution. So great was the chaos of contending factions in Holland, however, that there was little substantial progress. In 1778, William Lee concluded [1] with the Grand Pensionary of Amsterdam a draft of a treaty with Holland, wherein the latter recognized the United States but stipulated that this recognition was to be dependent upon a previous acknowledgment by Great Britain. This paper had in itself no diplomatic significance, for it was not in any way binding upon the States General. Lee deluded himself into thinking he was giving valuable diplomatic service. In October, 1779,[2] Henry Laurens was commissioned by Congress as Minister to the Netherlands, and among the papers which he bore with him was a copy of this agreement. Unfortunately, the vessel in which Laurens sailed was captured by the British, and the bag of papers, which he had thrown overboard, was rescued and carried to London. As soon as the supposititious treaty was discovered, the British government made a peremptory demand for explanations from the States General, to which the latter refused to accede. After some desultory hostilities, war was finally declared.[3]

It was after these events that Holland recognized the independence of the Colonies. John Adams was commissioned as envoy to the States General, but he experienced some difficulty in attaining his ends. This was due chiefly to the presence of a powerful pro-English party in the country which was endeavoring to avert the disaster of war. Although the State Friesland had declared early in 1781 for

[1] Wharton, *op. cit.*, vol. ii, p. 789.

[2] *Ibid.*, vol. iii, p. 394.

[3] *Ibid.*, vol. iv, pp. 151 *et seq.*

the United States, the States General at first refused to receive Adams when he presented his letters of credence, on the ground that the state which he represented was not recognized as an independent nation. Undaunted, Adams set to work to accomplish not only the acknowledgment of his state, but, what was of more importance, the conclusion of a treaty of commerce and alliance. A memorial which he prepared appears to have been of some effect in exciting the states to action, and on February 26, 1782, the state of Friesland again declared in favor of recognition.[1] The other states of the confederation soon followed suit, and on April 22d Adams was presented to the Prince of Orange, thereby completing the recognition.[2] It is interesting to note that the formal resolution of the States General which finally brought this about made no reference to the independence of the United States, but merely sanctioned the reception of Adams as minister of this country. The treaty of commerce and the convention on recaptures were signed October 8th of the same year.

Even in this instance we do not find the question of recognition as a basis of discussion. On the contrary, the conclusion of treaties was what Adams was instructed to accomplish, and although the completion of this act would amount to a recognition, this question was not of primary importance, for by entering into relations when they were already at war with Great Britain meant no material loss to the States General but, on the contrary, was a source of strength. Nor do the discussions relative to the negotiations reveal any disposition to treat the recognition problem in any different form than it had previously been handled. To recapitulate briefly, we find the theory of recognition a doctrine as yet undeveloped even as a part

[1] Wharton, *op. cit.*, vol. v, p. 206.

[2] *Ibid.*, p. 319.

of the principle of legitimate right, for this idea excluded *ipso facto* the possibility of any recognition except after the parent state had so acted. It is the development of a de facto principle which brings concomitantly the growth of a recognition theory. At the close of the revolution, if there was any development in international law it was imperceptible. An incident had occurred which, as I have said, through gross misinterpretation later came to be regarded as a precedent for the de facto principle. It is in the establishment of this erroneous precedent that the French recognition of the United States was of great significance for later developments in international law. It is strange that what was generally believed to be the cornerstone of our later recognition policy should ultimately prove to have been non-existent.

CHAPTER IV

JEFFERSON AND THE ESTABLISHMENT OF THE RECOGNITION DOCTRINE

IT is not surprising that American diplomacy should have felt the powerful influence of the political theories which the Revolutionary War had vindicated and which were regarded as the foundation principles of the American state. While the struggle for independence was still going on our diplomatists had, of course, little opportunity for developing a distinctive policy, not only because the situation of the United States rendered necessary a certain deference to the system of Europe, but also because there was under the old Confederation no strongly organized foreign office to direct and formulate such a distinctive policy. Moreover, this condition of affairs apparently continued until the establishment, in 1789, of the new constitutional government, which with its strongly organized executive inaugurated a change in our attitude towards European states. This marked the advent of new ideas and principles into international law and practice, which have characterized its development during the nineteenth century. Although it was to a certain extent inevitable that, by their very existence, American ideals of individual and political liberty should have influenced the conduct of this government toward other states, for a foreign policy is after all but the external expression of internal order, yet it is of greatest significance that the first Secretary of State should be the very man who stood, perhaps more than any one else, for these new political ideas and had been the author

of their most complete expression, the Declaration of Independence. Thomas Jefferson is rightly considered the author of many of the cardinal principles of United States foreign policy. No doctrine, however, bears more deeply the imprint of his political thinking than does our recognition policy. Indeed, so far removed were his doctrines from the accepted canons of international law, and even from the recent example of the recognition of the colonies by the French government, that it is impossible to trace any relationship between the two. We are obliged to conclude, therefore, that the ideas developed by Jefferson relative to the de facto principle of recognition were of his own invention and in no way connected with previous international precedents. What, in my mind, adds weight to this is the fact that the Jeffersonian recognition policy follows in such remarkably logical order from his other political precepts that it may be regarded as belonging to the general scheme of his political thought rather than as a development from the principles of Grotius or Vattel. This is all the more noteworthy when we consider that he was a close student of the early publicists and appears to have attached much weight to their views. A discussion of the de facto theory, therefore, necessitates a brief inquiry into the political philosophy of Thomas Jefferson.

Although Jefferson's political thought passed definitely through three stages of development, it was always closely allied to the system of natural law which flourished in the later eighteenth century. His views embrace the basic principles of this school—the state of nature, the political equality of man, the contract, the consent of the governed, and, finally, the corollary of this latter proposition, the ultimate right of rebellion which formed the keynote of his celebrated apology for the American Revolution. Like the other early publicists in the United States, Jefferson,

although his debt to this school was great, was not at all subservient to the thought of Europe; but he succeeded often in breaking away from the accepted views of the Rousseauean school, and when his ideas were put into active operation in the conduct of government they were given a significance and an authority which abstract philosophy seldom enjoys. Colonial political thinking always bore the imprint of *Realpolitik* which that in Europe attained only after the French Revolution and which, therefore, lent to the American ideas a certain originality of concept which entitles them to be considered as forming a separate division of the same great movement. To be sure, it is to the religious struggles of the seventeenth century that their ideas of liberty may be traced, but it was the transference of these ideas from religious to political spheres which was the great service of colonial politics and thought.

I have already said that the Jeffersonian principle of recognition was an outgrowth of the ideas of popular sovereignty and the right of revolution. Neither of these ideas was new, but as they found expression in the Declaration of Independence, they were epoch-making. The Declaration laid down not merely the principle that men were endowed with certain rights and that the government which secured the latter was dependent upon their consent, but that it was the right of a people to abolish this government and to establish in its place a régime which would secure them their inalienable rights.[1] Government did not represent to Jefferson the residuary in which were vested certain rights surrendered by man at the time of the compact, but it served merely as a guarantee for the sum total of rights which were never surrendered. The contract, however,

[1] Jefferson, *Works* (Washington ed.), vol. i, pp. 19 *et seq.*

which Jefferson assumed to be the basis of legitimate government was not an historical fact, an agreement made in the dim past which was unalterable and adhesion to which was secured by the mere fact of existence, but he regarded it as a very vital necessity which must either submit to renewal at certain intervals or must pass through the purging process of revolution. It is only thus that it became a vital part of the political life of a people. The doctrine of revolutions which was variously developed by Jefferson is the part of his system which intimately concerns us.

Writing to James Madison in 1787, Jefferson remarked:

I hold it that a little rebellion now and then is a good thing, & as necessary in the political world as storms in the physical. Unsuccessful rebellions indeed establish the encroachments on the rights of the people which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government.[1]

Again, in the same year he wrote regarding Shay's rebellion that one rebellion in thirteen states in the course of eleven years was too infrequent and that no government should be so long without one.

God forbid, [wrote he] we should ever be twenty years without such a rebellion. . . . If they [the people] remain quiet . . . it is a lethargy, the forerunner of death to the public liberty. . . . What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. . . . What signify a few lives lost in a century or two. The tree of liberty must be refreshed from time to time with blood of patriots & tyrants.[2]

[1] Jefferson, *Works* (Ford ed.), vol. iv, pp. 362-3.

[2] *Ibid.*, p. 467.

Jefferson's vindication of the cause of revolution was as old as the *Politics* of Aristotle, but, as I have remarked before, it is the fact that he was in a position to put into operation these ideas that lends them peculiar significance. At the same time we must not forget the firmness with which the principle of legitimacy and of the immutability of dynasty was rooted in the actual political life of the time and which made the growth of new ideas so difficult. The American revolution had been the first vigorous protest against this system for nearly a century, a century in which the right of dynasties had played an increasingly important rôle. Hitherto the speculations of political philosophers had been so far removed from the actualities of political life that although the systems of thought had kept abreast of the times, the customs of existing states were hardly removed from the bonds of medievalism. The sanction of the American revolution by French recognition and intervention had marked the first step in an entire change in the public-law system. It was the French revolution which continued the process, but it was the doctrines of American statesmen which furnished the theoretical justification.

In the period between the Declaration of Independence and Jefferson's presidency, his political views did not undergo any radical change such as they later passed through. If anything, his confidence in the axioms of consent of the governed and the right of revolution were increased, and his mission to France during the early days of the revolution served to confirm them. At the same time, he acquired a sympathy for the cause of the revolution which certainly influenced his subsequent conduct toward their government. The earlier outbursts of revolutionary ardor in France did not produce such governmental changes as to render necessary a recognition of the change in form. These move-

ments were preparatory to active insurrection which finally resulted in the deposition of the king. In August, 1792. Gouverneur Morris, lately appointed minister of the United States to France, wrote that another revolution had been effected in Paris and that the issue was now between republicanism and absolutism. The king had been deposed, the new executive was a babe in arms, and, to add to his embarrassments, trouble had arisen over the payment of the debt owed by the United States to France.[1] In the existing anarchic conditions he was at a loss as to what policy was to be pursued.

In his reply, November 7, 1792,[2] Jefferson advised Morris that he would in certain circumstances be justified in leaving Paris.

> With what kind of government you do business [he continued] is another question. It accords with our principles to acknolege any government to be rightful which is formed by the will of the nation substantially declared. The late government was of this kind and was accordingly acknoleged 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 acknoleged in like manner. With such a government *every kind* of business may be done. But there are *some matters* which I conceive might be transacted with a government de facto; such, for instance, as the reforming the unfriendly restrictions on our commerce & navigation. Such cases you will readily distinguish as they occur.

With regard to the payment of debt, he had previously[3] instructed Morris to suspend payments until there were duly constituted authorities to whom this could be done.

[1] *American State Papers, Foreign Relations*, vol. i, pp. 333-4.

[2] Jefferson, *Works* (Ford ed.), vol. vi, p. 131.

[3] *Ibid.*, p. 120 (15 October, 1792).

The reason for this was not to embarrass France but to assure payments to the persons authorized by the nation.

This instruction had apparently been the result of a previous consultation with the President on the expediency of suspending the payments. Jefferson, despite his enthusiasm for the new régime, had admitted that the Assembly was not competent to give legitimate discharge for payments, but he thought that the new National Convention would be competent. The suspension was, nevertheless, ordered and Morris was instructed to effect it. Jefferson, however, had definitely determined to recognize the new government. In November,[1] Hamilton had cautioned him to proceed carefully in the matter of loans to France, in fear lest a change to the former government should result in a repudiation of the acts of the republicans. Jefferson replied that the Convention then sitting would certainly establish a definite form of government and that [2]

as we had recognized the former government, because established by authority of the *nation*, so we must recognize any other which should be established by the authority of the nation. He [Hamilton] said we had recognized the former because it contained an important member of the ancient, to wit: the King, and wore the appearance of his consent, but if in any future form, they should omit the King, he did not know that we could with safety recognize it or pay money to its order.

On December 30th[3] of the same year an instruction was sent to Pinckney, our representative in London, regarding the policy which the United States intended to

[1] Jefferson, *Works* (Washington ed.), vol. ix, pp. 125 *et seq.*

[2] *Ibid.*

[3] *Ibid.*, vol. iii, p. 500.

adopt toward France. It was impossible, wrote Jefferson, to foresee the particular circumstances,

> but principles being understood, their application will be less embarrassing. We certainly cannot deny to other nations that principle whereon our own government is founded, that every nation has a right to govern itself internally under what forms it pleases and to change these forms at its own will; and externally to transact business with other nations through whatever organ it chooses whether that be a King, Convention, Assembly, Committee, President or whatever it be. The only thing essential is the will of the nation."

How intimately this outline of a recognition policy is related to his general political thinking is illustrated by Jefferson's own comment on the letter,[1] when he remarks that he had taken occasion to lay down for Mr. Pinckney's benefit "the Catholic principle of republicanism, to wit, that every people may establish what form of government they please, and change it as they please." He admitted that he had done this to get an expression of the President's opinion, which he desired to make a matter of record. The note was approved and a similar despatch was written to be sent to Morris. This latter instruction followed almost *verbatim* the despatch to Pinckney, with one significant addition. Up to this time the State Department had received no official advice as to where the actual de facto authority was vested in France. Jefferson, with the President's consent, took the unprecedented step of recognizing a government of which his only intelligence was from unofficial sources. He wrote:

> . . . We learn that a Convention is assembled, invested with full powers by the nation to transact it's affairs. Tho' we

[1] Jefferson, *Works* (Washington ed.), vol. iii, p. 500.

know that from the public papers only, instead of waiting for a formal annunciation of it, we hasten to act upon it, by authorizing you, if the fact be true, to consider the suspension of paiment . . . now taken off . . . considering the Convention or the government they shall have established as the lawful representatives of the Nation and authorized to act for them.[1]

It seems strange that, after the liberal grant of discretion to Morris in recognizing the new republic, the question subsequently came up whether or not a minister from the republic should be received. On February 17, 1793, M. Ternant, the French minister to the United States, informed the government that a republic had been instituted in France. This was acknowledged by Jefferson, February 23, 1793, who at the same time felicitated him on the change and on the successful establishment of the principles of liberty.[2] Shortly after, this minister was recalled, and in his stead was sent the celebrated Citizen Genet. As early as March 20th, Jefferson had inquired of President Washington whether M. Genet should be received, and was given assurances that he should. Subsequently other members of the cabinet[3] likewise agreed that this should be the case. On April 8th, however, the President submitted to the cabinet a list of queries in which, among other things, he asked:[4]

II. Shall a minister from the Republic of France be received?

III. If received shall it be absolutely or with qualifications, and if with qualifications, of what kind?

[1] Jefferson, *Works* (Ford ed.), vol. vi, pp, 149 *et seq.*

[2] *Ibid.*, p. 189.

[3] *Ibid.* (Washington ed.), vol. ix, p. 140.

[4] Washington, *Writings* (Ford ed.), vol. xii, p. 280.

IV. Are the United States obliged by good faith to consider the treaties heretofore made with France as applying to the present situation of the parties? May they either renounce them or hold them suspended till the government of France shall be *established*?

V. If they have the right is it expedient to do either and which?

It will be noted that by this time not merely did the question of claims embarrass the government in regard to its recognition policy, but, in view of the foreign wars in which the French government was involved, the binding force of the old treaty of alliance was one of vital importance to the nation. If the recognition process was not consummated until the French minister was received, there was the opportunity of withholding recognition and of refusing on these grounds to be drawn into the struggle. There was the other course, however, of completing the recognition but of refusing to regard the treaty as binding. The situation was critical, for there were at stake many points involving national honor, and the choice was offered to repudiate the basic principles of our government by refusing recognition, or merely refusing to abide by the terms of the treaty. It was out of this dilemma that the second great principle of American diplomacy was produced, the doctrine of non-intervention, which has since become so closely associated with our policy of recognition. Let me state here, however, that although they were both formulated at the same time from the same conditions of fact and even from the same underlying philosophic concept, they were entirely distinct and were applied at that time without any apparent relationship one to the other. It is only later that an intimate relationship springs up between the two and the de facto theory of recognition and the non-intervention idea are regarded as necessarily correlated.

To return, however, to the discussion over the President's questions. Jefferson, who thought the matter settled, believed the questionnaire to have been inspired by his opponent Hamilton, who does not appear to have greatly favored the Jeffersonian recognition principles.[1] At the cabinet meeting it was unanimously agreed that the new minister should be received, but Hamilton expressed great regret that any incident had occurred which would oblige the United States to recognize the government. With regard to receiving the French minister with certain qualifications, he pointed out that in his mind the treaty was void. He advised that the minister be received, but that his reception be qualified to the effect that the United States, wishing to maintain friendly relations with France, did not hesitate to receive him in the character which his credentials imported, but that, considering the origin of the relationships between the two countries, the United States deemed it advisable to reserve for future consideration and discussion the question whether the operation of the treaties by which those relations were formed ought not to be regarded as temporarily and provisionally suspended. Hamilton urged that the treaties had been made between the United States and the King of France, and that the government existing at that time had been succeeded by a new form which he thought had been attended by circumstances which raised doubt in his mind as to its being the "free, *regular* and deliberate act of the nation," performed in such a manner as to silence all scruples concerning the validity of its acts. Under these circumstances, therefore, the United States should have the option of considering the treaties as suspended, and eventually should have the right to renounce them if such changes should take place

[1] Washington, *Writings*, vol. ix, p. 140.

as might render their continuance dangerous. He agreed with Jefferson that a nation had the right to change its form of government as it chose, but he denied that it could thereby involve other nations in the consequences. In other words, if detriment proceeded to the other contractant from such changes, the latter would have the right of denouncing the treaty. Even treaties between ***nations*** as contrasted with *governments* would not, in his mind, be void if such incompatibility should arise. After a lengthy reference to the publicists, Hamilton pointed out that the conditions in France were of such uncertain character that the right to renounce was at present suspensory, and that, pending the outcome, no definite steps could be taken. It would be carrying theory to an extreme to say that the United States were under an indispensable obligation not only to acknowledge the authority of that government, but to admit the immediate operation of all treaties.

It is important to note that Hamilton drew a distinction between the actual recognition of a government by the reception of its minister and the adhesion to treaties, but he urged that the reception be made with express reservation, a reservation which would not be inconsistent with recognition. "The acknowledgment of a government," wrote he, "by the reception of its ambassador and the acknowledgment of it *as an ally*, are things different and *separable* from each other. However, the first, where a connection before existed between the two nations, may imply the last if nothing is said; this implication may clearly be repelled by a declaration that it is not the intention of the party." [1] The payment of debt, however, would continue, it being merely a question of fact to whom such moneys were payable.

[1] Hamilton, *Works* (Lodge ed.), vol. iv, pp. 369 *et seq.*

I have entered into this discussion at some length because the events and policies which were developed therefrom have been of unequaled importance in our diplomatic history. Hamilton, although he appears to have dissevered the connection between recognition and treaty obligation, nevertheless was of the opinion that the recognition process might be invoked in determining the other question, although the recognition *per se* would not be affected by the qualification.

The proposals outlined by Hamilton did not in the least coincide with Jefferson's political views. We have seen how strongly he favored a speedy, untrammeled recognition of a new government and what an important part these ideas played in the formation of his theories on the relation of popular will to government. A qualified recognition such as Hamilton proposed was entirely out of harmony not only with his particular policies, but with the whole trend of his philosophy. He opposed Hamilton's view of the treaties in cabinet meeting. Then, in his outline of American policy, drawn up April 28th, as an answer to Hamilton's objections, he followed out the ideas which he had first laid down in his instructions to Morris.[1] In the first place, he said he regarded the people of a society or nation as the source of all authority in that nation, and free to transact their business by any agents they might think proper to delegate it to. Furthermore, they could change these agents individually or their organization, and that all acts done by them under the authority of the nation were the acts of the nation itself, and hence binding upon them despite any change in the form of government. For this reason he believed that the treaties between France and the United States would still be mutually binding and

[1] Hamilton, *Works* (Lodge ed.), vol. iv, p. 394.

that the changes which had taken place in both governments had not affected them. Upon both theoretical and practical grounds Jefferson denied that the United States were bound to repudiate or justified in repudiating their treaty obligations. He concluded that in the present situation there was no substantial legal basis for such an act. The reception of the French minister without qualification would not, said he, bring us into difficulties. "The reception of the minister at all . . . is an acknowledgment of the legitimacy of this government; and if the qualifications meditated are to deny that legitimacy, it will be a curious compound which is to admit and to deny the same thing. But I deny that the reception of a minister has anything to do with the treaties. There is not a word in either of them about sending ministers. This had been done between us under the common usage of nations and can have no effect either to continue or annul the treaties." He concluded that even if the reception of the minister were an explicit declaration of treaty obligation, it would not take from the United States the right which existed at all times of denouncing a treaty which would mean her ruin or destruction.

