Georgia Law Review

Volume 54 | Number 1 Article 6

2019

Between Law and Diplomacy: The Conundrum of Common Law Immunity

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BETWEEN LAW AND DIPLOMACY: THE CONUNDRUM OF COMMON LAW IMMUNITY

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Drawing the line between disputes that can be adjudicated in domestic (U.S.) courts and those that cannot has perplexed judges and jurists since the Founding Era. Although Congress provided a statutory framework for the jurisdictional immunities of foreign states in 1976, important ambiguities remain. Notably, in 2010, the U.S. Supreme Court held in Samantar v. Yousuf *that the Foreign Sovereign Immunities Act (FSIA) does not govern suits against foreign officials unless the foreign state is the "real party in interest." This decision clarified, but did not fully resolve, conceptual and doctrinal questions surrounding the immunities of foreign officials whose conduct is challenged in U.S. courts and who do not fall within existing statutes. The original research and analysis offered in this Article provides the necessary foundation for approaching, and ultimately answering, persistent questions about what common law immunity entails. This research reveals that the deferential judicial posture of the 1940s was an aberration and that courts retain the authority to assess the rationales for varying degrees of judicial deference in different types of cases. Unpacking these cases points strongly towards the conclusion that, although the Executive Branch remains best situated to assess the potential foreign policy consequences of pending litigation, courts are ultimately*

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responsible for making jurisdictional determinations, including decisions regarding common law immunity.

TABLE OF CONTENTS

I. INTRODUCTION

The question whether, and in what circumstances, jurisdictional immunities shield foreign officials from proceedings in U.S. courts has perplexed jurists since the Founding Era.[1] Yet the Supreme Court has addressed this issue only once in living memory.[2] In *Samantar v. Yousuf*, the Court held that the Foreign Sovereign Immunities Act of 1976 (FSIA) does not govern suits against foreign officials unless the foreign state is the "real party in interest."[3] Although this decision clarified where the U.S. law of foreign official immunity *cannot* be found, it said little about where such law *can* be found, absent an applicable statute.[4] Lower courts have thus been left to figure out what the non-statutory law of foreign official immunity entails.[5]

The doctrine of foreign state immunity—which is distinct from but related to foreign official immunity—rests on the proposition that one country cannot exercise jurisdiction over another without violating the core principle *par in parem no habet imperium* ("an equal has no power over an equal").[6] In practice, however, the

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[1] *See generally* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012) (exploring 1790s cases in detail).

[2] Samantar v. Yousuf, 560 U.S. 305, 325 (2010) (finding that the Foreign Sovereign Immunities Act of 1976 (FSIA) governs the immunities of foreign states, not foreign officials). At the time of writing, a petition for certiorari was pending in another foreign official immunity case, *Lewis v. Mutond*, 918 F.3d 142 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-185 (U.S. Aug. 9, 2019).

[3] *Samantar*, 560 U.S. at 325.

[4] *See id.* at 315 (clarifying that a broad reading "agency or instrumentality" of a foreign state to include foreign officials as inconsistent with congressional intent). The Diplomatic Relations Act of 1978 governs the immunities of diplomatic and consular officials. *See* 22 U.S.C. § 254(a)–(e) (2012).

[5] *See, e.g.*, *Lewis*, 918 F.3d at 142; Doğan v. Barak, 932 F.3d. 888 (9th Cir. 2019); Rosenberg v. Pasha, 577 Fed. App'x 22 (2d Cir. 2014); Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012). For scholarly contributions to the conversation about how to adjudicate immunity claims, see Chimène I. Keitner, *Foreign Official Immunity After* Samantar, 44 VAND. J. TRANSNAT'L L. 837, 851 (2011); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2719–20 (2011); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 976 (2011); Harold Hongju Koh, *Foreign Official Immunity after* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1142 (2011); John B. Bellinger III, *The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*, 44 VAND. J. TRANSNAT'L L. 819, 835 (2011).

[6] Yoram Dinstein, *Par in Parem Non Habet Imperium*, 1 ISR. L. REV. 407, 413 (1966).

pervasiveness of cross-border travel and commerce creates a demand for the adjudication of transnational disputes in domestic courts, including disputes involving the activities of foreign states.[7] Litigation involving foreign states and foreign officials can carry implications for the Executive Branch's conduct of foreign relations. As a policy matter, the United States' interest in providing a forum for vindicating the legal rights of its citizens and residents, and ensuring accountability for unlawful conduct, weighs against special treatment for foreign official defendants in U.S. courts. On the other hand, concerns about creating diplomatic tensions and legitimizing legal proceedings against U.S. officials in foreign courts pull in the opposite direction.