Jefferson's conception of the comparatively small international significance of recognition naturally led him to repudiate a scheme which would transform it into a formidable political weapon. The reception of the French minister and the acknowledgment of the new government he dissociated from the idea of right or obligation and relegated it to the category of mere formality. In previous cases of recognition which had been confined chiefly to changes in state; this question, unless it had involved action by the parent state, had, as we have seen, usually meant the active interference by the recognizant in the domestic concerns of this state, and it was perhaps with

this in mind that Hamilton had suggested that our acknowledgment of the new French government be accompanied by an express renunciation of participation in its affairs. The allies then warring on France represented in a certain sense the legitimist interests, and in view of the tensity of the situation in Europe, Hamilton felt that any declaration in favor of the republic would be regarded as an attempt to interfere. Jefferson, however, was not at all impressed with the overwhelming danger of the situation and, influenced perhaps by his interest and sympathy for the French revolutionists, proposed to carry through both the recognition and the adherence to the treaties. There is no doubt that in so far as he conceived recognition to be an independent act depending not upon the whim of the recognizing state but conditioned solely by the governmental stability of the new organization, he laid down the doctrine of de facto recognition in its purest form. Nor does it appear that, on the strict grounds of theory, his views of the binding force of treaties were incorrect. On the broad ground of reciprocal good-will and international comity, he was correct in assuming that the agreements of 1778 were still binding upon the United States, but events have proven that Hamilton's design of avoiding entanglement with European powers and entering into no embarrassing political relationships with them embodied a most sagacious policy.

Jefferson's ideas mark the beginning of the de facto principle of recognition for which the United States has usually stood, but the policy of non-intervention finds its origin in the views of Hamilton, as just outlined. I do not wish to be understood as saying that the non-intervention policy was developed by Hamilton in anything like the modern sense. In the first place, the chief point of his argument was that the United States should repu-

diate the alliance; but at the same time he indicated in a more general way what he thought should be our policy when he said: "The military stipulations they [the treaties] contain are contrary to that neutrality in the quarrels of Europe which it is our true policy to cultivate and maintain." This was a doctrine essentially of non-participation in European affairs, but if we remember the political complexion of the map of the world, the European states were the only places where a question of our interference could come up. Thus the two ideas were nearly identical. The doctrine of non-intervention, therefore, in its beginnings is really a doctrine of non-participation, and it is only later in the South American struggle that it expanded to assume the form in which it is most generally understood. It is to be noted, moreover, that although the doctrine of non-intervention in later times was based upon the same principle as our recognition policy, the consent of the governed, as it was stated by Hamilton it did not have this underlying theoretic basis but was outlined rather as a pure matter of practical policy. It is, perhaps, for this reason that it was repudiated by Jefferson—who later became its advocate on the grounds I have indicated.[1]

It is significant that, although the President appears at first to have acceded to Jefferson's views, he later came to see the wisdom of renouncing the claims of alliance by the issuance of a proclamation of neutrality, thus definitely putting an end to the possibility of the United States becoming a party to the European conflict. In May, following the cabinet meeting the President received M. Genet, the new minister, without qualification of any sort. However, when it transpired that it would be impossible to sanction the acts the latter proposed to effect by virtue of the treaty

[1] For the answer to Washington's Question 4, *cf.* Hamilton, *Works*, vol. iv, p. 396.

relationships between the two countries,[1] President Washington asked for his recall. It is not my purpose to follow further the progress of the doctrine of non-intervention. Its genesis I have already indicated; and its connection with the theory of recognition, at this time imperceptible, will stand out in the succeeding chapters. The two principles have often been thought to have been inseparable, and the doctrine of non-intervention has frequently been cited as one of the reasons for the way in which the United States has carried into effect the de facto principle. If this be so, it is an historical development, for the basic principle of de facto-ism was conceived to be the consent of the governed and the binding international force of such a decision. It furnished the sanction of the revolution for which in municipal law there was no justification.

The outlines of policy which were laid down by Jefferson apparently survived dynastic changes in the State Department. The successive transformations which took place in the French government and in the map of Europe where there was no doubt as to the de facto existence of the new government were recognized promptly by the United States, following faithfully the policy which Jefferson had outlined. Thus the recognition of Napoleon as Emperor was effected by renewing the credentials of the American minister, to facilitate which a blank form of credence was sent to be filled out in accordance with the requirements of the Empire and presented when the minister was satisfied that his government was existing de facto. A similar procedure was adopted in the case of the restoration of Bourbon power under Louis XVIII.[2] In the case of the Napoleonic dependencies, however, not all of them were recognized.

[1] Moore, *Digest of International* Law, vol. v, § 899.

[2] *Ibid.*, vol. i, p. 122.

John Quincy Adams, minister to the Netherlands, was instructed, relative to changes in the government of that country, that the policy of the President toward France had been to follow the government of the people. Whatever régime a majority of them might establish was both de facto and *de jure*, the one to which our minister should address himself. In case, therefore, a change should occur, the old credentials were to be presented unless others were demanded.[1] The government of Joseph Bonaparte in Spain,[2] on the other hand, was never recognized by the United States, nor was the Chevalier de Onis whom the legitimist Junta had sent over received by our government. The President refused to enter upon the question of *de jure* sovereignty, but, limiting himself to the de facto aspect of the situation, declined to recognize in either claimant the sovereignty of Spain until the question of possession was settled. On the other hand, the government of Murat in Italy was recognized by the United States, and rather serious consequences developed, for the restored Neapolitan government later refused to accede to the acts performed by its predecessors and it was only after a lengthy dispute that the United States obtained a settlement of claims which had originated under the Murat régime.[3]

The various recognitions which were granted during this period of upheaval represented no new additions to the doctrine which had been developed by Jefferson. But they did establish the firm basis of precedent so necessary to the development of a norm of international law and produced a profound effect upon the later policy of the United States. It is needless to say that this policy of defacto-ism was supported among the powers of the time only by the United States. Europe was then seething with legitimism

[1] Moore, *op. cit.*, p. 128.

[2] *Ibid.*, p. 132.

[3] Moore, *Digest of International Arbitrations*, vol. v, pp. 4575 *et seq.*

—Bourbon on the one hand, Bonapartist on the other—so that nowhere did our doctrines of popular consent find particular favor. It is, therefore, all the more remarkable that they persisted despite the reactionary tendencies of the times. The comparative isolation of the United States and the attitude of toleration with which the European states regarded them largely contributed to this. There was something of the defiant propagandist in the aggressive manner with which we continued to assert our views, which gave them a force appreciated when our early practice furnished Europe with precedents for the vindication of her conversion to de facto-ism.

I have not yet mentioned the theories of the recognition policy of the United States as set forth at various times by historians. The most popular, of course, is that the policy has been the result of the doctrine of non-intervention. This view I believe I have shown to be historically incorrect. Previous to the French revolution there had been only isolated and vague indications of such a policy, which assumed a concrete and official form only after the new republic had been recognized. As a matter of fact, the recognition question had been definitely determined long before the non-intervention problem arose, and it was settled without any reference to it. Another favorite statement is that the recognition policy is a part of our system of neutrality. This is but the non-intervention theory in a new guise. If we admit that the earliest expressions of principle by Jefferson were the logical deductions from his views on the consent of the governed and the right to rebel, we can see how untenable is the supposition as to the causative effect of the non-intervention principle. I do not deny that in later times this principle had some influence upon recognition problems, but it was, in ultimate analysis, an effect and not the original cause.

CHAPTER V

The Recognition of the Spanish American States

The broad foundations upon which Jefferson had based his doctrine of recognition of governments made possible a further expansion of the theory to comprise the acknowledgment of changes in state. In none of these cases which arose previous to the Peace of Vienna had there been a clearly defined issue of change in state form or of new states, although both in the Kingdom of Italy and of Westphalia such a question was open. These instances had been looked upon rather as changes in governmental form due, chiefly, to the confusion of the two conceptions. It was not until the revolt of the Spanish-American Colonies took place that a new situation arose. By this time politics in the United States had become more involved and the issues which were raised so complicated the situation that our recognition policy underwent the first of a long series of changes which have given it such a checkered career.

It was natural that the United States should follow with interest the course of events in the south. The struggle of an oppressed colony against the tyrannical mother-country was in the popular mind so like the experiences through which this country had lately passed that the enthusiasm of the time seems to have quite overlooked the fact that the southern revolutionary movement in its inception was essentially one of royalist reaction against the Napoleonic régime. That this feeling of sympathy with the revolutionists was to some extent shared by the government is

not surprising, for the exalted ideals of Revolutionary days had left men firmly convinced that the propagation of the principles of freedom and equality was to be the mission of our nation. This furnished the justification for the active participation of private citizens in the South American revolution and explains the friendly attitude of the government of the United States, which took the form of active diplomatic intercession on behalf of the insurrectos, at the same time always maintaining an ostensible policy of non-intervention.

During the Napoleonic wars there had been considerable revolutionary activity in the Spanish colonies, but it was not until the year 1811, when the declaration of Venezuelan independence had been announced to this government and recognition asked for, that the first definite political steps were taken. Although no promises were made, a conciliatory reply was given to the Venezuelans and they were informed, as Secretary of State Monroe wrote to Joel Barlow, minister to France,[1] "that the Ministers of the United States in Europe will be instructed to avail themselves of suitable oportunities to promote their recognition by other powers. You will not fail to attend to this object, which is thought to be equally due to the just claims of our Southern Brethren, to which the United States cannot be indifferent, and to the best interest of this Country."

It is possible that these instructions may have portended some active steps in the interest of the "Southern Brethren," but if so, such a policy was never realized. In his Message of November 5, 1811, Madison[2] drew the attention of Congress to the situation in Latin America, and in a rather general way indicated what he thought should be the course of the United States:

[1] Monroe, *Writings*, vol. v, p. 364 (November 27, 1811).

[2] Madison, *Writings*, vol. viii, p. 162.

An enlarged philanthropy and an enlightened forecast concur in imposing on the national councils an obligation to take a deep interest in their [the South American states'] destinies, to cherish reciprocal sentiments of good will, to regard the progress of events, and not to be unprepared for whatever order of things may be ultimately established.

The Message was referred to a committee, which reported in the form of a public declaration that Congress beheld:[1]

with friendly interest the establishment of independent sovereignties by the Spanish provinces in America, consequent upon the actual state of the monarchy to which they belonged; that, as neighbors and inhabitants of the same hemisphere, the United States feel great solicitude for their welfare; and that when those provinces shall have attained the condition of nations by the just exercise of their rights, the Senate and House of Representatives will unite with the Executive in establishing with them as sovereign and independent states such amicable relations and commercial intercourse as may require their legislative authority.

The Latin-American revolutionists may have found encouragement in these manifestations of good-will, and they may have hoped for a policy of at least diplomatic intervention on the part of the United States, to be followed by an early recognition (a thing not entirely impossible), but two events occurred almost simultaneously which ended for a period of some five-odd years the question of recognition. First and foremost was the rapid reconquest of Venezuela by Spanish troops, which completely paralyzed the revolutionary movement there until the year 1819. The second event was the outbreak of hostilities between the United States and Great Britain, which temporarily commanded the undivided attention of the United States.

[1] *American State Papers, Foreign Relations*, vol. iii, p. 538.

The signal for the renewal of the agitation for the recognition of the Spanish American colonies was the declaration of independence by the United Provinces of Rio de la Plata on July 9, 1816. This state, which had maintained since the year 1810 a de facto independence under a junta, nominally for the benefit of Ferdinand of Spain, now came out squarely in favor of independent action. From this time on the cause of revolution was pursued with greater vigor.[1]

By the month of October, 1817, the trend of events in South America had been so distinctly favorable to the cause of the colonies that Monroe, who was now President, began to give the matter of recognition his serious consideration, and the despatch of commissioners of inquiry to South America was decided upon. Previous to this time the United States had restricted its activity to the sending of unaccredited agents to various parts of the country. Among them was Joel R. Poinsett, who had been sent to Buenos Ayres as early as the year 1810.[2] The appointment of the commission was important merely as an indication of a more active policy on the part of the United States, for the members of the commission bore no powers to treat with revolutionists or to take any official step with a view toward recognition. They were charged only with

[1] Previous to the successful campaigns of 1817, which followed the declaration of independence of Buenos Ayres, the armies of the revolutionists had met with such crushing defeats on land that the war had been carried on in a desultory fashion, chiefly by privateers both in the service of the colonists and of the mother country. To a great extent the vessels of the colonists were fitted out in the ports of the United States. It was to bring about the discontinuance of these practices that the new neutrality act of 1817 had for its aim. The debates over this bill during the 1816-17 session of Congress reopened once more in the United States the question of recognition. On this bill *cf. Annals of Congress,* 14 C., 2 S., p. 716.

[2] *British and Foreign State Papers,* p. 1219 (cited *Br. and For.*).

the function of investigating the situation, and, bearing these instructions, set out on their mission in December, 1817. It may be mentioned here that there has been a disposition among writers to over-emphasize the importance of these commissions which have been sent out on various occasions to collect data on the situation in some newly-founded state. They have, in my opinion, overlooked the fact that these commissions, as a rule, were usually used as a device to postpone as long as possible a recognition which the political situation rendered for the moment inadvisable. This was certainly the case with the commission which was despatched to South America.

In the meanwhile, a preliminary cabinet discussion was held over the question of recognition. The occasion for this was a memorandum prepared by Monroe, embodying among others the following questions:[1]

> Has the executive power to acknowledge the independence of new States whose independence has not been acknowledged by the parent country and between which parties a war actually exists on that account?
>
> Will the sending or receiving a minister to a new State under such circumstances be considered an acknowledgment of its independence?
>
> Is such an acknowledgement a justifiable cause of war to the parent country? Is it a just cause of complaint to any other power?
>
> Is it expedient for the U. States at this time to acknowledge the independence of Buenos Ayres or of any other part of the Spanish dominions in America now in a state of revolt?

There was also a query relative to the breaking-up of piratical establishments of the revolutionists on Amelia Island. This was the only matter contained in the memo-

[1] Monroe, *Writings*, vol. vi, p. 31.

randum which was definitely decided upon.[1] On the rest of the points discussed no decision was reached, although John Quincy Adams, the Secretary of State, who was to a great extent responsible for the attitude of the United States toward the Spanish colonies, was very firmly opposed to the acknowledgment of the independence of Buenos Ayres. The character of the questions propounded by Monroe indicates the uncertainty of the administration not only as to the course it intended to pursue, but also over the question whether these matters were really within the competence of the executive. It was, perhaps, the very uncertainty surrounding this question of executive power which made possible the strong congressional opposition which developed from these questions. Indeed, when, on December 6, 1817, Henry Clay announced that he intended moving the recognition of Buenos Ayres and probably of Chile [2] at the session of Congress then going on, no one appears to have questioned the impropriety of this procedure as an infringement upon executive power.[3]

While these preliminaries to the struggle over policy were taking place the South American agents had been far from inactive. Don Manuel Aguirre, appointed in March, 1817, to supersede one Don Martin Thompson as agent of the Rio de la Plata, and bearing also a semi-official commission from the Chilean government, made a formal demand on December 16, 1817, for the recognition of Rio de la Plata.[4] He based his argument chiefly upon the

[1] Adams, *Memoirs*, vol. iv, p. 15.

[2] *Ibid.*, p. 28.

[3] Monroe in his message Dec. 2, 1817, had alluded in a cursory way to the revolution and had mentioned the fact that the United States was giving both parties equal rights. *Cf.* his *Writings*, vol. vi, pp. 34-5.

[4] 5 *Br. and For.*, 818. This name was used alternately with Buenos Ayres.

identity of the political principles of the United States and his own government, and, insisting that the recognition would not be premature, pointed out that all means of conciliation with Spain had been exhausted. At the same time, however, he admitted that he did not possess sufficient powers to deal with the question by treaty. Here followed a veritable bombardment of notes pointing out the justice of the cause of the insurgents, the success of their arms in the Banda Oriental, and complaining against the neutrality laws of March 3, 1817, as discriminating against the insurrectos. Finally, on January 5, 1818, Aguirre announced that he possessed sufficient power to deal with recognition by treaty.

The attitude of the administration toward this incessant pleading and argumentation was firm. The cabinet had decided at the November meeting to delay all action on the recognition question until the commissioners should have made their report, and until the attitude of the European powers had become more certain. Moreover, the situation in Montevideo and the Banda Oriental, over which Buenos Ayres claimed sovereignty, was sufficiently doubtful to permit postponement of a definite decision on the ground that the de facto control of the state was still unsettled. In his report to Congress, March 25, 1818,[1] Adams explained the attitude of the administration relative to the recognition of Rio de la Plata. He pointed out that Aguirre was merely a public agent and not a diplomatic functionary.

Neither the letter of which he was the bearer, nor he himself at his first interview with the Secretary of State, suggested that he was authorized to ask the acknowledgement of his government as independent, a circumstance which derived addi-

[1] *5 Br. and For.*, 801.

tional weight from the fact that its Predecessor, Don Martin Thompson had been dismissed by Director Pueyrredon, for having transcended his powers . . . .

The first congressional discussions of the question of recognition arose relative to the appropriation bill. True to his word, Clay, on March 24, 1818, moved to insert in the bill a provision to appropriate the sum of $18,000, as outfit and one year's salary of a minister to be deputed from the United States to the la Plata provinces.[1] In support of his amendment, Clay made one of the most remarkable speeches of his career. He outlined the situation in South America in a most favorable light and drew the inevitable conclusion that the time was ripe for recognition. The portion of his address in which he describes the previous policy of the United States is a clear exposé of the principles for which this nation has stood:[2]

We have constantly proceeded on the principle that the government *de facto* is that we can alone notice. Whatever form of government any society of people adopts, whoever they acknowledge as their sovereign, we consider that government, or that sovereignty as the one to be acknowledged by us. We have invariably abstained from assuming a right to decide in favor of the sovereign *de jure* and against the sovereign *de facto*. That is a question for the nation in which it arises to determine. And so far as we are concerned, the sovereign *de facto* is the sovereign *de jure*. . . . As soon as stability and order are maintained, no matter by whom, we have always considered and ought to consider the actual as the true government.

Seldom had a measure produced in Congress such an abundant flow of oratory as did Clay's amendment, but the

[1] *Ann. of Cong.*, 15 Cong., 1 sess., vol. ii, p. 1468.

[2] Mallory, *Life and Speeches of Henry Clay*, vol. i, p. 391.

tide ran steadily against those who favored immediate recognition and the measure was lost by a vote of 115 to 45.[1] Strangely enough, the reason for the defeat appears to have been that the amendment was interfering with the functions of the executive.

The vote of Congress meant a great increase of strength for the administration. Not only was it now assured of the support of Congress in its policy of watchful waiting, but it had received a direct confirmation of its ultimate right to determine whether a government was to be recognized or not. So complete was the defeat of the Clay faction that when, in December, 1818, the President finally communicated to Congress the reports of the commissioners to South America, there was no resultant reflection in congressional activity. This, however, may have been due in part to the character of the reports. General disagreement had prevailed among the members of the commission, and the reports which were made were so contradictory that, instead of adding strength to the cause of the revolutionists, they indicated that there was room for considerable doubt.

Beginning with the latter half of the year 1818, the recognition policy of the United States, which had hitherto been little more than an issue of domestic politics, began to assume an international character and to feel the effects of the complicated diplomacy of the time. So far as international questions were concerned, recognition had been looked upon in Congress as a foregone conclusion which must inevitably occur in the near future, depending upon the stability of the Latin-American states. The question as to the probability of prejudicing Spanish interests, if it ever occurred to our government, certainly does not appear to have been of great weight in determining its

[1] *Annals of Cong., loc. cit.*, p. 1655.

conduct. But now there occurred a number of events which brought the United States in sharp conflict with Spain. These were the events which led to the ultimate cession of the Floridas by Spain.[1]

In the spring of the year General Jackson, who was waging war against the Seminole Indians near the Florida frontier, pursued his enemy across the border and, charging the Spanish régime with having aided and abetted the savages, captured St. Marks and later Pensacola. Although, in August of the same year, the United States ordered these towns to be restored to Spanish authority, the Spanish government was very justly indignant over the affair and protested vigorously. In addition to these very direct injuries to Spain, was the active aid constantly being rendered the colonies by the citizens of the United States in contravention of the existing neutrality laws of the country. Now, although these violations and their suppression were a purely domestic matter, their general color was one of direct hostility to Spain, and there can be no doubt but that in many individual cases local officials connived with private citizens in the performance of hostile acts. Besides, the very vague ideas which existed at the time respecting neutral obligations frequently caused the United States government to be charged with permitting unneutral acts which it was in no sense bound to prevent. The tension and inimical spirit in this country were heightened by the fact that Spain, in a rather futile attempt to enforce a blockade of the South American coast, was indulging in indiscriminate seizure of American vessels. In many respects the sort of naval warfare which was carried on in the King's name differed little from that which the Spanish authorities bitterly stigmatized as the piratical acts of the

[1] A good account of this is given in Fuller, *The Purchase of Florida*, pp. 213 *et seq.*

Colonists. As early as February 22, 1816, Chevalier de Onis,[1] the Spanish minister at Washington, addressed representations to the United States government against the unneutral acts of its citizens, alleging the organization of expeditionary forces in Kentucky, Tennessee and Louisiana. At the same time, he protested against the admission into the ports of this country of vessels flying the flag of the Spanish colonies. Such a course on the part of the United States, he insisted, placed the "factionists" not merely on a footing of equality with the Spanish nation, but gave them advantages over all other independent nations. In demanding of the United States a stricter neutrality, he cited the fact that, in 1806-7, all commerce with the rebels of San Domingo had been interdicted by act of Congress, and he considered that Spain was entitled to a similar favor.[2] These protests were continued throughout the whole year.

It may be understood that under the circumstances of increasing tension which existed at this time between the two countries, the administration of the United States became more and more cautious against giving offense to Spain. Both at Washington and at Madrid an attempt was being made to find some basis upon which the two countries could come to an understanding respecting the Floridas, and any ill-timed move on the part of the United States might result in the complete rupture of negotiations. At the same time, however, this government did not abandon its purpose of an early recognition of the Latin-American states. It adopted an entirely new line of policy. Instead of an independent course, Monroe now planned concerted action with European powers. The uncertainty of the situation in Europe was favorable to this project. At that time[3] England was contemplating the restoration of the

[1] 4 *Br. and For.*, 321 *et seq.* [2] 5 *Br. and For.*, 357 *et seq.*

[3] Monroe to Jackson. Monroe, *Writings*, vol. vi, p. 60.

colonies to Spain on the basis of commercial freedom and colonial government, a policy to which Russia agreed and was even willing to support by force. The United States, however, came out flatly against such a *modus operandi*, and Monroe insisted "that we partake in no councils whose object is not their [South American] complete independence." The views of the United States were communicated to the powers, and Richard Rush, our minister at London, in an interview with Lord Castlereagh, and Mr. Gallatin, our minister at Paris, in conference with the Duc de Richelieu and the Minister of Russia, were informed that their governments could not move without the United States, a statement which Monroe interpreted as meaning that nothing would be done prejudicial to the interests of this country.[1] Evidently he was so favorably impressed with the attitude of the powers, which was in reality anything but non-committal, that early in December Adams requested the French minister to inform the Duc de Richelieu, then Prime Minister of France, that the United States was desirous of entering with that country into a joint recognition of the Spanish colonies and that a similar notice had been sent to Great Britain.[2] It does not appear what answer was given, but inasmuch as recognition was at this time the thing farthest from the minds of the European statesmen, the request could only have been looked upon as an indication of policy.

In this same year, Spain, conscious of the diplomatic advantages which the intemperate actions of General Jackson in Florida had given her, attempted in the treaty negotiations then pending to inaugurate a more decisive policy. In both the projects[3] submitted by de Onis and Don Pizzaro,

[1] Monroe, *Writings*, vol. vi, pp. 84-85.

[2] Adams, *op. cit.*, vol. vi, p. 190.

[3] 5 *Br. and For.*, 451, also 354.

Spanish Minister of Foreign Affairs, provision was made for the more effective enforcement of measures against the outfitting of privateers, enlistments, *et cetera,* by the United States, but to these proposals Adams turned a deaf ear, alleging that such stipulations were unnecessary, for the extent of our obligations in these matters was guaranteed by the neutrality laws of the country. The Spanish minister, however, insisted that what was asked for was no more than already required by the laws of the United States, " international law and treaty obligations," and that Spain wanted merely a more effective enforcement of these measures. His demands were not excessive, but he was not able to force his point, and the treaty of cession, as it was finally signed February 22, 1819, made no provision for dealing with the South American situation.

The effect of the Florida treaty upon the policy of the United States toward the insurrectos did not end here. In January, 1819,[1] Adams had instructed Rush to inform Lord Castlereagh that the United States intended the early recognition of Buenos Ayres, and Mr. de Forest, the agent of the latter government, was also to be informed of the impending action. This change in policy, as Adams explained to the cabinet, was due to the fact that our recognition of Buenos Ayres had been dependent merely upon the ultimate stability of that state, and that since they had demonstrated that stability, the time was now ripe for recognition. Notice of this intention was given to England, although Adams himself said that he was strongly disinclined toward showing too much deference. But the expected action on the part of the United States was to receive a severe check. The treaty of February, 1819, had been ratified by the Senate, but the final exchange of ratifi-

[1] Adams, *op. cit.,* vol. iv, p. 203.

cations was delayed by the refusal of the Spanish king to agree to its terms. There was dispute over many matters, not the least of which, as it later turned out, was the failure of the negotiators to deal with the Latin-American question.[1] A new minister, General Vives, was appointed to continue the negotiations.

In April, 1820, Vives announced the basis upon which a ratification must depend.[2] In the first place, he said, adverting to the alleged hostility toward Spain in certain parts of the United States, this country must repress the piracy and depredations carried on from her ports upon Spanish commerce; secondly, pledge the guaranteeing of the integrity of the Spanish possessions in order to put a stop to future armaments and to prevent future aid being given these possessions; and finally "that they [the United States] will form no relation with the pretended Government of the revolted Provinces of Spain, situate beyond the sea, and will conform to the course of proceeding adopted in this respect by other Powers in amity with Spain." In supporting his demands, Vives insisted[3] that the acts of American citizens, the outfitting of privateers, and even the decisions of our courts, were all contradictory to the idea of friendly feeling which was necessary to a treaty. "The hostile proceedings," he went on to say, "were, notwithstanding, tolerated by the Federal Government, and thus the evil was daily aggravated; so that the belief generally prevailed throughout Europe that the Ratification of the treaty by Spain and the acknowledgment of the independence of the rebellious Trans-Atlantic Colonies by the United States would be simultaneous acts."

In his reply to these charges,[4] Adams emphatically denied that the United States had violated her neutrality or

[1] *7 Br. and For.*, 658.
[2] *Ibid.*, 663.
[3] *Ibid.*, 659.
[4] *Ibid.*, 665.

sanctioned any of the conspiracies which Vives alleged had taken place in this country; that the United States had even reinforced her obligations by statute; and that, as a necessary consequence of her neutrality in the contest between Spain and the South American provinces, the United States could contract no engagement not to form any relations with these provinces, because any other course would be a violation of neutrality.

Vives answered these denials by repeating his demand for a pledge of integrity of Spanish possessions in North America, and denied the efficacy of our neutrality laws to prevent excesses. In regard to his demands, he said: "Although His Majesty might not have required of any of the European governments the declaration which he has required of yours, yet that ought not to be considered as unreasonable, it being well known to the King, my Master, that those Governments, far from being disposed to wish to recognize the Insurgent Governments of the Spanish Colonies, had declined the invitation intimated to them some time past by yours, to acknowledge the pretended Republic of Buenos Ayres." To these charges Adams could frame only an inadequate reply to the effect that the proposals had been made to European powers in the belief that Spain herself would and must recognize the colonies at no very remote date and that the joint acknowledgment would hasten this event and put an end to the combat; nor did the mere making of such proposals by this country give Spain the right to demand of the United States a pledge that they would not recognize South America, but she should regard it as a proof of good-will.[1] Vives replied to this

[1] 7 *Br. and For.*, 678. Gallatin to Adams, 15 February, 1820, wrote that Pasquier had told Vives in Paris that the demand for non-recognition was an impropriety. *Cf.* also Monroe to Jefferson (3 March, 1820) on the same subject. Monroe, *Writings*, vol. vi, p. 119; Gallatin, *Writings*, vol. ii, pp. 133 *et seq.*

obvious sophism that to accept these explanations would mean the undermining of all international authority, and all integrity of possessions would cease.

In view of the threatening attitude of Spain, it is easy to understand why the United States abandoned any attempt to carry out a policy of concerted action, and indeed was compelled to postpone definite action on the question of recognition. The ratification of the Florida Treaty had become, from its significance to internal conditions in the United States, of foremost importance as a piece of administrative policy. It was particularly so for Adams, because the failure to conclude the negotiations threatened likewise the termination of his political career. Not merely, therefore, did reasons of public policy caution a certain circumspection in making premature recognition, but private considerations were of equally great weight. Adams appears to have been determined to conclude both measures, but the question of recognition was one of decidedly secondary importance. Into his carefully calculated plans the second congressional opposition, led by the indomitable Henry Clay, burst with a vehemence that threatened to bring them to an untimely end.

On April 4, 1820,[1] Clay, adopting his former tactics, introduced a resolution to the effect that it was expedient to provide by law an outfit and salary for such ministers as the President by advice of the Senate might send to the governments of South America which had established and were maintaining their independence of Spain. As on the previous occasion, a stubborn contest arose over these resolutions. Clay in debate declared that it appeared to him that the object of the administration was to manage the South American affair so as to produce an effect upon the

[1] *Ann. of Cong.*, 16 Cong., 1 sess., p. 1781.

negotiations, but that this policy had been a failure, as the President's recent Message [1] itself had indicated. The opposition on this occasion was stronger, for the sentiment in the country at large was overwhelmingly in favor of immediate recognition. Clay's motion was carried by a vote of 80 to 75. The triumph, however, was empty, for nothing further was done and the resolution died for want of attention. Adams offers some explanation for this rather remarkable fact in pointing out that this was a victory against himself, a personal triumph calculated to prevent the ratification of the Spanish treaty and not a success scored on the administration. Indeed, the root of the whole congressional opposition appears to have been the intense rivalry between Henry Clay and John Quincy Adams rather than any party disagreements. This was an antagonism which originated at the time of the Ghent treaty negotiations and which abated only later when Clay became Adams' Secretary of State. At this time Clay, who scented in Adams the probable Presidential aspirant, was bending every effort to defeat Adams' treaty projects and thus compel him to act precipitately in the South American affair.

The remainder of the year passed without event. In Spain the revolution had taken place which had given that country a constitutional government and had inaugurated a more liberal policy in respect to the colonies. But here success had at last favored the colonial arms and the spirit of independence was too well advanced to be stayed. The agents [2] of the Latin-American states informed this gov-

[1] Monroe, *op. cit.*, vol. vi, p. 123.

[2] Adams, *op. cit.*, vol. v, p. 120. Torres informed Adams that the scheme of the Cortes government would be to try a compromise by recognizing Buenos Ayres and Chile, retaining Peru and Mexico in exchange.

ernment that opinion in their states had remained unchanged by the events in Europe and that they were determined to have no connection with Spain.

Early in 1821, Clay again took up the cudgels in behalf of the revolutionary states. On February 3d, he moved that the resolution adopted at the last session be referred to the Committee of the Whole, to which the House agreed; but three days later when he moved an addition of $18,000 to the General Appropriation Bill as outfit and salary for such ministers as the President might send to any government of South America which had established and was maintaining its independence, the motion was lost in the Committee of the Whole by a vote of 73 to 77. In the session of February 9th, however, Clay, determined to force through the question, reproposed the motion. It was rejected (79 to 86) on the ground of irregularity. On the next day, to atone in some measure for his defeat, Clay moved that the House participated in the interest which the people of the United States felt for the success of South America and "give its Constitutional support to the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces." Both clauses of this resolution were carried by large majorities, whereupon a committee was appointed to inform the President of the resolution and Henry Clay's great opposition came to an inglorious end.[1]

Close upon the heels of these events, which marked a definite triumph for Adams, followed the final ratification of the Florida Treaty on February 22, 1821, just two years after the conclusion of the first negotiations. The consummation of this event, which had been the great obstacle in

[1] *Ann. of Cong.*, 16 Cong., 2 sess., p. 1071 *passim.*

the way of the recognition of Spanish American independence by the United States, materially changed the course of the State Department. The solicitations of agents of the revolutionists were looked upon with increased favor. On February 20, 1821, Don Manuel Torres, self-styled chargé d'affaires for Colombia, again requested for that state the recognition which he had been urging ever since the spring of 1820.[1] Adams, however, who had indicated earlier in the year that some definite action would be taken by the United States in the near future, informed him that the government was awaiting the outcome of negotiations between Spain and Colombia. It is just possible that this may have been the reason for the dilatory policy of the administration. Of more significance, however, must have been the embarrassing relations with the government of Spain into which the irrepressible Andrew Jackson had again plunged us by his foolish and inexcusable actions in taking possession of the Floridas. Indeed, the situation immediately following the conclusion of the treaty which had been calculated to end the tension between the two countries was as strained as it had been at any time during the negotiations.

In November, 1821, Don Manuel Torres again[2] renewed his requests for recognition, urging the fact that at the present moment the political situation in Peru and Mexico rendered the recognition of the independence of Colombia urgent "on account of the great confidence with which this act would inspire those Nations to establish popular Representative Government." He then proceeded to urge the scheme which he had previously suggested, of an American system to which all the states of the Western Hemisphere

[1] Adams, *op. cit.*, vol. v, pp. 114, 186, 240.

[2] *9 Br. and For.*, 410 *et seq.*

were to be parties, to offset and counteract the influence of the European alliance and to protect and maintain republican ideals and institutions. It was this idea, highly gratifying to our national vanity, which later found fruition in the Panama Congress.

But the ultimate recognition of the South American states was not to be much longer delayed. In January, 1822,[1] the House by resolution requested the President to lay before it the communications of the agents of the United States in South America which would tend to show the condition of affairs in those states. This was done by the President on March 8, 1822, accompanied by a lengthy message in which he reviewed both the situation in South America and the course of the United States.[2] Urging upon Congress the advisability of a speedy recognition of these states, he said:

> This contest has now reached such a stage and been attended with such decisive success on the part of the provinces, that it merits the profound consideration whether their right to the rank of independent nations, with all the advantages incident to it in their intercourse with the United States, is not complete. . . . When the result of such a contest is manifestly settled, the new governments have a claim to recognition by other powers which ought not to be resisted. . . . We are compelled to conclude that its [the war's] fate is settled and that the Provinces which have declared their independence and are in enjoyment of it ought to be recognized.

Monroe also mentioned the fact that an attempt had been made at concerted action with the European states, but that they had not been prepared for it, nor was there anything known at the present moment of the disposition either of

[1] *Ann. of Cong.*, 17 Cong., 1 sess., pp. 825 *et seq.*

Monroe, *op. cit.*, vol. vi, pp. 207 *et seq.*

the powers or of Spain. In proposing recognition, nothing in the existing international relations was intended to be changed.

The Committee on Foreign Affairs, to whom the President's message and the accompanying documents were referred, reported on March 19th unanimously in favor of the justice and expediency of acknowledging the independence of the South American states, without reference to the diversity in their forms of government.[1] It resolved that the House concurred in the opinion of the President and that the Committee of Ways and Means should be instructed to report a bill appropriating a sum not over $100,000 to give due effect to such recognition. This motion was adopted and in April a bill was reported by the latter committee. Lively discussion ensued, but on April 11th the act passed the House. It was approved May 4th.

The first immediate result of this act of Congress was a protest, on March 9th, from the Spanish minister, Anduaga, against such action on the part of the United States.[2] He denounced the recognition in the strongest of terms and branded it as a countenancing of the insurrection which could find no sanction by virtue of similarity to the North American revolution. He denied that the South American provinces were in any condition to be acknowledged as states, claiming that if they had been they would long ago have been so recognized by the European powers, and added:

I think it my duty to protest, as I do solemnly protest, against the Recognition of the Governments mentioned, the Insurgent Spanish Provinces of America, by The United States; declaring that it can in no way, now or at any time,

[1] *Ann. of Cong.*, 17 Cong., 1 sess., p. 1382.

[2] *9 Br. and For.*, 752.

lessen or invalidate in the least, the right of Spain to the said Provinces, or to employ whatever means may be in her power to reunite them to the rest of her Dominions.

Adams replied to this protest in masterly terms:

In every question [he said] relating to the Independence of a Nation, two principles are involved, one of *right* and the other of *fact*. The former exclusively depending upon the determination of the Nation itself and the latter resulting from the successful execution of that determination. . . . This recognition is neither intended to invalidate any right of Spain nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view of reuniting those provinces to the rest of her Dominions. It is the mere acknowledgement of existing facts. . . . [1]

Anduaga's protest was a natural and proper action in view of the dictamen of the Cortes government of February 12, 1822, which declared that Spain would regard even a qualified recognition of the Ultramarine Provinces as a "violation of existing treaties as long as the contest continued between the mother country and these provinces." He repeated his protest April 24, 1822, in view of the repudiation by the Cortes of the O'Donoju-Iturbide Treaty.

The administration, assured of the support of the legislature, was now able to proceed with the formality of recognition. The question of what method would be used was important, whether ministers should be sent by the United States to the various countries or whether their agents in the United States should be received first. Of no little importance, too, was the question of preferential treatment of Buenos Ayres.[2] It was finally decided that

[1] 9 *Br. and For.*, 754.

[2] Adams, *op. cit.*, vol. v, p. 91.

the South American representatives should be received first. The claim for precedency of Buenos Ayres was found to be inadmissible, and it was agreed that de Forest would have to obtain a new commission before he could be received as its representative. Adams was instructed by the President to write Torres that he should appear to be presented to the President as chargé d'affaires for the Republic of Colombia.

On June 19, 1822, the formal recognition of Colombia took place. "At one o'clock," wrote Adams,[1] "I presented Mr. Manuel Torres as Chargé d'Affaires for the Republic of Colombia to the President. This incident was chiefly interesting as being the first formal act of recognition of an independent South American government."

The recognition of the other Latin-American states took place within a short time. Buenos Ayres, whose consul had been denied the right of a prior recognition and who had been instructed to obtain new credentials, was formally recognized, on January 27, 1823, by the appointment of Caesar Rodney, sometime commissioner to the South American states.[2] On this same day [3] both Chile and Mexico were recognized by the appointment of ministers. In Central America and in Peru the internal conditions postponed ultimate recognition until August 4, 1824, when that of the former was made by the reception of Don Antonio Cañaz as Envoy Extraordinary to the United States,[4] and that of the latter, on May 21, 1826, by the appointment of Jas. Cooley as Chargé d'Affaires.[5]

We may here note the recognition of the independence of Brazil. During the Napoleonic Wars the Portuguese

[1] Adams, *op. cit.*, vol. vi, p. 23.

[2] Moore, *Digest*, vol. i, p. 91.

[3] *Ibid.*

[4] Adams, *op. cit.*, vol. vi, p. 405.

[5] *Sen. Doc.* 40, 54 Cong., 2 sess., p. 13.

government at Lisbon had removed to Rio de Janeiro, and in 1815 the country was proclaimed Kingdom of Brazil, being a part of the United Kingdoms of Portugal, Brazil and Algarves.[1] By the year 1822, however, constitutionalism had invaded Portugal, a Cortes was summoned, and the King was asked to return. Pursuant to this request, Dom João embarked for Portugal, leaving Dom Pedro, his son, as Governor of Brazil. But the relations with the mother country were soon ruptured, the result of an attempt to decentralize the government of the colony and reduce it to a provincial status. In the summer of the year 1822 the independence of Brazil was declared and Dom Pedro was proclaimed constitutional Emperor.

The chief question of policy relative to the recognition of the new empire by the United States was that respecting the form of government. As a champion of republican government there was some prejudice in this country against an acknowledgment of independence which implied at the same time a sanction of principles antagonistic to those which the United States was supposed to represent. But a precedent had been set in the recognition of the Iturbide government in Mexico, and, as Calhoun pointed out in a cabinet meeting, on the basis of a distinction between independence and internal affairs, our acknowledgment of independence could not be denied.[2] Another potent reason which was urged by Monroe was the fact that the recognition of Brazil as an empire would lessen the offensiveness to the Holy Alliance of the previous recognitions and would indicate that our action had not been merely a piece of political propaganda—a rather startling observation from the lips of the author of the

[1] Gervinus, *Geschichte des Neunzehnten Jahrhunderts*, vol. iii, p. 458.

[2] Adams, *op. cit.*, vol. vi, p. 281.

Monroe Doctrine! The recognition was, however, momentarily suspended, pending further developments between the mother country and Brazil, the Brazilian agent meanwhile murmuring to the Secretary of State the insidious argument of an American System to combat the reactionary alliance in Europe. But in May, at another cabinet meeting, it was decided to receive Señor Rebello as the representative of Brazil. On the twenty-sixth day of the same month he was formally presented by Adams to the President, and the Empire of Brazil was thereby recognized.[1]

It may be well to review at this point the chief features of American policy in its relations to the Latin-American states. In the year 1820 Monroe wrote to General Jackson:[2]

The policy here hath been to throw the moral weight of the U. States in the scale of the Colonies without so deep a compromitment as to make ourselves a party to the war. We have thought that we even rendered them more service in that way than we should have done by taking side with them in the war, while we secured our own peace and prosperity. Our ports were open to them for every article they wanted, our good offices are extended to them with every power in Europe and with great effect. Europe has remained tranquil spectators of the conflict whereas had we joined the Colonies, it is presumable that several powers would have united with Spain. . . . It is obvious that a recognition of any of the Colonies if it did not make us a party to the war as the recognition of the U. States by France made her, would have no effect but be a dead letter; and if it made us a party, it would, as I already observed, do more harm than good."

[1] Adams, *op. cit.*, vol. vi, p. 358.

[2] Monroe, *op. cit.*, vol. vi, pp. 128-129.

To this acknowledgment of policy by Monroe several important additions may be made. In my opinion the recognition question as it was fought out during the years 1816-1822 embodied four distinct points: (1) The complete absence of a question of legitimacy; (2) the treaty negotiations with Spain; (3) the legislative opposition which was developed in Congress under the leadership of Henry Clay; and (4) the opposition to the European schemes of conciliation which crystallized later in the celebrated message of Monroe.

Throughout the discussion in this country of the independence of Latin America, the question of legitimate right appears to have been almost totally disregarded. Whereas the idea of *de jure* sovereignty was still the keynote of European diplomacy on this subject, an entirely reverse situation existed in this country. As I have pointed out above, this is the logical outgrowth of the Jeffersonian theory and is not explainable by the fact that the very existence of our state had depended upon a broad interpretation by France of the de facto principle. In that case the matter had been one purely of political interference without any particular regard for underlying theoretic justification. In my opinion, the only explanation of the appearance of a de facto theory in almost perfect completeness is the fact that this principle as outlined by Jefferson is as inevitable to the idea of democracy and republican government as is the idea of legitimacy to the existence of a monarchy.

So far as the treaty negotiations with Spain are concerned, I am positive that if there was any one element of preëminent importance in influencing the recognition policy of the United States, it was this. It has already been indicated that Spain herself was convinced that the United States were merely waiting for the conclusion of the Florida

negotiations in order to recognize the Latin-American states. This opinion was vehemently denied at the time, but the peculiar coincidence of the termination of the Florida matter and the recognition of the South American states raises more than a suspicion that such was the keynote of our policy toward these states. It may be observed, however, that Madison, writing to Monroe, May 6, 1822, remarked: [1]

> This insinuation will be so readily embraced by suspicious minds and particularly by the wiley Cabinets of Europe, that I cannot but think that it will be well to take away that pretext against us by an Exposé brought before the public in some due form in which our conduct would be seen in its true light. An historical view of the early sentiments expressed here in favor of our neighbors, the successive steps openly taken manifesting our sympathy with their cause . . . would shew to the world that we never concealed the principles that governed us nor the policy which terminated in the decisive step last taken. .

Without attempting to cast aspersions upon the honesty of the administration in these matters, I think that sufficient facts have been brought forward to establish the justice of the charges made by Spain. Let me emphasize once more, then, this point which has never been sufficiently appreciated, that the Spanish negotiations were of ultimate importance in the recognition of South America.

So far as the congressional opposition was concerned, this was an effect of the executive policy rather than a cause. Clay, in an attempt to force the hand of the administration, had hoped to precipitate the recognition question, and it was the mere fact that the Monroe men commanded a majority that prevented a forcing of the issue,

[1] Madison, *Writings*, vol. ix, p. 29.

despite the vague feeling which prevailed that any action on the part of Congress would necessarily constitute an infringement upon executive prerogatives. Reduced to its simplest terms, the opposition in Congress was a struggle between Clay and Adams. Its political significance was primarily internal and it was Adams' good fortune that the contest terminated as it did.

The effect which the diplomacy of Europe had upon the policy of the United States prior to the actual recognition of Latin America was negligible. I have indicated the periods into which the European phase of the question falls. Two of these, the period of inaction and the period of attempted mediation, occurred while the United States was most active. About the time when the United States acknowledged the new commonwealth, opposition to the French domination began, which culminated in the declarations by Canning and Monroe in the year 1823 and paved the way for English control. The tenders of concerted action with Europe made by the United States at various times were repeatedly refused, but they nevertheless indicate that even at this late date the policy of non-intervention had not yet been fully developed. It is possible that these refusals to act in concert with the United States may have inspired the extension of the non-intervention principle as much as any fear of aggression.

CHAPTER VI

The Recognition of Texas and the Growth of the de facto Principle

The impulse which in the early days of our national existence made the question of recognition a fundamental issue in our foreign policy, continued throughout the first half of the century. The popular reaction which the formation of new states or governments on the basis of a larger political liberty invariably brought with it, was of some influence in shaping the course of our government in respect to these new organisms. Especially was this true of the recognition of Texas, because the movement for the acknowledgment of the independence of that state did not originate with either the legislative or administrative branches of our government but was directly inspired by the popular interest taken in its affairs.

What may be described as a characteristic of almost all revolutionary movements is the fact that the idea of ultimate independence appears late in the struggle which has had for its primary purpose the rectification of existing evils. This was the character of the situation in Texas when, in the latter part of the year 1835, definite hostilities broke out between the settlers and the troops of the Mexican republic. A long period of discontent against the machinations of the political leaders of Mexico had preceded the actual opening of a war which the establishment of a military despotism under General Santa Anna had directly caused. Accordingly, in November, 1835, when the "Consultation" on the constitutional rights of Texas

met at San Filipe de Austin, the members decided against a declaration of independence and issued a proclamation in favor of the Mexican Constitution of 1824, announcing at the same time their intention of joining forces with the Liberal Party in its support.[1] At the same time a provisional government was chosen and three commissioners appointed to the United States. Since no action had been taken upon independence, the chief purpose of these commissioners, as stated in their instructions,[2] was the raising of a loan and the enlistment of public sympathy in the United States. President Smith, furthermore, as an ardent independence man, gave the commissioners instructions to sound the government of the United States in respect to possible favorable intervention in the dispute and also on the question whether immediate recognition would follow a declaration of independence. The prospect of ultimate annexation was held out as a sort of bait.

With the arrival of these commissioners (Messrs. Archer, Austin and Wharton) in the United States, commences the popular movement for the interposition of the United States in the affairs of Texas. As early as the fall of the year 1835 there had been an active agitation in the South, and substantial aid in the form of money subscriptions and the organization of troops had been forthcoming, not only there, where interest in the affairs of the settlers was liveliest, but also in the North where men had always regarded themselves as the champions of liberty. The appearance of the commissioners and the arrival of news relating to the bloodthirsty exploits of the Mexican forces at the Alamo and at Goliad served to heighten the popular enthusiasm for Texas and hatred against their

[1] Rives, *United States and Mexico*, vol. i, pp. 286 *et seq.*

[2] *Diplomatic Correspondence of Texas* (American Historical Association Rep., 1907), vol. i, pp. 51 *et seq.* (Cited *Tex. Dip. Cor.*)

Mexican enemies who for the time being supplanted their Spanish forbears in the rôle of the villain of American politics. The movement for definite action by our government took the form of presentation of petitions for recognition long before there had been an actual declaration by Texas herself.

The Mexican government observed these proceedings with growing distrust. The actions of American citizens in fitting out expeditionary forces and in furnishing aid to the Provisional Government were conceived as breaches of neutrality which the Federal government was bound to prevent. As early as October 29, 1835, Señ. de Castillo, the Mexican chargé at Washington, protested[1] against what he alleged were the unneutral acts of American citizens. John Forsyth, then Secretary of State, promised the active interference of our government and instructed the district attorneys of the United States to enforce more effectively the neutrality laws. He also wrote Butler, our representative in Mexico City, to assure the Mexican government of our complete neutrality in the struggle.[2]

While the Texan commissioners were continuing their activity in the United States, accomplishing much in the way of arousing public sentiment but very little in stirring official circles to action, the convention met which declared the independence of Texas. At the same time a second commission, composed of G. C. Childress and Robert Hamilton, was apopinted. These agents were instructed[3] to open negotiations with the cabinet at Washington, "inviting on the part of that Cabinet a recognition of the Sovereignty and Independence of Texas and the establish-

[1] 25 *Br. and For.*, 1078.

[2] *Ibid.*, 1079 *et seq.*

[3] *Tex. Dip. Cor.*, vol. i, p. 73.

ment of . . . relations between the two Governments." Two weeks later a further commission was issued to Samuel Carson, Secretary of State of the new republic, ordering him to Washington to assist in securing recognition and giving him the general supervision over the negotiations.[1] Nor were the commissions previously issued revoked, the idea of the government being that the various appointees should coöperate in their efforts to secure some action on the part of the United States.

In the meantime, the Congress of the United States had assembled and the psychological moment had arrived for the commissioners to press their claims for an acknowledgment of their independence. But the total absence of any instructions from the Provisional Government, or any official accounts of the declaration of independence, left them impotent. Moreover, the informal character of the credentials issued to them made it impossible for them to be officially received. The friendly disposition of the United States was unavailing in the face of such dilatoriness on the part of the new republic and Congress adjourned without taking any definite action. Austin, writing June 10, 1836, to President Burnett, said: "If such documents as the above had been received by the representatives of Texas before I left Washington, I believe that I could have brought on our recognition." [2]

The second commission, upon its arrival in Washington, presented its credentials to Secretary Forsyth, and on June 10th, after waiting in vain for official confirmation of the victory of the Texans at San Jacinto, made a demand for recognition upon the basis of the unofficial documents at their disposal, alleging that the government which they represented was de facto the government of Texas.[3] They

[1] *Tex. Dip. Cor.*, vol. i, p. 75.

[2] *Ibid.*, p. 98.

[3] 24 *Br. and For.*, 1268.

were afforded little opportunity to press their claims for on May 27, 1836, they were recalled.[1]

When the Texas commissioners had presented to Forsyth their demand for recognition, the relations between the United States and Mexico, already strained by the unneutral acts of our citizens, had reached a high degree of tension. In April, 1836, Forsyth had informed[2] Señ. Gorostiza, minister of Mexico at Washington, that, in view of the contest in Texas, the movements of United States citizens on the Red River, and the apprehended hostile intentions of the Indians of both countries, orders would be given to General Gaines, then in Florida, to take such a position with troops of the United States as would safeguard both countries from outrages by the Indians and preserve the territory of the United States from violation by either Mexicans or Texans. In case the troops of this country should advance beyond the frontier, Mexico was to regard such a procedure, not as evidence of any hostile disposition, but merely as a temporary occupation. To these orders the Mexican minister made no objection. When, however, it later appeared that the United States claimed as the boundary a line wholly supposititious, to which it had no legal claim, Señ. Gorostiza despatched an indignant protest to the State Department,[3] and a heated correspondence ensued. Fuel was added to the fire by the intemperate statement of Forsyth that in order to fulfil our treaty obligations with Mexico by protecting its territory against the Indians of this country, troops might be sent into the heart of Mexico, where their presence could only

[1] It will be remembered that the commissions of all the representatives sent to the United States were still in force. The recall applied to all previous commissions. *Tex. Dip. Cor.*, vol. i, p. 91.

[2] 25 *Br. and For.*, 1089.

[3] May 9, 1836. 25 *Br. and For.*, 1098.

be regarded as evidence of our friendship and fidelity to treaty engagements. Against sophistry of this sort the arguments of the Mexican minister proved to be futile. It was not until later, when General Gaines actually despatched a detachment across the Sabine River to Nacogdoches, that he resorted to more vigorous action.

While the State Department had its hands full not only with the Mexican representations against our aggressive politics but also with the Texan commissioners who were condemning the administration for lack of initiative, important events took place in Congress, events which marked the first active participation of that body in the recognition of Texas. I have adverted to the fact that during the fall of the year 1835 the circulation of petitions for an acknowledgment of Texan independence had been of frequent occurrence. These were presented to Congress, and in this way the question was brought before the two Houses. In the Senate, the petitions were referred to the Committee on Foreign Relations and a report was made on the situation by Henry Clay, its chairman.[1] For the first time in the history of our recognition policy a clear distinction was drawn between recognition of governmental changes and of new states.

Clay pointed out that the policy of the United States had been to act on the fact of existence without regard to the origin of new governments or states. He continued:

There is, however, a marked difference in the instances of an old nation which has altered its form of government and a newly-organized Power which has sprung into existence. In the former case, . . . the nation had existed for ages as a separate and independent community. It is a matter of history; and the recognition of its new Government was not neces-

[1] *Sen. Doc.* 406, 24 Cong., 1 sess., p. 1.

sary to denote the existence of the nation; but, with respect to new Powers, the recognition of their Governments comprehends, first, an acknowledgement of their ability to exist as independent states, and, secondly, the capacity of their particular Governments to perform the duties and fulfill the obligations toward foreign Powers incident to their new condition. Hence, more caution and deliberation are necessary in considering and determining the question of the acknowledgement of a new Power than that of the new Government of an old Power.

Clay proceeded to advert to our policy of remaining neutral despite popular sympathy with the revolutionists and suggested that the United States await the action of Mexico in regard to recognition, provided this was not put off too long. There were four ways, he said, by which Texas might be recognized:

First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or lastly,

by the Executive receiving and accrediting a diplomatic representative from Texas which would be a recognition as far as the Executive only is competent to make it. In the first and third modes, the concurrence of the Senate in its executive character would be necessary, and in the second, in its legislative character.

The Senate alone, without the coöperation of some other branch of the Government, is not competent to recognize the existence of any power.

The President of the United States, by the Constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgement of the independence of any new Power. . . . If, in any instance, the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion or by other acts of one or both branches of Congress. . . .

In the present case, there was no ground for charging the President with tardiness, and the following resolution was reported:

Resolved, That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil Government capable of performing the duties and fulfilling the obligations of an independent Power.

This resolution was agreed to without division.[1]

It is difficult to connect the passages which I have just quoted with the person of the fiery Henry Clay who had led the opposition to the administrative policy of hesitation in recognizing the Latin-American states. Clay was probably an advocate of the liberty of peoples as much as ever, but he was now some twenty years older, he had served in the administrative capacity of Secretary of State during the presidency of John Quincy Adams, and he seemed now to have been resigned to the necessity of concerted action by the legislature and the executive.

Pursuant to a resolution of the Senate, President Jackson transmitted to that body on June 23d the correspondence with Texas to date, which consisted merely in the reports of the battle of San Jacinto, certain state papers of Texas and the demand made upon the 10th of the month by Childress and Hamilton for the recognition of their state. The consideration of the resolution and the President's message was begun on July 1st, and after a lengthy oration by Senator Preston, who appeared as the chief champion of the cause of Texas, the resolution was unanimously adopted with the addition of an amendment expressing the satisfaction of the Senate at the adoption of

[1] *Congressional Globe*, vol. iii, p. 565.

measures by the President for obtaining accurate information as to the condition of the new republic.[1] It was, perhaps, in consideration of this resolution that Jackson sent to Texas one Henry Morfit to report upon the condition of that state.

The action of the House during this period was less decisive, although there was almost constant debate on the subject. The memorials and petitions presented to the House for the recognition of Texas were referred to the Committee on Foreign Affairs, and on July 4th, the last day of the session, Mason of Virginia presented its report.[2] In its general outlines this report was similar to Clay's. It mentioned the fact that there was no satisfactory evidence obtainable to enable the committee to determine whether there was a successful de facto government in operation in Texas, but that when this necessary information had been received the United States would establish relations with that state. So far, the committee expressed itself to be satisfied with the course of the administration, and a resolution to the same effect as that passed in the Senate was carried by a large majority.

The first session of the Twenty-fourth Congress came to an end with a very definite expression of opinion by both Houses in favor of recognition at some future date. There was a decided tendency on the part of both bodies to place the responsibility of such a move in the hands of the President. So friendly was the disposition of both the administration and of Congress that it seems strange that Texas was not recognized before the session closed. For this failure the Texans were themselves to blame. They had furnished the President with no official information upon which he could act, and even the credentials to the com-

[1] *Cong. Globe*, vol. iii, pp. 603-4.

[2] *House Report* 854, 24 Cong., 1 sess., p. 1.

missioners were faulty. A little more care on the part of the Texan government in proving its de facto existence might have brought an earlier recognition. Another fact contributing to their lack of diplomatic success was the constant change in the personnel of the commission at Washington which rendered an harmonious policy impossible.

We have seen that the commissioners Childress and Hamilton had hardly entered upon their functions in Washington before they were recalled and Messrs. Collinsworth and Grayson sent in their stead.[1] The instructions with which these commissioners were armed were practically identical to those of their predecessors. They arrived in Washington in July, just before the departure of General Jackson. Congress had adjourned and the time for obtaining any decisive results was most inopportune. Moreover, as on previous occasions, the letters of credence were not in proper form and Forsyth intimated that, in view of the many previous appointments, such formality was necessary. He also informed them that nothing could be done until the President's agent, Morfit, had made his report.[2] The work of this commission was brought to an end by the appointment of W. H. Wharton as Minister Plenipotentiary to the United States on November 18, 1836. Thus, in the short space of a year, four sets of diplomatic officers had been sent out, but the results of their respective missions were practically nil.

The use to which the Texans had put their prisoner, General Santa Anna, showed some diplomatic skill. It will be remembered that the General had been captured at the battle of San Jacinto. On May 14th, he had signed two treaties,

[1] *Tex. Dip. Cor.*, vol. i, p. 89.

[2] *Ibid.*, pp. 110, 117, 125.

one public and the other secret, by which he agreed that the Mexican troops should evacuate Texas and that hostilities should cease. He further agreed that he would do what he could to secure a recognition of Texan independence.[1] The public treaty was ratified by General Filisola, who succeeded Santa Anna.[2] The Texans, on their part, had agreed to liberate the General in order that he might carry out his share of the agreement. But when the time came to release him, popular opposition was so strong that the government felt obliged to continue its guardianship over its distinguished prisoner. On July 4th, evidently at the instance of his captors, Santa Anna wrote a letter[3] to President Jackson, in which he communicated to him the agreements he had concluded with the Texans and which he now petitioned the President to assist in carrying into effect. He suggested that under the joint patronage of the United States and Mexico, the independence of Texas might be established. At the same time, he wrote to General Urrea, who had succeeded General Filisola, requesting him to cease his advance upon Texas pending a political settlement of the difficulties between the two countries. It was the threatened danger of this invasion which had inspired the letter to General Jackson.

The President's reply[4] was made September 4, 1836. He informed General Santa Anna that the policy of the United States was one of non-intervention in the affairs of other nations, and that whatever they could do to restore peace which was not inconsistent with this policy would be done. In reference, however, to the treaty made by the General,

[1] Yoakum, *History of Texas*, vol. ii, pp. 526 *et seq.*

[2] *Ibid.*, p. 529.

[3] *Tex. Dip. Cor.*, vol. i, p. 106.

[4] *Sen. Doc.* 84, 24 Cong., 2 sess., p. 4.

he declined to interfere, because the Mexican minister had served notice on this government that no act of General Santa Anna's, as long as he was in prison, would be regarded as binding upon Mexico. Jackson suggested that in case the latter government should wish to avail itself of the good offices of the United States, he would gladly accept any such proposal. He also indicated that he would sound the Mexican minister upon the subject of the letter.

A matter which I have already indicated needs further explanation. In July, the interest in the activities of General Gaines along the Texas border was revived by the news that he had despatched across the Sabine River to Nacogdoches a detachment of troops. It appears that tidings of the intended advance of General Urrea had filled him with anxiety over a probable Indian rebellion and a violation of American neutrality by the Mexicans, and had led him to take this bold step. Señ. Gorostiza made an immediate protest, but the State Department replied that it had received no information of any violation of Mexican sovereignty by General Gaines. A considerable period passed before definite news of the event was received in Washington. Then, in an interview September 23, 1836, Forsyth [1] informed Señ. Gorostiza that troops of the United States were at Nacogdoches. The latter denying that there was any danger of Indian troubles or of a Mexican invasion, again protested against the authority given General Gaines. He insisted that his note respecting the presence of United States troops in Mexico be answered, and, furthermore, threatened that if the troops remained on Mexican territory, he would be obliged to close the legation. Forsyth remained firm in his attitude on the right to occupy Nacogdoches, going so far as to intimate that

[1] 25 *Br. and For.*, 1168.

the sovereignty of the territory was an open question. The exasperation of the Mexican minister increased, and finally, on October 15th, he demanded his passports. Diplomatic relations were thus definitely severed.[1] Before leaving the United States, he published a pamphlet[2] in which he set forth his case and to which he appended certain documents relating to the affair. This pamphlet had the effect of further irritating the State Department and the situation became even more strained when later the Mexican government definitely approved this document and the actions of its Minister.

In addition to these events, the diplomatic relations between the United States minister at Mexico City and the Mexican Foreign Office served to increase the existing difficulties. The United States had pending with Mexico certain claims which, as early as the year 1828, they had attempted to have settled. On January 29, 1836, Powhatan Ellis, who had been appointed chargé d'affaires to Mexico, was instructed particularly with reference to pressing these claims.[3] Ellis performed his duty to the letter. The Mexican government, distracted both by turbulent internal conditions and the war which it was carrying on with Texas, was in no condition to give its attention to the demands of foreign nations. Its attempts at conciliatory postponement of these claims met with renewed demands by the American chargé. Finally, on October 20, 1836,[4] Ellis presented the alternative of settlement or severance of diplomatic relations. The indefinite promises of the

[1] 25 *Br. and For.*, 1177 *et seq.* Shortly after relations were renewed.

[2] An anonymous critique of the pamphlet, *An Examination and Review of a Pamphlet . . . by M. E. Gorostiza* (Wash., 1837), contains the pamphlet as well as other documents.

[3] *House Doc.* 351, 25 Cong., 2 sess., pp. 160 *et seq.*

[4] *Sen. Doc.* 160, 24 Cong., 2 sess., p. 153.

Mexican government were not regarded as satisfactory, and another protracted argument ensued. On December 22d Ellis demanded his passports.[1] Just previous to his departure, Gorostiza arrived in Mexico City and Ellis was the bearer to Washington of the intelligence that the Mexican government thoroughly approved of the course taken by its minister.[2]

When Congress convened in December, 1836, the recognition of Texas occupied a prominent place in national politics. In his annual Message, President Jackson indicated that the United States was following the same principles in her relations with Texas and Mexico as she had laid down in her recognition of South American independence. Alluding to the popular feeling in this country for recognition and in Texas for annexation, President Jackson pointed out that this should not precipitate action on our part, but that we should act cautiously lest wrongful motives of territorial aggression be imputed to us.[3] But before any action was taken by Congress there followed, on December 22d, a special Message based on the report of Henry Morfit, our agent to Texas.[4] In submitting this report, Jackson outlined what he conceived to be the policy of the United States, and indicated that premature recognition if at all unfriendly in spirit might be regarded as *casus belli*. He said:

All questions relative to the government of foreign nations whether of the old or the new world, have been treated by the United States as questions of fact only, and our pre-

[1] *Sen. Doc.*, 160, 24 Cong., 2 sess., p. 70.

[2] *Ibid.*, p. 84.

[3] *Sen. Doc.* 1, 24 Cong., 2 sess., p. 4. Alludes also to Gorostiza's withdrawal.

[4] *Sen. Doc.* 20, 24 Cong., 2 sess.

decessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession to enable them not only to decide correctly but to shield their decisions from every unworthy imputation. . . . The uniform policy of the United States is to avoid all interference in disputes which merely relate to the internal government of other nations and eventually to recognise the authority of the prevailing party, without reference to our particular interests and views, or to the merits of the original controversy. . . Nor has any deliberative inquiry ever been instituted in Congress or any of our legislative bodies as to whom belonged the power of originally recognising a new state — a power the exercise of which is equivalent, under some circumstances, to a declaration of war—a power nowhere expressly delegated and only granted in the constitution as it is necessarily involved in some of the great powers given to Congress: in that given to the President and Senate to form treaties with foreign Powers, and to appoint ambassadors and other public ministers; and in that conferred upon the President to receive ministers from foreign Nations.

The disposition of Jackson to avoid as much as possible the responsibility of initial action involved in the recognition of Texas stands out clearly in the passage following. He indicated that the congressional resolution of the last session had intimated that the recognition of states was a matter for Congress to decide, and in this he concurred. "It will always be consistent," said he, "with the spirit of the constitution and most safe, that it [the power of recognition] should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished." In congressional control over recognition, Jackson saw greater guarantees against executive despotism.

After these preliminary remarks on the power of recognition, in themselves of much significance, Jackson proceeded to discuss the situation in Texas in the light of Morfit's report. It was true, said he, that the Mexican government had been expelled from Texas, but there was the appearance of a lack of strength on the part of the insurgents, and at the present moment a new invasion was threatened. "Our acknowledgment of its independence at such a crisis could scarcely be regarded as consistent with that prudent reserve with which we have held ourselves bound to treat all similar questions." In conclusion, he suggested that in view of the dangers of unjust charges being made against the United States relative to annexation,[1] it would be well to wait until some foreign power had recognized the country.

The Message of President Jackson is a very remarkable document. I have noted that through the whole Message runs an expression of the desire to throw upon Congress the burden of taking the initiative. This may have been inspired by purely political considerations. In the recognition of the Latin-American states it had become quite firmly established that this act was a function of the executive, and, indeed, it seems to me that from the viewpoint of internal policy, the postponement of the recognition of the Spanish colonies represented very definitely a triumph of the administration over Congress, an assertion of executive prerogative. Regarding the question of Texas, the temperate attitude of Jackson is noteworthy. Certainly the incendiary pamphlet of Gorostiza had roused the peppery temper of the President, and it might seem that for this reason alone if for no other, he would have shown greater

[1] In September, the people of Texas had voted overwhelmingly in favor of annexation.

inclination for the immediate recognition of Texas. But, as he himself indicated, the fear of having the actions of the United States subjected to adverse criticism by foreign states because of Texas' open annexation policy had rendered him cautious.

Congress delayed taking direct action upon the Message of the President, and in the meantime Wharton, the new representative of Texas who had arrived just prior to the sending of the Message, renewed the solicitations for recognition. In his first interview with Forsyth, the latter indicated to him that it would be expedient for the Texans to secure recognition from some other power before the United States could take action herself, for the vote in favor of annexation had greatly embarrassed this country.[1] This seems to add weight to what I have indicated as the motivation for the President's Message. The latter came, moreover, as a distinct disappointment to the advocates of immediate recognition. In a despatch to President Austin, December 28th, Wharton wrote that it had pleased no one and that it had been the work of the Van Buren elements in an attempt to shift the responsibility.[2]

In January, came news which must have influenced to some degree the attitude of the administration. In accordance with the desire of the administration not to prejudice the United States with foreign governments, Stevenson, our minister to Great Britain, had been instructed to ask that government whether it was disposed to intervene in the affairs of Texas and whether or not Mexico had made such application. Lord Palmerston had replied that Mexico had applied indirectly but that Great Britain had positively refused to listen to these requests. He stated further

[1] *Tex. Dip. Cor.*, vol. i, p. 157.

[2] *Ibid.*, p. 158.

that Great Britain was quite satisfied with the course of the United States. Similar statements were made by the French government.[1]

Late in the same month there arrived in Washington General Santa Anna, who was sent by his captors to solicit some action on the part of the United States. His representations were of no influence, for Jackson had so definitely committed to Congress the taking of initiative in the matter that attempts to move the administration itself were likely to prove futile. The President had informed Wharton to this effect, and the latter indicated that the tone of his Message had caused the administration members of Congress to fear that action on their part would be interpreted as an attack on the administration. Jackson said "that that was all foolishness, he doubted the power of the President to recognize of himself, he wished the sense of Congress on the subject, and would immediately concur if a majority recommended it."[2]

After several abortive attempts to get the question squarely before the Senate, Walker of Mississippi, on January 11, 1837,[3] offered a resolution, "that the State of Texas, having established and maintained an independent Government, capable of performing those duties foreign and domestic which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of the successful prosecution of the war by Mexico against said State, it is expedient and proper and in perfect conformity with the law of nations and the practice of this Government in like cases, that the independent political existence of said State be acknowledged by the Government

[1] *Tex. Dip. Cor.*, vol. i, p. 168.

[2] *Ibid.*, p. 171.

[3] *Cong. Globe*, vol. iv, p. 83.

of the United States." The action of the Senate upon the resolution was several times postponed, but on Wednesday, March 1, 1837, the resolution was debated and the attempt to insert an amendment giving the President discretionary power being lost, it was adopted by a vote of 23 to 19.[1]

In the House,[2] the first step was taken on February 18th, when Howard of Maryland, chairman of the Committee on Foreign Affairs, reported a resolution that the independence of Texas be recognized and that the Committee of Ways and Means be directed to provide for an appropriation to pay the salary and outfit of such public agent as the President might determine to send to Texas. Ten days later, in the discussions over the Appropriation Bill, an amendment was introduced making such provision, and was carried 121 to 76. It is interesting to note that a proviso for Presidential discretion was inserted as the result of John Quincy Adams' objection that recognition was the function of the President.[3]

The long-delayed action of Congress had kept the Texan representatives in a very ecstacy of impatience.[4] Wharton had appeared before the Foreign Affairs Committee of the House and had besought the President to transmit to Congress another Message. This the latter had refused to do because he thought it unnecessary, and that a call for it from Congress would be with a view to screen themselves from responsibility. The President was quite right. On February 6th,[5] he had sent a message relative to the claims against Mexico in which he had advocated the use of reprisals for the enforcement of our demands. He said:

[1] *Cong. Globe,* vol. iv, p. 214.

[2] *Ibid.,* pp. 194 and 196.

[3] *Ibid.,* p. 213.

[4] Memucan Hunt appointed Dec. 31, 1836; *Tex. Dip. Cor.,* vol. i, p. 161.

[5] Richardson, *Messages,* vol. iii, p. 278.

The length of time since some of the injuries have been committed, the repeated and unavailing applications for redress, the wanton character of some of the outrages upon the property and persons of our citizens, upon the officers and flag of the United States, independent of recent insults to this Government and people by the late extraordinary Mexican minister, would justify in the eyes of all nations immediate war. That remedy, however, should not be used by just and generous nations . . . if it can be honorably avoided; and it has occurred to me that, considering the present embarrassed condition of that country, we should act with both wisdom and moderation by giving to Mexico one more opportunity to atone for the past before we take redress into our own hands. . . . To this end I recommend that an act be passed authorizing reprisals, and the use of the naval force of the United States by the Executive against Mexico to enforce them, in the event of a refusal by the Mexican Government to come to an amicable adjustment of the matters in controversy between us. . . .

He further indicated that he would co-operate in any other course which Congress might see fit to adopt to secure an adjustment of the existing difficulties. Whether he had meant this as a veiled hint for immediate recognition as a sort of retaliatory action, it does not clearly appear; but it seems a fair inference from the tone of the Message that any sufficiently vigorous measure taken by Congress in respect to Mexico would find the President's approval. This Message has, in my opinion, never been fully appreciated. It amounted, in fact, to the assumption of responsibility for initiative which Jackson had previously attempted to shift to Congress and forms the turning-point in the situation. This fact is substantiated by the speed with which that body finally resolved upon Texan independence. Another point which is worth considering, however, is the remark made by Wharton in his correspondence, according to which the real reason for the postponement of action lay with the

Van Buren men, who, realizing how inextricably the question of annexation was bound up with the recognition of Texas, disliked to embarrass the incoming administration with the probable division in Congress between North and South such as the annexation of Texas would bring with it. This would become an issue in the next election and would certainly place Van Buren in the minority. Although no friendly Congress likes to force upon an incoming administration a policy which it might not care to pursue, in the present case this could not have been the motive, for otherwise no action would have been taken at all. Jackson himself was such a hearty supporter of Van Buren that he would never have attempted to recognize Texas in the last days of his presidency if his successor had not been in substantial accord with this policy.

The vote of both the Houses had swept away whatever scruples Jackson may have had against acting on the responsibility he had assumed. It remained only for him to complete the recognition by the appointment of a representative to the new republic. The Texan representatives—for there were two of them now — in desperate fear lest the Jackson régime should pass away without consummating the act of recognition and leave them to face an administration of whose disposition they were none too sure, addressed to the President, on March 3, 1837, a fervent plea for the acknowledgment of the independence of their country. Jackson, however, had made up his mind to recognize Texas, and since he had the consent of the Van Burenites, there was no longer any obstacle in his way. On the same day he nominated Alceé La Branche, of Louisiana, as chargé d'affaires to Texas. At midnight he announced his decision to Wharton and General Hunt.[1] Action of the

[1] *Tex. Dip. Cor.*, vol. i, p. 201.

Senate on the nomination of La Branche was postponed on motion until March 6th, when it was referred to the Committee on Foreign Relations. This committee returned a favorable report and the nomination was confirmed.[1]

The protests of the Mexican government, which in her present impotent condition were of necessity faint, immediately followed. Señ. Castillo, the Mexican representative to the United States, appealed to Jackson's Message in which the latter had doubted the stability of Texas scarcely three months before. He apparently did not realize that it was the stability of Congress rather than that of Texas which had caused the President's doubt.[2]

Have the obstacles, may I ask, [wrote Castillo] which have constantly obstructed the recognition of the independence of Texas, disappeared? Is that portion of the Mexican territory less a rebellious province of Mexico than it was two months ago? Has its pretended independence been so completely assured that there are no grounds for apprehending an immediate invasion from Mexico . . . ? . . . I . . . regret to find myself obliged to declare, that I am totally at a loss to discover the grounds of a conviction so diametrically contrary in appearance to that which could have occasioned his [the President's] other recommendations, so very recently made, and so very different in their spirit.

In reply to this protest[3] Forsyth merely said that the policy of the United States in respect to these matters had not been departed from, and that the act of recognition of Texas should be regarded neither as an unfriendly one toward Mexico nor as an attempt at intervention in the contest.

[1] *Sen. Ex. Jour.*, vol. iv, p. 631.

[2] *Sen. Doc.* 1, 25 Cong., 2 sess., p. 133.

[3] *Ibid.*, p. 135.

Three weeks later diplomatic relations were again severed between Mexico and the United States by the recall of Castillo, pending the receipt of explanations from the Government of the United States respecting the occupation of Nacogdoches.[1] In reality the measure appears to have been retaliatory for the departure of Ellis from Mexico City. A second protest, this time directly from the Mexican Foreign Office, was despatched on March 31,[2] wherein the same arguments were used as had been employed by their erstwhile representative. Forsyth replied by forwarding a copy of his note to Castillo. With this correspondence the recognition phase of the Texas question was closed.

I have tried to indicate the importance of the relations between Mexico and the United States to the recognition question. In these relations I think that the question of claims played a larger rôle than is usually attributed to it. The severance of diplomatic relations by the return of Ellis had angered the President. This is reflected in his message of February 6, 1837, where he shows a complete change of attitude. The administration had displayed a strange mixture first of consideration for Mexico and then a total lack of regard. At the same time, however, in this as in the Latin-American cases, it desired to avoid too grave an affront to the parent state and thus to prevent precipitate action on the part of the latter. This was not what the administration itself avowed; it was the fear of embroiling the United States in a possible war which had led the executive to place in the hands of Congress the responsibility of initiative. This seems strange

[1] *Sen. Doc.* 1, 25 Cong., 2 sess., pp. 137-8. The order for recall was dated Dec. 27, 1836.

[2] *Ibid.*, p. 145.

when we consider that Andrew Jackson was in practice such a hearty advocate of executive prerogative. The congressional participation in recognition is one of the strange events in Jackson's career. This deliberate surrender of what was by this time generally considered a function of the executive is comprehensible only if we remember that the whole international policy of Jackson was tempered with a tranquillity and a conservatism not generally associated with the man. Certainly his course toward Texas, where he obviously sought to avoid international friction both in the Eastern and Western Hemispheres, stands as a laudable example for other executives. It may be that the hard-headed conservative John Forsyth was in some measure responsible for this attitude, but his influence would certainly never have served to override the opinions of his chief. It was only at the last, when he urged upon Congress the adoption of retaliatory measures, that Jackson departed from the course he had first adopted. His policy has the merit of consistency and reflects great credit on the closing years of his administration. The harmony between executive and Congress was made possible to some extent by the unanimity which prevailed in the United States respecting the desire to recognize Texas. This was the result not only of the prevalent passion for liberty, but was due also to the fact that while the Texan question was still in the embryonic stage, no problem of slavery was related to it. To be sure, there were at the time some dull murmurings of the storm which was later to burst forth in the fiercely contested annexation dispute, but until this question finally came up the North and South worked in complete unison.

The enthusiasm for the spread of liberty reached its height in the United States at the same time that in Europe it culminated in the famous revolutionary disturbances of

the year 1848. In France,[1] the only country where the revolution was successful, the governmental change was recognized almost immediately. For the struggling revolutionists in other countries there were expressions of sympathy, which in the case of Hungary took a most unusual form.

On June 18, 1849, A. Dudley Mann was appointed by the President as secret confidential agent of the United States to investigate the situation in Hungary. He was instructed that the principal object in sending him was to get accurate information as to Hungary in relation to other states, and as to the probable outcome of the revolution. Russian intervention, he was told, had awakened painful solicitude in the minds of the American people, a solicitude which was not inconsistent with our policy of non-intervention. "If it shall appear that Hungary is able to maintain the independence she has declared, we desire to be the very first to congratulate her, and to hail, with a hearty welcome, her entrance into the family of nations."[2] Mann was then cautioned that if it appeared to him that Hungary was unable to maintain her independence, he should not proceed there at all. If, on the other hand, the new government appeared stable, the President would recommend recognition to Congress. Mann was invested with complete powers to meet with authorized Hungarian representatives to consult and negotiate concerning matters of interest to both, and to conclude and sign treaties.

Mann was in Paris at the time of his appointment, and in the interval between the issuance of his papers and his arrival in Vienna Russian intervention had broken the revolution and the leaders had fled to countries where they were safe from extradition. The affair had an aftermath

[1] *Sen. Ex. Doc.* 53, 30 Cong., 1 sess.

[2] *Sen. Doc.* 43, 31 Cong., 1 sess.

in the United States in the subsequent efforts of Kossuth, the leader of the patriots, to obtain assistance for the liberation of his fatherland. The ovation tendered him by the officials of this government and the demonstrations so decidedly hostile to Austria stretched the forbearance of that country to the limit.

When the Austrian government heard of the sending of Mann, Hülsemann, chargé d'affaires at Washington, addressed to the United States government representations [1] against the mission, which he alleged was contrary both to international law and to the principle of non-intervention to which the United States had always adhered. Clayton replied that Mann's mission had no other object than to obtain information as to the situation in Hungary. The publication of Mann's instructions, however, opened the way for new protests on the part of the Austrian government against the course of this country on the ground of its impropriety as an interference with the internal affairs of Austria. The celebrated Hülsemann note was written by Webster in reply and is a masterly example of bombast, in which the Mann mission was characterized as a matter of purely domestic interest! A little over a year later, in consequence of the Kossuth demonstrations in this country and Webster's own speech eulogizing the revolutionists, the incident was brought to a close by the withdrawal of Hülsemann from the legation at Washington, by way of enforcing Austria's attitude of protest.

There is little to be said in defense of the attitude of the United States. Apart from the possible merits of the Hungarian revolt, the extended powers given to Mann contemplated what was little less than an intervention in the domestic affairs of Austria by the recognition of Hun-

[1] *Sen. Doc.* 9. 31 Cong., 2 sess., pp. 1 *et seq.*

gary. The question never really entered a stage where recognition could be seriously spoken of. I cite this case merely as an incident in the development of a tendency which had been growing ever since the days of the Spanish-American revolution. It was not until the Civil War broke out in this country and the injustice of premature recognition was brought home to us that we returned to a more sober governmental policy.

CHAPTER VII

Civil War and Reaction

There was an element of irony in the situation which faced the North in the spring of the year 1861. For nearly a century the chief champions of the revolutionary idea had been the American people. They had been the first to give aid to struggling insurrectos; their recognition of rebel belligerency and of rebel state had been second to that of no other country; but now when civil war broke out in their own state, a war based as much on the theory of the free will of the governed as had been the War of Independence, the great body of states united against the expression of this idea in order to force their views upon the recalcitrant states. As there has never been a revolution in which the cry of illegality or illegitimacy has not been raised (the principles for which the insurrectionists fight are always illegal from the standpoint of the existing order, and to admit these principles would amount to an acknowledgment of the right of revolution) the disposition in the North during the secession of the South was one of deep indignation at the illegality, or better, the unconstitutionality, of this action. It is in this feeling that we may find the keynote of the early policy of the Lincoln administration toward the recognition of the Confederate States. Nevertheless, it is, to my mind, difficult to comprehend the struggle against the recognition of the Confederate States within the recognition policy of this country. The secession was from the first treated primarily as a domestic

sedition. The rules of foreign policy were absolutely denied application in this case. Even the tremendous success of Southern arms could not shake the faith of the State Department in the view that the Richmond government did not exist de facto. But as this view was not shared by the European powers, we notice in the early phases of the struggle of the North against the South the development of a question of recognition which, as it rapidly passed into the more advanced phase of intervention, nearly threatened the disruption of friendly relations between the United States and Great Britain.

I have already indicated that the development of the de facto principle of recognition was in distinct opposition to the older idea of legitimacy, in that it waived all questions of legality and inquired merely into the existence of a certain state of facts. When, therefore, the government at Washington, in decided reversal of former policy, denied, on the ground of illegal origin, the right of other states to recognize the Confederacy, these states replied with the formula so familiar to the government, that a state, to be recognized, need prove merely its de facto existence, and that these considerations alone could govern the action of the powers. The denunciation of the illegitimacy of the Confederation was bound to weaken the position of the Union in its relations with European powers. It is easy to understand why the Federal administration, claiming to be the *de jure* government, would make assertions to this effect; at the same time the open disavowal by the Washington government of its traditional policy was certain to be taken advantage of by other states. This is what actually occurred, and the United States was obliged to prove the de facto non-existence of the Confederacy before the dangers of recognition from abroad had completely passed.

The first attempt of the Confederate States to secure a

recognition of their state was directed to the United States shortly after the inauguration of Lincoln.[1] In February, pursuant to a resolution of the provisional congress of the Confederacy,[2] Davis appointed as commissioners to the United States, A. B. Roman, John Forsyth and M. J. Crawford. Two of these commissioners arrived in Washington in March, and on the twelfth of the month, after an unsuccessful effort to secure an informal interview with Secretary Seward, a formal request was made for their reception as accredited commissioners from the Confederate States, "an independent nation, *de facto* and *de jure*," with a view to opening negotiations for a peaceful solution of the existing difficulties. Seward, in his extreme caution to avoid a formal reply which might indicate in any way a recognition of the commissioners, made his answer in the form of a memorandum which he filed with the State Departent. A copy of this was later delivered to the commissioners. The tenor of this document makes it apparent that the United States government refused to deal with the problem as one of recognition, and for this reason more than a brief mention of its purport would be here out of place. Seward explained that he saw in the existing situation not a rightful and accomplished revolution and an independent nation, but a perversion of a temporary and partisan aggression upon the rights and authority vested in the Federal Government; that, guided by the principles laid down in Lincoln's inaugural address, he was prevented from admitting that the Southern states had in law or in fact withdrawn from the federal union or that they could do so.

[1] Richardson, *Messages and Papers of the Confederacy*, vol. i, pp. 70, 84 *et seq.*

[2] *Provisional and Permanent Consts. together with Acts and Resolutions of first sess. Prov. Cong. of Con. St.* (1861), p. 38.

Of course, [he said] the Secretary of State cannot act upon the assumption or in any way admit that the so-called Confederate States constitute a foreign power, with whom diplomatic relations ought to be established. Under the circumstances, the Secretary of State, whose official duties are confined, subject to the direction of the President, to the conducting of the foreign relations of the country and do not at all embrace domestic questions or questions arising between the several States and the Federal Government, is unable to comply with the request of Messrs. Forsyth and Crawford. . . . On the contrary he is obliged to state to Messrs. Forsyth and Crawford that he has no authority, nor is he at liberty to recognize them as diplomatic agents or hold correspondence or other communication with them.[1]

These statements show sufficiently well the attitude toward the Confederate States resolved upon by the administration, and it will therefore not be necessary to follow the negotiations further. The Confederate States did not constitute a new state and they were not independent, hence they were not entitled to treatment by the United States as a foreign state. The existing difficulty was characterized as of purely domestic moment, and for this reason a recognition could not be granted. This statement of policy was perfectly reasonable as far as relations with the Confederate States themselves were concerned. Seward, however, with singular lack of vision, attempted to formulate a foreign policy upon the same hypothesis. This the rapid course of military events soon proved to be untenable, but he persevered with a certain dogged blindness which nearly led to an open rupture with England and France. It is quite possible that if the Confederacy had not hastened military events in the way it did, such a break might have

[1] Richardson, *op. cit.*, vol. i, pp. 85 *et seq.* Also Nicolay and Hay, *Abraham Lincoln*, vol. iii, pp. 402 *et seq.*

occurred. Seward himself openly avowed that it had at first been his plan thus to create a counter force to the growing rebellion. What is most inexplicable, however, is the fact that instead of abandoning this policy when the outbreak of hostilities between the North and South made it an impossibility, the Department of State persisted in demands which rendered a European conflict an almost daily possibility. Since the whole policy of the United States toward recognition of the Confederacy by European powers was so largely influenced by Seward's scheme of vigorous aggressiveness, and since a change in the attitude of the United States was the result of an accompanying change in Seward's views, it will be necessary for us to follow out these transitions with some care.

When the Prince of Wales was visiting the United States just prior to the secession of the South, Seward had been indiscreet enough to remark to the Duke of Newcastle that as he contemplated being the next Secretary of State he would make it his first business to insult England in order to secure his position in the United States. These supposedly humorous remarks were taken seriously by the Duke and were later given wide circulation. The Duke alleged, moreover, that Seward had further expressed himself to the effect that England would never go to war with the States because in the first place she could not afford it, and furthermore she would not dare to.[1] These statements later appeared to be in some measure confirmed by Seward's British policy, and there is some evidence that he was serious in what he had said. In his previous congressional career he had on more than one occasion publicly expressed himself in those terms of braggadocio which politicians of his type often affect toward European

[1] Bancroft, *Life of W. H. Seward*, vol. ii, pp. 225-6, and Martineau, *Life of Henry Pelham, Fifth Duke of Newcastle*, p. 301.

powers. His own constituency in New York was made up in part of the disaffected Irish element which later was active in the Fenian movement; and a convenient way of controlling this important "vote" was by loud-mouthed defiance of the mother country.

Great Britain was fully aware of Seward's attitude before he even entered upon his secretarial duties. In January, 1861,[1] Lord Lyons, the British minister, wrote to his chief, Lord John Russell:

> With regard to Great Britain I cannot help fearing he [Seward] will be a dangerous Foreign Minister. His view of the relations between the United States and Great Britain has always been that they are good material to make political capital of. He thinks at all events that they may be safely played with without any risk of bringing on a war. He has even to me avowed his belief that England will never go to war with the United States. He has generally taken up the cry against us but this he says he has done from friendship, to prevent the other Party's appropriating it and doing more harm with it than he has done. The temptation will be great for Lincoln's party, if they be not actually engaged in a civil war, to endeavour to divert the public excitement to a foreign quarrel.

Lord Russell evidently had his suspicions of Seward's friendship for Great Britain, and this communication from Lord Lyons served to confirm them. Being thus forewarned of the probable foreign policy of the administration even before it could be put into operation, he laid his plans for defeating the successful outcome of the scheme. Accordingly, on February 20, 1861,[2] he instructed Lord Lyons as follows:

[1] Newton, *Lord Lyons*, vol. i, p. 30.

[2] 51 *Br. and For.*, 175.

Supposing, however, that Mr. Lincoln acting under bad advice, should endeavor to provide excitement for the public mind by raising questions with Great Britain, Her Majesty's Government feel no hesitation as to the policy they would pursue. They would, in the first place, be very forbearing. They would show by their acts how highly they value the relations of peace and amity with The United States. But they would take care to let the Government which multiplied provocations and sought for quarrels, understand that their forbearance sprung from the consciousness of strength, and not from the timidity of weakness.

These instructions explain Great Britain's attitude of apparent calm when Seward commenced his policy of pin-pricks, which was to goad her into action against the United States. Her attitude of forbearance was made possible only by this fortunate preliminary preparation.

On April 1, 1861,[1] Seward submitted to Lincoln a memorandum which he entitled, "Some Thoughts for the President's Consideration." In this remarkable document, which complains of a lack of initiative in both domestic and foreign policy, Seward suggests a more vigorous conduct, as follows:

I would demand explanations from Spain and France, categorically, at once.

I would seek explanations from Great Britain and Russia and send agents into Canada, Mexico, and Central America, to rouse a vigorous continental spirit of independence on this continent against European intervention.

And if satisfactory explanations are not received from Spain and France,

Would convene Congress and declare war against them.

Seward evidently intended this document to perform the

[1] Nicolay and Hay, *op. cit.*, vol. iii, pp. 445-6.

functions of a two-edged sword. In the first place, he sought to probe Lincoln's disposition toward the greater assumption of power by himself, and secondly to use this as a scheme for averting the domestic conflict. The explanations he demanded were relative to the operations of Spain, France and Great Britain in Mexico for the collection of certain debts which had long been due them, an intervention which, since it was accompanied by the use of violence against the Mexican goernment, would furnish good excuse for interference by this country on the grounds of violation of the principles of the Monroe Doctrine. It was quite natural that Lincoln should decline to consider the propositions offered by Seward and that he should indicate to his Secretary of State that the prosecution of a foreign policy was a matter resting entirely in the hands of the President.[1] Despite this rebuff, however, I am confident that Seward, at least during the first year of the Civil War, shaped the foreign policy of this country to accord in some measure with this conception of a foreign war as a counter-force to the rebellion. At any rate, the attitude taken by Seward toward a recognition of the Confederacy by European powers, as expressed in his communications to American representatives, was one of sharp defiance which indicated anything but an unwillingness to avoid a misunderstanding.

Seward's foreign schemes have frequently been the object of admiration as daring productions of a gifted and brilliant imagination, but this is a character which a careful observer will not give them. To plunge into an international war two countries living in relations of amity in order to settle a domestic difficulty was a monstrous scheme for which we must condemn its author as either a very shal-

[1] *Nicolay and Hay, op. cit.*, vol. iii, p. 448.

low or a very unscrupulous man. If he thought to heal the breach between North and South by a measure of this sort, Seward evidently had no conception of the antipathy, of the bitterness and the depth of the grievances nourished by the South against the North. These feelings had been intensified by actual secession to such a degree that it was preposterous to suppose that a European war would knit together once more the disaffected elements. As time passed, therefore, Seward gradually became aware of these changes, and a great transformation took place in his mental attitude, a transformation which materially influenced the later policy of the State Department.

The first step toward averting a premature recognition of the Southern States was taken by Judge Black, who had succeeded General Cass as Buchanan's Secretary of State. On February 28, 1861, a circular note was sent to the various ministers of the United States, instructing them as to the course they should take to prevent a recognition by European states.[1]

It is not impossible, [the note went on to say] that persons claiming to represent the United States which have thus attempted to throw off their federal obligations will seek a recognition of their independence by the Emperor of Russia.[2] In the event of such an effort being made you are expected by the President to use such means as may in your judgment be proper and necessary to prevent its success. . . . It must be very evident that it is the right of this government to ask of all foreign powers that the latter shall take no steps which may tend to encourage the revolutionary movement of the seceding States; or increase the danger of disaffection in those which still remain loyal.

[1] 1861 *Diplomatic Correspondence of the United States*, 31 (cit. Dip. Corr.).

[2] A "mutatis mutandis" note.

Ten days later Seward [1] despatched a similar circular, but its general tone was more decisive and aggressive. Any action, he wrote, on the part of the European states in favor of the Secessionists would be regarded and resented as an unfriendly intervention in the domestic concerns of the nation. This circular and the policy which it attempted to lay down was reinforced by the instructions issued to the newly appointed ministers and fashioned to suit the needs of the particular states to which they were accredited. Herein a policy of non-intervention and non-recognition on the part of the European states was insisted upon. The instructions issued to C. F. Adams, minister to Great Britain, were of particular significance.[2] The United States, wrote Seward on April 10, 1861, would not listen to any compromise of the questions at issue, and in case Great Britain should see fit to recognize the Confederacy, she might as well enter into an alliance with the enemies of the United States. He admitted the right of a nation to recognize the independence of a new state which had achieved its independence, but he condemned in unqualified terms recognition given with intent to aid the revolutionists.

To recognize the independence of a new state, and so favor, possibly determine its admission into the family of nations, is the highest possible exercise of sovereign power, because it affects in any case the welfare of two nations and often the peace of the world. In the European system this power is now seldom attempted to be exercised without invoking a consultation or congress of nations. That system has not been extended to this continent. But there is even a greater necessity for prudence in such cases in regard to American States than in regard to the nations of Europe.[3]

[1] 1861, Dip. Corr., p. 33.

[2] *Ibid.*, p. 71.

[3] *Ibid.*, p. 79.

Adams, to whom these instructions were addressed, was a firm friend of Seward's and one upon whom he could rely to carry out his policies. He may have been aware of Seward's war schemes, but the rare tact with which he carried out his orders does not indicate that he in any way favored them.

The circulars issued by the Department of State, and the subsequent instructions to outgoing ministers, soon bore fruit in the shape of protestations of friendship for the United States and assurances that no steps would be taken toward a premature recognition of the Confederacy, and that nothing would be done without first advising the Federal Government. From Berlin, from Russia, and from Vienna came vigorous expressions of disapproval of revolutionists and of de facto governments. Other states of the continent, although not so positive in their assurances, likewise gave guarantee not to act prematurely. The attitude of England and France, however, was less decisive, and it is here that the most important developments of policy took place.

On April 9, 1861,[1] Mr. Dallas, the outgoing minister of the United States to Great Britain, wrote to Seward the purport of a conversation which he had had with Lord Russell, British Minister of Foreign Affairs. In the course of this conversation the latter had assured him that Great Britain had no intention of grasping at any advantage which the war might open to her, but that, on the contrary, she would be happy to see the Union restored to its former integrity. Dallas attempted to impress the British minister with the importance of abstention, on the part of both France and Great Britain, from giving the rebels encouragement, but Lord Russell seemed to think that the matter was not ripe for decision one way or the other, remarking that what he had said was all that at present it was in his power to say.

[1] 1861, Dip. Corr., p. 81.

The noncommittal attitude of the British minister appears to have irritated Seward and at the same time afforded him an excuse for more aggressive action. He instructed Adams that these last remarks were by no means satisfactory to the United States.

> Her Britannic Majesty's government [he continued] is at liberty to choose whether it will retain the friendship of this government by refusing all aid and comfort to its enemies, now in flagrant rebellion against it, as we think the treaties existing between the two countries require, or whether the government of her Majesty will take the precarious benefits of a different course.[1]

Two matters occurred shortly after this instruction which increased the difficulties of the situation. On May 2d,[2] Dallas was apprised of the arrival in London of the delegates of the Confederacy and also of the fact that there existed an understanding between Great Britain and France by which both would take the same course in regard to recognition. The knowledge of this scheme of concerted action was of the highest importance to the United States. It signified not merely the necessity of greater caution in dealing with the situation, but also revealed the fact that in Napoleon III the United States was meeting with the most irrepressible intrigueur of the nineteenth century, whose designs upon Mexico were looked upon with great suspicion by this country and who for this very reason was bound to be a factor in the outcome of the Civil War. With whom the initiative rested in the projected concert would depend in a large measure the ultimate success of the policy of the United States.

In the meantime, Lincoln's proclamation of the blockade

[1] 1861, Dip. Corr., p. 83.

[2] *Ibid.*, p. 84.

of the southern coast was issued, on April 19, 1861; and on May 13th the British declaration of neutrality was forthcoming.[1] This, in recognizing the belligerency[2] of the Confederates, at once gave them a certain prestige which promised to be of great value in gaining for them the ultimate recognition of their state. The United States government was naturally irritated by what it considered a premeditated act to injure her position as a power by giving to the Confederate States a character which she herself denied them. Seward was very anxious that the rebellion be treated by foreign states as a sort of *affaire d'honneur* of the United States, from which they would be gentlemanly enough to keep out. This was an absolutely untenable position, for the declaration of neutrality by Great Britain was a natural step to avoid embarrassment in a conflict whose dimensions no one could foretell, although she must have been aware that the circumstances under which the declaration was made were likely to give offense to this country. Lord Russell had assured Dallas that no steps would be taken by the British government prior to the arrival of Adams, and here, on the very day of his arrival in England, the declaration had been issued. If not an actual breach of faith, it was at least an inconsiderate act on the part of the British government.

The interpretation put by Seward on the Queen's proclamation, however, is not supported by the facts. In a note to Adams, June 3, 1861,[3] Seward tried to explain the proclamation as vaguely recognizing the Confederacy as a national power. "That proclamation," he wrote, "unmodified and unexplained, would leave us no alternative

[1] This was not a result of Lincoln's measure so much as an attempt to prevent the Confederates from being treated as pirates.

[2] 51 *Br. and For.*, 165.

[3] 1861, *Dip. Corr.*, p. 97.

but to regard the government of Great Britain as questioning our free exercise of all the rights of self-defense guaranteed to us by our Constitution and the laws of nature and of nations to suppress the insurrection."

Unless Seward was seeking a quarrel with Great Britain, his interpretation is inexplicable. The Washington administration was evidently in an agony of fear lest the Confederacy be given definite recognition as an independent state. So much weight had been placed upon the value of foreign intervention by the Southerners themselves that both governments were firmly convinced that in the hands of the European states lay the decision of the outcome of the secession. The Southern States in their application for recognition had adopted the same arguments and policy which had been so often applied by the United States. The basis of their argument was the de facto existence of their state, and upon this theory they rested their case. Seward's appeal was two-fold: first, that this rebellion was purely a domestic concern of the United States, and secondly, that the action of the South was illegal, an argument sure to find favor with the reactionary governments of the continent.

The Southern commissioners arrived in London, as I have said, in the early part of May. They were unofficially received by Lord Russell, their arguments were heard, but no promises were made them. The American minister apparently made no objection to the action of the Foreign Secretary. Not so Seward when he heard of the event. In a celebrated dispatch Adams was instructed [1] to protest against the British Government having any intercourse with the agents of the Confederate States on the ground that such intercourse might be construed as a recognition of their government. The note went on to say:

[1] 1861 *Dip. Corr.*, p. 87.

Such intercourse would be none the less hurtful to us for being called unofficial, and it might be even more injurious, because we have no means of knowing what points might be resolved by it. Moreover, unofficial intercourse is useless and meaningless if it is not expected to ripen into official intercourse and direct recognition. . . . You will in any event, desist from all intercourse whatever, unofficial as well as official, with the British Government so long as it shall continue intercourse of either kind with the domestic enemies of this country.

Seward then dwelt on the subject of joint action of England and France in respect to the United States, and on the fact that other European states were expected to concur in the measures adopted by these two states, a course which the United States looked upon with disfavor. Adverting to the recognition of the Confederacy, Seward then remarked that a concession of belligerent rights was liable to be construed as a recognition. None of these proceedings would pass unquestioned by the United States, for "British recognition would be British intervention to create within our territory a hostile State by overthrowing this republic itself."

It is worth while to note the words which followed in the original draft of this despatch.[1] "When this act of intervention is distinctly performed, we from that hour shall cease to be friends and become once more, as we have twice before been forced to be, enemies of Great Britain." These words were struck out by Lincoln in his revision of Seward's despatch, a revision which changed in many particulars the original belligerent tone of the instrument and rendered it more innocuous. Moreover, Lincoln directed that the note be for Adams' use only and not for filing with

[1] Nicolay and Hay, *op. cit.*, vol. iv, p. 273; *cf.* 142 *N. Am. Rev.*, 410, for facsimile.

the British Foreign Office as originally intended. Had Seward followed out his original plan, we would probably have been embroiled in a war with Great Britain.

In conclusion, the despatch made direct allusions to the possibility of a war, the outbreak of which was deprecated but upon which the United States was firmly resolved if her demands were not acceded to. The instruction was, fortunately, followed by Adams only in spirit and not to the letter. A rupture of diplomatic intercourse merely for the hearing given to the Confederate agents by the British authorities, would have been most ill-advised and would have served only to involve the United States still further in needless international complications.

Protests against the proclamation of the Queen and against the reception of the Confederate ministers were made by Adams prior to receiving the above instructions,[1] but the British government remained firm on both points. It was pointed out by Lord Russell that the proclamation of neutrality was a domestic policy designed for the protection of British citizens and that the course of events in the United States had justified such a step. So far as receiving a representative of the Southern states was concerned, it had always been the policy of his government to receive such agents and to hear what they had to say, and such unofficial conduct could not be regarded in any sense as compromising his government.[2] Lord Russell refused to bind his government to any course respecting recognition which a change in events might render impossible to follow.[3] He concluded by saying that Lord Lyons, the British minister at Washington, would be directed to give such

[1] 1861 *Dip. Corr.*, pp. 90 *et seq.*

[2] *Ibid.*, p. 103. This point was enlarged on at another interview, June 12.

[3] 51 *Br. and For.*, 192.

assurances to the United States as he might think satisfactory. There is no evidence that these assurances were ever given, but on June 15th Lord Lyons presented, jointly with the French minister, the first official notification to the United States of the neutrality of Great Britain, in the form of certain proposals for the adhesion of the United States to the Declaration of Paris. These instructions [1] were given to Seward on that day for a preliminary inspection, but after examining them he declined to have them read to him or to receive official notice of them. As Lord Lyons [2] later reported to his government,

Mr. Seward said at once that he could not receive from us a communication founded on the assumption that the Southern rebels were to be regarded as belligerents; that this was a determination to which the Cabinet had come deliberately; that he could not admit that recent events had in any respect altered the relations between foreign Powers and the Southern States; that he would not discuss the question with us, but that he would give instructions to The United States' Ministers in London and Paris, who would be thus enabled to state the reasons for the course taken by this Government to your Lordship and to M. Thouvenel. . . .

Adams was informed concerning this event that the United States were living under the obligations of international law and their treaties, as they always had done, and that they insisted that Great Britain must do the same. "Great Britain, by virtue of these relations, is a stranger to parties and sections in the sovereignty of any power, State, or section in contravention to the unbroken sovereignty of the federal Union." The situation in the United States did not constitute a state of war, and there was, therefore, no necessity

[1] 55 *Br. and For.*, 550.

[2] *Ibid.*, 558.

for a declaration of neutrality. Instructions in the same tenor were sent the United States minister in France.

Up to this time the negotiations with France had been carried on with more tact, but were likewise unsuccessful in preventing a declaration of neutrality and of the belligerency of the Confederate States. In reply to the first request that France abstain from a recognition of the Confederacy, the French government had said that, although it admitted the de facto principle, it was not inclined toward precipitate action.[1] But Seward, who wanted a more definite explanation of policy, instructed Dayton, our Minister, that this government would regard any communication held by the French government with the Confederate representatives as injurious to the United States, and that such intercourse, though unofficial, was bound to encourage them to continue the civil war. Nor would the United States be content to allow the Confederate States to be recognized as belligerents by any foreign powers, and any concert among them would not reconcile the United States to such a proceeding, whatever might be the consequences of resistance.[2]

It was impossible, however, to prevent the issuance of a declaration of neutrality, despite the fact that M. Thouvenal, Minister of Foreign Affairs, had assured Dayton that this would not be necessary, in view of the statutes dealing with the matter. On June 10th, the Imperial Government proclaimed its neutrality in a document which *ipso facto* gave to the Confederates a character of belligerents. Shortly after, as we have seen, the notes of M. Mercier and Lord Lyons stating these facts, were returned to them, Seward repeating his conviction that a recognition of belligerency raised the presumption that a state making such

[1] 1861 *Dip. Corr.*, pp. 204 *et seq.*

[2] *Ibid.*, p. 215. An offer of mediation was declined.

recognition reserved a right to recognize the independence of the belligerents *in toto*. Notifying Dayton of his refusal to hear the proposals of the French government, Seward said:[1] "We shall continue to regard France as respecting our government throughout the whole country, until she *practically acts in violation of her friendly obligations* to us as we understand them."

It is noteworthy that no protest was made by the United States against the reception by France of the Confederate commissioners. Indeed, the general tone of the correspondence with France was much more conciliatory than that with Great Britain. It is possible that Seward surmised that the initiative decision in case of joint action lay with Great Britain rather than with France, and that for this reason he proposed taking toward the former country a more aggressive stand than against the Empire. Furthermore, as I have indicated, the bold defiance of Great Britain was inspired to some extent by the deference necessary to the Irish vote, an attitude which was not essential in the case of France. Nor were the English people unaware of the attitude taken by the United States. In June, Adams had informed the Department that the general belief in England was that there would never be any actual conflict between the North and the South, and that in many cases this belief was connected with the apprehension that reunion might be affected upon the basis of hostile measures against Great Britain. "Indeed," wrote he, "such has been the motive hinted at by more than one person of influence as guiding the policy of the President himself."

It is during this period in the negotiations between the United States and the two great European powers that the question of recognition passed from this preliminary phase

[1] 1861 *Dip. Corr.*, p. 229.

into the more delicate question of intervention. Seward had from the very first laid it down that any premature act of recognition—and by this he included all recognition of any sort—would be regarded by the United States as an act of intervention, and hence a *casus belli*. This point had been so firmly reiterated in subsequent correspondence that by the middle of the year it had become the point of departure for our whole policy. For these reasons, therefore, it will not be necessary for us to pursue further the recognition policy of the United States. The recognition problem definitely passed into the more advanced stage of a question of intervention and underwent no further developments. At the same time, however, that our policy toward European interference became fixed, it lost the aggressive tone in which it had heretofore been carried on. This was due, as I have indicated, chiefly to the change in Seward's attitude toward the war and also to the fact that at about this time rebel arms achieved their first astounding successes in a measure which promised to establish their existence as a state and which put an end to the empty phrases of rebels, pirates and treason.

It was in the Trent affair that this change in Seward's attitude became most noticeable. The circumstances were such as to keep the two countries on the brink of actual war and it was only by rare tact on both sides that the conflict was averted. Had the incident occurred earlier in the year I think that, with Seward still under the influence of his first schemes, war would have been inevitable. This change in attitude was noted by Lord Lyons in a letter to Lord Russell, December 23, 1861:[1]

You will perhaps be surprised, [he said] to find Mr. Seward on the side of peace. He does not like the look of the spirit

[1] Newton, *op. cit.*, vol. i, p. 69.

he has called up. Ten months of office have dispelled many of his illusions. I presume that he no longer believes in the existence of a Union Party in the South, in the return of the South to the arms of the North in case of a foreign war; in his power to frighten the nations of Europe by great words, in the ease with which the U. S. could crush rebellion with one hand and chastise Europe with the other; in the notion that the relations with England in particular are safe playthings to be used for the amusement of the American people. He sees himself in a very painful dilemma. But he knows his countrymen well enough to believe that if he can convince them that there is a real danger of war, they may forgive him for the humiliation of yielding to England, while it would be fatal to him to be the author of a disastrous foreign war.

It is due Seward, however, to remark that the purely material considerations of political prestige, of the influence of England and France on the money market, and of fear of a Mexican embroglio were not the sole factors in causing him to abandon his visionary plans. When the horror of war had been actually brought home to him, he underwent a complete psychological transformation, and it is chiefly from this more purely human point of view that we must interpret his acts.

There is little to add by way of summary. In the first days of the rebellion the United States, in complete abandonment of their earlier expressions of policy, chose to regard the conflict with the Confederate States as a local matter in the nature of a riot which, because of its peculiarly domestic character, was lifted beyond the spheres of diplomatic action and foreign cognizance. The flat assertion that recognition under any circumstances meant intervention and war, a position never yet taken by a European nation, certainly acted as a check upon the increasingly

inimicable governments of Great Britain and France and was largely instrumental in keeping these nations within the limits which they themselves, as neutrals, had set. There was a great exchange of rash opinions back and forth, especially on the part of the United States, but their attitude, if not to be justified, is to be explained by the gravity of the crisis which the nation faced. In short, the incident of Confederate recognition, though of intense interest, does not properly belong in the continuity of our recognition policy, but the lesson which it taught was not soon forgotten.[1]

[1] To the end of his days A. Dudley Mann, one of the Confederate Commissioners, insisted that the Pope, Pius IX, had recognized the Confederates. The letter of the Pope upon which he bases his case contains no justification for this view; *cf.* Moore, *Digest of International Law*, vol. i, p. 211.

CHAPTER VIII

Developments since 1865

The policy pursued by Seward in regard to the recognition of the Southern Confederacy was in many respects reactionary, and for that reason necessarily involved a departure from the previously liberal practice of the country. However, with the wholesale destruction of republican idols as the inevitable consequence of the Civil War, these obvious incongruities of policy were without any serious international results, although they did not pass unnoticed. Indeed, the latter years of Seward's incumbency saw a development along new lines which was of inestimable importance to our later policies and which, although notably conservative and legitimistic in its general character, is not to be entirely distinguished from our earlier doctrine. Just as the views of the State Department on the subject of Confederate recognition marked a violent breaking away from the existing trend of political thought, so this new policy may be regarded historically as the continuance of the older ideas chastened by the experience of the Civil War. This transition was made possible, first of all, by the fact that the policy was developed in relation to the recognition of new governments and not of new states; and again for the reason that national self-respect demanded that our future action toward changes in the internal constitution of other political bodies conform in some measure to the attitude which we assumed toward changes in our own. It must be noted, too, that it was at this time that a more defi-

nite distinction was gradually drawn between a recognition of governments and a recognition of states.

What promised to be the most serious international complication of the Civil War, if we exclude the "Trent Affair," was the series of events which followed the joint intervention of France, Spain and Great Britain in Mexico. I have mentioned the fact that these countries had carried on a joint expedition against that unfortunate republic for the collection of certain debts. The invasion had not progressed very far before the real purpose of the French government was revealed, whereupon the other two powers, anxious to avoid any clash with the United States, withdrew from the scene and left France alone to carry out her schemes of colonial empire. The establishment of the Archduke Maximilian as Emperor of Mexico soon took place and a recognition of the new government was in order.

A more delicate dilemma is hardly conceivable. The government of Napoleon III was even then carrying on negotiations with the Confederate commissioners for the recognition of their state, an act which would certainly follow any open hostility on the part of the United States toward the new Empire of Mexico. On the other hand, the Mexican intervention represented such a definite violation of the principles for which our government was supposed to stand that a recognition of Maximilian would mean the end of the doctrine of non-intervention and would cast indelible discredit upon the government. The only possible course, which was one of strict neutrality, was adopted by Seward. During the whole existence of the Empire he refused not only to recognize Maximilian, but continued relationships with the opposition, the Juarez government. Attempts were made by France to force the hand of this government, and late in the year 1863. M.

Drouyn de Lhuys proposed that, in return for recognition by the United States, France withdraw her troops. Seward, however, replied that the United States intended to preserve her neutrality and that the settlement of their destinies must be left to the Mexican people themselves.[1]

It is not as a matter of foreign policy, however, that I cite this case, but rather for the effects it had as a question of internal power. On this, as on previous occasions, Congress insisted on meddling in the conduct of foreign relations. On April 4, 1864, it was unanimously resolved by the House of Representatives that "the Congress of the United States are unwilling by silence to have the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the republic of Mexico, and that they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge any monarchical Government in America under the auspices of any European Power."[2] The resolution was referred to the Senate, where it was allowed to perish in the hands of the Committee on Foreign Relations. It was not without effect, however, for in France it was looked upon as portending a change of attitude in the United States and it caused great disquietude in that country. Seward instructed Dayton, April 7, 1864, that although the resolution of the House was a true expression of the prevailing sentiment in the United States, yet it was an entirely different question whether the United States would think it necessary and proper to express themselves in the same way to the French government. "This is a practical and purely executive question and the decision of its constitutionality belongs not to the House of Represen-

[1] 1863 *Dip. Cor.*, vol. ii, p. 98.

[2] *Cong. Globe*, 38 Cong., 1 sess., p. 1408.

tatives, nor even to Congress, but to the President of the United States." Furthermore, he indicated that action upon the resolution had been confined to the House and that it did not receive a legal character until both the Senate and the President had passed upon it. The French government was content with these explanations as expressed through Dayton, and published in the *Moniteur* the statement that the Emperor had received satisfactory explanations from the United States concerning the sense and bearing of the resolution of their House relative to Mexico; and that it was known, in addition, that the Senate had indefinitely postponed consideration of the question to which the executive would not, in any event, give its sanction.

This apparent disregard of the action of the House created a profound sensation in that body, and a call was at once made for the correspondence with France.[1] This was submitted by Lincoln on May 24th. A month later, the Committee on Foreign Affairs, to whom the matter was referred, made its report, presenting a new resolution for consideration by the House.[2] In this report the administration was subjected to severe castigation for its action. The committee professed regret that the President should have so widely departed from the usage of Constitutional government as to make a pending resolution of so grave and delicate a character the subject of diplomatic explanations. It regretted even more the fact that the President should have thought proper to inform a foreign government of a radical and serious conflict of opinion and jurisdiction between the legislature and the executive. What, however, surprised the committee most was the fact

[1] *Cong. Globe*, 38 Cong., 1 sess., p. 2427.

[2] *House Rep.*, 129, 38 Cong., 1 sess., p. 1.

that the President claimed the power of recognition to be a purely executive act within the competence of the executive alone. "This assumption is equally novel and inadmissible. No President has ever claimed such extensive authority. No Congress can ever permit its expression to pass without dissent. It is certain that the Constitution nowhere confers such authority on the President." The committee proceeded to review the precedents which, naturally, they found favorable to its argument, claiming that in these precedents such problems had invariably been treated as grave questions of national policy on which the will of the people should be expressed in Congress, whose dictates the President followed.

Hitherto new nations, new powers, have always been recognized upon consultation and concurrence of the executive and legislative departments, and on the most important occasions by and in pursuance of law in the particular cases. Changes in the person or dynasty of rulers of recognized powers . . . have not been treated always with the same formality. . . . It it not known that hitherto the President has ever undertaken to recognize a new nation or a new power not before known to the history of the world, and not before acknowledged by the United States without the previous authority of Congress. It is peculiarly unfortunate that the new view of the executive authority should have been announced to a foreign government, the tendency of which was to diminish the force and effect of the legislative expression of what is admitted to be the unanimous sentiment of the people of the United States, by denying the authority of Congress to pronounce it. . . .

The report wound up with the resolve that

Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States as well in the recognition of new powers as in other

matters and it is the constitutional duty of the President to respect that policy, not less in diplomatic negotiations than in the use of the national force when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition while pending and undetermined is not a fit topic of diplomatic explanation with any foreign power.

The resolution was tabled until the next session when, on December 15, 1864, it was revived and passed by the House, after heated debate, and by a very small vote, four days later.[1] Arriving in the Senate, however, it was referred to Sumner's committee and, like its predecessor, was never again heard from.

The action of Congress did not produce any effect upon the acts of the State Department beyond what has already been noted. The purely political devices of both Monroe and Jackson to thrust upon Congress responsibility for recognition, which threatened the administration with serious embarrassment, bore fruit in these proceedings. The quashing of the resolution in the Senate marks an end of the legislature's attempt to assume initiatory control over recognition.

Upon the basis of his experience with Great Britain and France in regard to the Confederacy, Seward made it a fundamental condition of his new policy of recognition that the de facto government which was ushered in by revolution should be adopted with the full consent of the people, and that until the consent had been evidenced either by act of the legislature or by formal election, recognition should be withheld. Thus our representative in Bolivia was instructed April 21, 1866, that,[2]

[1] *Cong. Globe*, 38 Cong., 2 sess., p. 48.

[2] 1866 *Dip. Cor.*, vol. ii, p. 330.

Hitherto your instructions have been not to recognize any government in Bolivia which was not adopted through the free will and the constitutionally expressed voice of the people of that republic: but, nevertheless . . . the President deems it expedient under the exigencies of the present condition of affairs in that region to recognize the actual government of Bolivia if that government has become truly and in fact consolidated. . . .

Shortly thereafter instructions in the same tenor were given to General Hovey, Minister to Peru, in respect to the revolution then going on.[1] General Hovey had set out with instructions to continue to recognize President Pezet, with whom the United States was still in amicable relations, but by the time he arrived in Peru the *de jure* government had been overthrown and General Canseco was ruler *pro tempore*. This government the diplomatic corps, with the exception of the representatives of the United States, had hastened to recognize, an act which had scarcely been consummated when the new president was summarily deposed by Colonel Prado and a dictatorship established. This government was likewise given immediate recognition by all but the minister of the United States. On March 8, 1866, Seward gave the explicit command that the United States was not yet ready to recognize:

The policy of the United States [he wrote] 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.[2]

A more illuminating statement of the motives for Seward's policy could not be desired. It is to his credit that

[1] 1866 *Dip. Cor.*, vol. ii, p. 617. [2] *Ibid.*, p. 630.

the attempt was made to develop a consistent policy of recognition equally applicable to domestic dissensions and to similar disorders abroad. As he indicated later, the policy of the United States toward revolutionary governments in Latin America had been adopted after due consideration, and it had been adhered to faithfully. But this statement is not correct. In the history of the Latin American states before the middle of the century the revolutionary ideal had been almost as vigorously prosecuted as it has since been, and our policy in regard to the frequent governmental bouleversements had been on the whole extremely liberal. Thus, in a Message of May 15, 1856,[1] President Pierce had indicated that of the five successive revolutionary governments which had made their appearance in Mexico in the course of a few months, each had been recognized in turn by the United States as sovereign *de jure*. This policy was further borne out by our recognition of two more revolutionary governments which followed each other in rapid succession.[2] This case is quite typical of the general tendency up to this time. Indeed, the Mann Mission to Hungary and the instructions given in 1852 to our representative in China, to recognize the Tai Ping leaders as the political power in that country, are all a part of the same liberal tendency.

Seward's policy, while on the one hand containing an element of consistency, represents to my mind a lapse to the principle of legitimacy, or better, of legality, quite out of harmony with our previous traditions. So far indeed did he carry this principle that he refused even to receive informally agents of the enemies of the *de jure* government, stating it to be the rule of the United States "to

[1] *House Ex. Doc.*, 103, 34 Cong., 1 sess., p. 5.

[2] Moore, *History and Digest of International Arbitrations*, vol. ii, p. 1289.

hold no interview, public or private, with persons coming from any country, other than the agents duly accredited by the authority of that country which is recognized by this government." [1] Here was consistency to a fault, for Seward was, in truth, attempting to formulate a policy quite contrary to what had previously been the practice of the United States. One has but to recall the swarm of South American agents which infested Washington in the early twenties, with whom Adams had continual informal intercourse, and the activities of the Texans who went even so far as to appear before a House committee, to find refutation for Seward's statements. Subsequent developments have proven the untenability of the Sewardian doctrine, for although republican exuberance may lead in some cases to international embarrassments, it is healthier than a reversion to legitimacy. It seems not out of the natural order of things, however, that a reaction of this sort should set in after the excessive republicanism of the latter forties.

That Seward did not attempt to break away entirely from the traditions of the Department is evident. His purpose was rather to adhere to previous policy as much as was consistent with his ideas of revolution for evidently he does not seem to have been able to reconcile revolution with the democratic ideal of liberty. Instructions sent to our minister in Peru are of some significance. The Pradist government had just been overthrown by the previously deposed General Canseco, to whom, immediately preceding his disposition, General Hovey had presented his letters of credence. General Canseco now claimed to have continued as *de jure* sovereign, holding that the recognition given him two years before still obtained. Seward, writing on May 7, 1868, endeavored to reconcile the old with the new view: [2]

[1] 1865 *Dip. Cor.*, vol. iii, p. 378.

[2] 1868 *ibid.*, vol. ii, pp. 863 *et seq.*

What we wait for in this case is the legal evidence that the existing administration has been deliberately accepted by the people of Peru. When a Republican form of government is constitutionally established, we hasten to recognize the administration and to extend to it a cordial friendship. We do this because every state which constitutes itself a republic becomes by force of that very circumstance a bulwark of our own republic. We do not deny or question the right of any nation to change its republican constitution. We do not deny the right even to change it by force, although we think that the exercise of force can be justified in rare instances. What we do require, and all that we do require, is when a change of administration has been made, not by peaceful constitutional process, but by force, that then the new administration shall be sanctioned by the formal acquiescence and acceptance of the people.

We insist upon this because the adoption of a different principle in regard to foreign states would necessarily tend to impair the constitutional vigor of our own government, and thus favor disorganization, disintegration, and anarchy throughout the American continent. In our own late political convulsions, we protested to all the world against any recognition of the insurgents as a political power by foreign nations, and we denied the right of any such nation to recognize a government here independent of our constitutional republic until such new government should be not only successful in arms, but should also be accepted and proclaimed by the people of the United States.[1]

This message is the best expression of Seward's ideas of recognition, which, despite their essentially opportunistic nature, were destined to continue to form the basis of our policy toward new governments. Hamilton Fish, Seward's immediate successor, was his political rival, and had it not

[1] The Canseco government was recognized after the regular elections. A similar course was taken in respect to Colombia. *Ibid.*, p. 1015; Venezuela, pp. 962 *et seq.*; and Costa Rica, pp. 334-7.

been for the comparative infrequency with which the recognition question was raised during his incumbency, it is reasonably certain that he would have attempted a departure from the principles which we have just outlined. The recognition of the provisional government of France, and later of the Republic,[1] was effected with great speed, but I do not think that either of these cases may be taken as criteria of any change of policy, for the situation at the time was extraordinary and had to be met with extraordinary measures. The only other case of importance was the recognition in Mexico of the government under Diaz.[2] The existence of large outstanding indemnity payments, the acceptance of which would be equivalent to a recognitiion of the government making the payment, and the difficulties then arising over border raids on the Rio Grande, combined in bringing about an early recognition of this government. Foster was instructed by Secretary Fish to recognize the new government, but to use recognition as a means of securing a pacific settlement of the border disputes. Before the Diaz régime was acknowledged as the power in Mexico, however, Fish was superseded by Evarts, and in May, 1877, we have the issuance of an instruction under the signature of F. W. Seward which had the ring of a previous administration and in which Foster was cautioned to withhold the recognition until assured that the Diaz government "is approved by the people and has sufficient strength to carry out its international obligations."[3]

Although Seward's policies were to some extent disregarded by the Fish régime, they appear to have had some influence and effect upon the attitude of the United States

[1] 1870 *For. Rel.*, p. 67.

[2] 1877 *ibid.*, pp. 385 *et seq.*

[3] *Ibid.*, p. 404. Seward had been his father's secretary.

toward the recognition in Cuba.[1] It will be remembered that following the outbreak of civil dissensions in Spain in the year 1868, Cuba had likewise been in a state of revolt, and as the years went on the insurrection grew in strength and fierceness. The Spanish forces on that island had met with serious reverses and on various occasions recognition at least of the belligerency of the insurgents was more than a remote possibility. Two factors, the large commercial and property interests of the United States in Cuba and the usual enthusiasm for liberty, brought great pressure to bear upon the administration to recognize the revolutionists or the state which they pretended to set up. Inasmuch as the recognition propaganda was confined almost wholly to a question of belligerency, the Cuban case is of little interest to us as affecting the problem with which we are dealing, the belligerency question being a matter but remotely related to the question of state recognition. The agitation was confined chiefly to Congress, where the adherents of the revolutionary cause, with fine disregard for our own complaints against Great Britain in 1861, urged the acknowledgment of Cuban independence and secured the introduction of a resolution advocating recognition. From the first, however, the question had been one of intervention, and recognition, in so far as it was involved, would have meant merely the initial act toward such a policy. This was pointed out by President Grant in his Message of December 7, 1875, when he said:

While conscious that the insurrection in Cuba has shown a strength and endurance which make it at least doubtful whether it be in the power of Spain to subdue it, it seems unquestionable that no such civil organization exists which

[1] A good account is given in Callahan, *Cuba and International Relations*. *Cf.* also 1875 *For. Rel.*, and the succeeding years.

may be recognized as an independent government capable of performing its international obligations and entitled to be treated as one of the powers of the earth. A recognition under such circumstances would be inconsistent with the facts and would compel the power granting it soon to support by force the government to which it had really given its only claim to existence.[1]

Subsequent events in Cuba justified President Grant's attitude, and the insurrection was suppressed without any change in our recognition policy.

Important developments took place in Peru in the early eighties which illustrate a tendency of the State Department to follow with less strictness the criteria of recognition laid down by Seward. Peru had engaged in an unfortunate war with Chile and had been completely defeated. In January, 1880, Evarts informed Don José Tracy[2] that the President of the United States had decided to recognize the government established by General Pierola, it being understood that the people of Peru were driven to accept a new government on a provisional basis by the pressure of external affairs, and that General Pierola's accession had not been the result of insurrection. The fortunes of war, however, soon disposed of this government, and the victorious Chileans, refusing in any way to recognize it, confined their dealings to the government which had been organized by Sen. Calderon. This government was permitted but a very circumscribed field of action, yet Blaine, who had succeeded Evarts, instructed Christiancy, our minister, that if the Calderon government was supported by the character and intelligence of Peru and was really attempt-

[1] 1875 *For. Rel.*, p. viii.

[2] Moore, *Digest*, vol. i, pp. 156-7.

ing to restore a constitutional government with a view to order both within and without, he might accord recognition.[1] This was done on June 26th because, as Christiancy explained, the question as to whether the Calderon government was a de facto government was not made a condition. Subsequently the unfortunate President was arrested and carried off to Chile and Sen. Montero, as vice president, was recognized by the United States.

Another governmental overthrow soon followed. The Calderon-Montero government fell out with both people and conquerors, and General Iglesias, supported by the Chileans, gained complete control of the country. On October 20, 1883, the treaty of peace was signed with Chile, which recognized General Iglesias as president. The latter issued a call for a representative assembly and the recognition of the United States was made dependent upon his confirmation as president by this assembly.[2] This actually occurred and recognition was finally given.

The same principle of making an acknowledgment of a new government dependent upon the expression of popular will was again brought out in the year 1885, when the Iglesias government was unseated and a council of ministers, at the instance of the diplomatic corps, assumed the political power until a popular election could be held. Secretary Bayard instructed Buck that recognition must be withheld for the reason that the change in government had been brought about by the good offices of the diplomatic corps:

> . . . the United States . . . [he said] can not assume to forejudge the popular will of Peru by ratifying and confirming an experimental and provisional order of things they may have

[1] 1881 *For. Rel.*, p. 909.

[2] 1883 *ibid.*, p. 728.

indirectly helped to create. . . . Probably credentials will be sent you in due time to be presented to the President of Peru when his authority shall have been confirmed by the Peruvian people.[1]

It will be noted that in all of these cases it seems hardly to have occurred to the State Department to question whether or not the new government was so constituted as to insure the fulfillment of international obligations. On the contrary, in every case which has been cited, the recognition of the new government was made conditional merely upon its acceptance by the general body of citizens. To profess a principle of this sort and at the same time to insist that there existed no intention of interfering in the domestic concerns of another nation, is, as a matter of fact, an attempt to make recognition conditional, a practice which cannot be sufficiently condemned. I have already pointed out that the withholding of recognition has proved to be a most potent instrument in the hands of a state for accomplishing its ends. Instances are numerous where it has actually been put to political uses to make or unmake a nation. It is clear that from its very nature recognition must be confined within certain well-defined limits. Such limits have been described. They are those which limit recognition of governments to a mere formality of diplomatic intercourse and leave it entirely without constructive function. If we accept this definition, we can readily understand that the only concern which one government can have in the affairs of another lies in its ability to fulfill international obligations. This it is generally able to do if the majority of the people accept it, a presumption which a successful revolution at once raises. From an inter-

[1] Moore, *Digest*, vol. i, p. 159.

national point of view it is quite immaterial whether the government be legally constituted or not, or even whether a considerable portion of the population be opposed to it.

During the last twenty-five years there has taken place a reversion to our earlier recognition policy. We have seen how the restrictions placed by Seward on our freedom to recognize, gradually lost their strength during the eighties and that the United States government tended more and more to a pure de facto principle. The revolutions in the early nineties confirmed this tendency. The instructions given United States ministers in Brazil, Chile, Venzuela and Ecuador in the years 1889, 1891, 1892 and 1895 respectively, are evidence in point. To the minister at Rio de Janeiro, Blaine sent instructions to maintain diplomatic relations with the government of Brazil, saying that a formal recognition was to be made when the majority of the people signified their assent.[1] The Chilean case was the Congressional revolt against the president, Balmaceda, resulting in the victory of the former. Four days after the news of their success Egan was instructed to recognize the new government and to open communication with its head, if one had been formed by the "congressional party which is accepted by the people."[2] The instruction in the case of Venezuela, given with equal celerity, read that the new government was to be recognized "provided it is accepted by the people in possession of the power of the nation and fully established."[3] Finally, in Ecuador,

[1] 1889, *For. Rel.*, pp. 60 *et seq.* There was dissatisfaction in this country at the time, especially in Congress, that recognition was not effected more rapidly.

[2] 1891, *ibid.*, p. 161.

[3] 1892, *ibid.*, p. 635.

the new government was to be recognized when it had been fully established with the general consent of the people and when our minister should be satisfied that the "new Government is in possession of the executive forces of the nation and administering the same with due regard for the obligations of international law and treaties. . . ."[1]

In all of these cases the permission to recognize was given with unprecedented speed, the general average being within the period of two weeks after the successful outcome of the revolution was known. The element of universal consent gradually disappears, the element of republican sentiment, except in the case of Brazil, likewise has vanished, and in their stead the actual existence of a capacity to transact international business becomes the controlling principle. The transition is complete by the end of the nineties. In March, 1899,[2] Bridgman, minister to Bolivia, was instructed that if the provisional government of that country was being de facto administered by the Junta, affording reasonable guarantee of stability and international responsibility and without organized resistance, it was to be recognized. Seven months later, *in re* a revolution in San Domingo,[3] Powell was informed that he should recognize the new government if he was satisfied that it was "in possession of the executive forces of the nation and administering the public affairs with due regard for the obligations of international law and treaties," it being the policy of the United States "to acknowledge any government to be rightful which is established and accepted as such by the nation over which it exercises all the functions of government."

[1] 1895, *ibid.*, p. 249.

[2] 1899, *ibid.*, pp. 105 *et seq.*

[3] *Ibid.*, pp. 249, 253.

But with telegraphic brevity the Castro régime in Venezuela was ordered to be acknowledged "if the provisional government is effectively administering government of nation and in position to fulfill international obligations. . . ."[1]

These rapid changes in policy are not at all incomprehensible. In the first place the European states had finally divorced themselves from a theory of legitimacy and adopted in its entirety the theory of recognition which the United States had developed during the earlier part of the century. These principles as they were applied to recognition of governments were more liberally interpreted as time went on, and it became the regular practice of European states to grant recognition as soon as the de facto government gave evidence of possessing a preponderating stability over the previous *de jure* power. Thus from the early eighties on, we find the European recognition of governmental changes preceding sometimes by months any action on the part of the United States, which accordingly fell from the position of a radical innovator and were finally regarded as the most conservative element among the great nations. In another direction, too, the United States adopted an attitude which was far from progressive. It had become customary in Latin-America, whenever a revolutionary change in political power took place, for the local diplomatic corps to take concerted action in deciding whether or not the new government was de facto in control, the action of the participating governments being guided generally by the decision of its diplomats. The result was usually a simultaneous recognition by all. The United States, in its dread of entangling European alli-

[1] 1899, *For. Rel.*, p. 809.

ances, usually instructed its representatives to avoid participating in such concerted action and to preserve as much as possible independence of action. These two conservative tendencies soon operated to place the United States at great disadvantage. As a general rule, a government which comes into power by violence is desirous of having as early as possible the moral support of recognition by foreign governments, for although this does not sanction the transitory illegality of revolution it at least gives the appearance of permanency. A government which seeks to withhold, for any reason, an acknowledgment of such a de facto power when other nations have already taken the initiative, lays itself open to the suspicion of unfriendliness which often results to its national disadvantage. This was the case with the United States. After some twenty-five years of experience with Seward's recognition policies, we were virtually compelled to return to the principles for which we had originally stood.

The abandonment of a policy which has been pursued with some degree of faithfulness for twenty-five years, is not an easy matter, especially if it represents intimate national experience. The change which after the Civil War had taken place in our republican traditions, substituting for its former aggressiveness a certain deeper respect for law and order, lost in the course of time its earlier force. It had meant a substitution of constitutionalism for unrestrained republican liberty, the State Department assuming the function of a particular guardian of this constitutionalism. The expansion of our national life, however, brought a concomitant breaking away from these more purely provincial ideals. In its place appeared a growing consciousness that other nations had the right to shape their own destinies without

our particular interference, and that above the Utopian ideal of constitutional propagandism were the dictates of international expediency, which the hitherto narrow provincialism of our national life had scorned.

It is this growth of a consciousness of a larger international existence which leads me to my third point, namely, the change which improved methods of communication have had upon our national thinking and consequently upon our diplomacy. It is significant that in the last six cases which I cite above, the negotiations for recognition were completed by telegraph and with unprecedented speed. This is not merely a result of the change in the disposition of the State Department, but it operates as a contributory cause.

I have already alluded to the fact that recognition has been frequently used as an instrument to extort from a new state or government concessions to the recognizant. The United States had until the beginning of the twentieth century few of such incidents in her history, and on various occasions our statesmen had expressed themselves strongly against using such means to obtain commercial preferment. It was, therefore, with a feeling somewhat akin to pious horror that the Rooseveltian *coup d'etat* in the recognition of Panama was regarded by the conservative element among our statesmen, a feeling which does not seem to have completely disappeared. Indeed, the event occupies a unique place in our diplomatic history as the first attempt at a bloodless *Machtpolitik*. Its success is the only criterion upon which to base an excuse for the pangs of conscience which it caused.

The failure of the Colombian Congress to ratify the Hay-Herran treaty for the sale of the Panama Canal interests was the direct cause of the revolution in the

Isthmus.[1] Definite information of the probability of such an outbreak appears to have been given our administration long before the event actually took place. The greatest precautions were taken to protect American lives and property. As early as the middle of October the Navy Department had ordered ships to the scene of the threatened outbreak, the appearance of which successfully frustrated the attempts of the Colombians to suppress the revolt. At the same time the Colombian government, alive to the dangers of the situation, despatched troops to Panama. On the evening of November 3, 1903, the revolution finally took place. The army and navy officials, together with the governor of the Department, were taken prisoners and a government was at once organized.

The independence of the new republic was proclaimed the next day.[2] Two days later Secretary Hay telegraphed to Ehrman, our representative at Panama, as follows:[3] "The people of Panama have, by an apparently unanimous movement, dissolved their political connection with the Republic of Colombia and resumed their independence. When you are satisfied that a *de facto* government, republican in form, and without substantial opposition from its own people, has been established in the State of Panama, you will enter into relations with it as the responsible government of the territory and look to it for all due action to protect the persons and property of citizens of the United States and to keep open the isthmian transit in accordance with the obligations of existing treaties governing the relation of the United

[1] 1903, *For. Rel.*, pp. 230 *et seq.*

[2] *Ibid.*, p. 232.

[3] *Ibid.*, p. 233.

States to that territory." The information contained in this despatch was communicated to the United States minister at Bogotá, and he was further informed that the United States had entered into relations with Panama.[1] It is particularly important to note that at this time no reply had been received from the United States representative to the new republic. This answer came the next day,[2] to the effect that Ehrman had informed the Panama government that it would be held responsible for the protection of the persons and property of United States citizens as well as for freedom of Isthmian transit. On this day too Dr. Herran, the minister of Colombia at Washington, filed a protest upon his own motion, against the attitude of the United States.

The final formalities of recognition were soon completed. On November 11th, Mr. Bunau-Varilla informed the Secretary of State that he was the duly accredited envoy of the Republic of Panama and requested an interview for the presentation of his letters of credence. The interview was granted him the next day, and amid flower-strewn addresses the Republic of Panama was given formal admission into the family of nations.[3] The United States minister at Panama was commissioned December 12, 1903, and on Christmas Day was formally received by the Junta.

The attitude of the Colombian government is not without some interest. The outbreak of the insurrection in Panama had produced a popular reaction in favor of ratifying the Hay-Herran treaty. On November 6th, Gen-

[1] 1903, *For. Rel.*, p. 225.

[2] *Ibid.*, p. 234.

[3] *Ibid.*, pp. 245-6.

[4] *Ibid.*, pp. 689-90.

eral Reyes informed Mr. Beaupré, our minister at Bogotà, that if the United States would land troops to preserve Colombian sovereignty and transit, his government would declare martial law and by virtue of its power under such circumstances, would proclaim the ratification of the treaty. The Colombian government also asked whether the United States would suspend recognition of Panama aud would permit the landing of Colombian troops to suppress the insurrection. In the meanwhile, however, Mr. Hay notified the Colombian government, as I have indicated above, that the United States had entered into relations with the new government. Later, in reply to the request for permission to land Colombian troops, he said that to avert civil war and to keep open the transit, it would be desirable not to land these forces. The Colombian government protested. It said:[1]

The immediate recognition of the so-called Government of Panama by the Government of the United States entering into relations with it is a circumstance aggravated by the fact that such recognition is a violation of the treaty of 1846, which compels the Government of Colombia to protest, as it does in most solemn and emphatic manner, and to consider that the friendship of this Government with the Government of the United States has reached such a grave point that it is not possible to continue diplomatic relations unless the Government of the United States states that it is not its intention to interfere with Colombia in obtaining submission of the Isthmus nor to recognize the rebels as belligerents.

Mr. Hay replied by instructing Mr. Beaupré to inform once more the Colombia government that we had recognized the Republic of Panama and that this action had been taken in the interest of peace and order.[2]

[1] 1903, *For. Rel.*, p. 229.

[2] *Ibid.*, p. 230.

It would be useless to repeat the purport of the demands and the protests which followed. The most able paper was submitted December 23, 1903,[1] by General Reyes, who came to this country on a special mission for the purpose of settling the dispute. He pointed out, that but for the intercession of the United States, the Colombian troops would have been able to suppress the insurrection; that our course in recognizing previous governments had in no way justified the action toward Panama; and that by recognizing the Republic and subsequently guaranteeing its independence, the United States had deliberately violated the obligation previously taken upon herself to respect Colombian sovereignty and property over the Isthmian territory.

In his reply,[2] Mr. Hay, insisting upon the justice of our position, pointed out that all of the great powers and many of the lesser ones, had recognized Panama, and that this left no doubt in the public opinion of the world as to the propriety of the measure. International law, he said, did not undertake to set an exact time when recognition should be extended, but that this was a question to be determined by each state as it thought best.

> And if in the present instance the powers of the world gave their recognition with unwonted promptitude, it is only because they entertained the common conviction that interests of vast importance to the whole civilized world were at stake, which would, by any other course, be put in peril.

Mr. Hay then proceeded to deny the complicity of the United States in the revolution, and with rare diplomatic skill sought to fix the blame upon Colombia herself.

General Reyes made replication by preferring certain

[1] 1903, *For. Rel.*, p. 284.

[2] *Ibid.*, p. 294.

formal charges against the United States pursuant to instructions of his government which embodied the gist of what had already been said. The correspondence dragged on for a time, filled with mutual recriminations and, finally, by its very fruitlessness, was discontinued.

It is with some reluctance that I have included in our discussion the recognition of Panama. In the strictest sense it was not a recognition at all, but as Mr. Roosevelt himself avowed in his message of January 4, 1904, was an act of intervention. It illustrates the bad side of a prompt acknowledgment of independence, just as Seward's policy illustrates the weaknesses of one which is too cautious. If we frankly admit our attitude in Panama to have been one of extraordinary aggressiveness, we at least avoid the implication of trying to excuse something which, at the same time, we insist needs no excuse.[1]

The Panama recognition does not appear to have had any influence upon the development of our policy during the next ten years, the tendency during that period being quite uniformly in the direction of pure de facto-ism. Since the year 1913, the tendency as illustrated in the case of the recent revolutions in Haiti and Peru, seems to have been in the same direction, save in the case of Mexico. This affair, if it were to be treated as involving simply the question of recognition, would appear to be altogether exceptional; but it is, perhaps, to be considered, like that of Panama, as actually involving the question of intervention rather than that of recognition. In this character it may be too

[1] Colonel Roosevelt, evidently forgetting the avowal in his message, in the *Metropolitan Magazine*, February, 1915, denies that there was any intervention. On the other hand, the Wilson administration insists on making this the ground for an indemnification to the Colombian government.

soon to pass judgment upon it. From the point of view both of our own and of general international policy, the case does not seem properly to fall within the category of recognition. The fact that the question of recognition constantly recurs would render a departure from the enlightened principles heretofore established a matter of grave import, while the dangers attending a relapse into the discarded theory and practice of legitimacy would be no less real and substantial because it was made under the guise of promoting constitutionalism.

CONCLUSION

In the foregoing pages I have tried to point out some of the difficulties which surround the question of recognition. The historical heritage of the Middle Ages and of the seventeenth and eighteenth centuries, the intricate legal problems and the exigencies of policy have combined to invest a matter intrinsically simple with a factitious complexity. Moreover, every state inevitably develops within itself a legitimist ideal. This need not be limited to monarchy, but, as we have seen, may also appear in the form of republican or constitutional legitimacy. The tendency of such an internal legitimacy to produce a similar international theory has already been pointed out. As long as this tendency continues, the de jure theory will remain firmly intrenched in international politics to combat the de facto principle. And as long as the de jure principle continues to flourish, governments will inevitably lean toward a theory of constitutive recognition. These tendencies are closely bound up in an intimate relation of mutual cause and effect, but they are, nevertheless, utterly antagonistic to what may be regarded as fundamental to a rational legal system among nations, namely, the principle of their sovereignty and their equality. Unless we insist upon the acknowledgment of the de facto principle as a rule of law, its observance may be wholly subordinated to considerations of policy.

This is the direction in which the exaggeration of "social forces" inevitably carries us. This is so, not only because such exaggeration tends to create a supreme disregard of the legal bases of international life, but also because it tends to crystallize its own conceptions into a principle of legitimacy. In its ultimate analysis this theory of "social

forces" is a rejuvenated and transformed system of natural law with the familiar attendant elements of uncertainty, insecurity, and arbitrary judgment.

There are certain periods in history when "social forces," or, perhaps, the conviction in them are of particular strength and importance. Such was the period immediately following the Congress of Vienna when the principle of monarchic legitimacy was invoked to sustain *jure divino* governments. Is it possible that, with a view to sustain a different legitimist system, we are to-day passing into a similar period? Vague rumors are current at present of an American System, a union of republican governments not only for their mutual protection but also for the perpetuation and propagation of republican forms—a scheme which, so far as it relates to the conservation of certain governmental forms, vividly reminds us of the Holy Alliance and its necessarily ill-fated attempt to sow the earth with Bourbon legitimacy. Such schemes are not entirely new to our own international politics. We have seen how an American System was broached to John Quincy Adams by certain South American agents, and how this proposal inspired the Panama Congress of 1826. There was nothing unhealthy about these projects; for, although they to some extent suggested the legitimacy of republicanism they were essentially prompted by the motive of self-defense against the European alliance. It is significant, however, that despite the enthusiasm of our forbears for constitutional government, the principle of the free consent of the governed triumphed.

Perhaps, the proposed American System of which we hear to-day is the offspring of the combined operation of the legitimist principle and of those quasi-religious theories which are its usual concomitant. In the Middle Ages the religous element was prominent in the *jus divinum*. In

the early nineteenth century it was the mystic religious element which inspired Alexander I of Russia to form the Holy Alliance. To-day the legitimist suggestions seem to recall the teachings of the early ecclesiastics who looked upon the state as a being acting from human impulses and governed by the same ethical considerations as govern the individual—a being which can feel, can love, and can hate!

Upon one other occasion in our history the legitimist principle rose superior to that of the consent of the governed. This was under the Seward regime in the '60's. I have shown how this tendency was pre-eminently the result of circumstances and was motivated only by a desire to appear consistent in the eyes of the world. Its effect upon our later policy was not durable and it added nothing to our international prestige. The later disposition of the State Department to adopt the pure de facto principle was more in accordance with our theories of government and of international conduct.

It seems inevitable that we should continue to observe these principles. They form so intimate a part of both our national and international experience, that the attempt to repudiate them seems thoroughly discordant with past traditions. The recognition problem existed before the days of Thomas Jefferson, but it was he who made it a definite question of international law and evolved the correct answer in the form of the de facto theory. Together with the principle of non-intervention, it forms one of the distinctive contributions of United States diplomacy to the present international system. Because these principles are so firmly grounded upon the basic conceptions of international law, they have outlived the decay of natural law ideas upon which they were originally founded. Their lasting political value, however, will always depend upon the continuance of the spirit of idealism by which they were first inspired.

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