To determine the contours of foreign official immunity and the circumstances in which it can be invoked, one must first identify the source of the applicable law. The *Samantar* opinion offers scant guidance on this point. The Court indicated that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976," but it devoted less than one page to describing that development, which was not material to its interpretation of the scope of the FSIA.[8] However, tracing the common law development of this doctrine is required to determine what "the common law of official immunity," which the Court identified as governing the immunities of foreign officials, entails.[9] This Article draws on original archival research to provide the most comprehensive available account of the genesis of the doctrine of common law immunity from civil suit in U.S. courts.

Although "the common law of official immunity" referred to in the *Samantar* opinion cannot necessarily be reduced to historical

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[7] In 1956, Philip Jessup coined the term "transnational law" to refer to law that "regulates actions or events that transcend national frontiers." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956); *see also* Peer Zumbansen, *Transnational Law* (commenting on Jessup's conclusions about "the inseparability of the issues that underlie the allegedly 'domestic' versus the likewise purely 'international' constellations"), *in* ENCYCLOPEDIA OF COMPARATIVE LAW (J. Smits ed., 2006).

[8] *Samantar*, 560 U.S. at 311. The FSIA is codified at 28 U.S.C. §§ 1330, 1602–1611 (2006).

[9] *Samantar*, 560 U.S. at 320; *cf.* Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1538 (2011) (explaining that "the Court's discussion of the pre-FSIA regime leaves no doubt that it regarded the relevant law as federal, not State, law" and that "the opinion is probably best read to leave open . . . all other questions about the nonstatutory immunity of foreign officials apart from its federal nature").

practice, it is certainly informed by it. This practice, in turn, was heavily influenced by judicial understandings of the requirements of international law.[10] Because the *Samantar* Court took the position that the FSIA left the "common law of official immunity" unchanged, the question naturally arises: unchanged from what? The Executive Branch has, in recent years, asserted that it is entitled to absolute judicial deference if it informs a U.S. court that a current or former foreign official enjoys jurisdictional immunity for his or her conduct.[11] As Department of Justice attorney Lewis Yelin, writing in his personal capacity, has indicated, "[a]lthough denominated a 'suggestion' of immunity, the government's filing informs the courts that the Executive Branch's immunity determination is binding."[12] As I have previously recounted, however, this position is radically different from that of the Executive Branch in the Founding Era, which disclaimed the authority to instruct courts to dismiss claims on immunity grounds.[13]

This Article is divided into several main parts. Part I introduces the doctrines of foreign state immunity and foreign sovereign immunity. Part II excavates the practices and understandings associated with eighteenth- and nineteenth-century cases that challenged U.S. jurisdiction over claims involving foreign states. It

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[10] As David Golove and Daniel Hulsebosch have noted, "[t]he commitment of the Founders, especially the Federalists, to the law of nations is difficult to miss in the historical sources." David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1607 (2018). Early cases illustrate "the wide consensus among judges, lawyers, and government officials in the early Republic that the law of nations was part of the law of the land and would be enforced by the judiciary as such." *Id.* at 1640. The cases discussed here form an integral part of the U.S. "common law" corpus of authoritative judicial opinions on foreign official immunity, even though they draw on law-of-nations principles rather than the English common law.

[11] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Affirmance at 14, Samantar v. Yousuf, 560 U.S. 305 (2010) (No. 08-1555), 2010 WL 342031 at *10 ("FSIA left in place the pre-existing practice of recognizing official immunity in accordance with suggestions of immunity by the Executive Branch."); Doğan v. Barak, No. 2:15-CV-08130-ODW(GSJx), 2016 WL 6024416, at *6 (C.D. Cal. Oct. 13, 2016) (explaining that "the Executive [generally] recommend[s] that the court either grant or deny immunity" and that courts "consistently . . . defer[] to the decisions of the political branches" to "avoid embarrassing or antagonizing the Executive in its conduct of foreign affairs").

[12] Lewis Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 915 n.15 (2011).

[13] *See, e.g.*, Suits Against Foreigners, Case of Collot, 1 Op. Att'y Gen. 45 (1794); Actions Against Foreigners, Case of Sinclair, 1 Op. Att'y Gen. 81 (1797); *see generally* Keitner, *supra* note 1 (unearthing and examining Founding Era cases brought against foreign officials in U.S. courts).

focuses on doctrinally significant cases that have been cited in subsequent judicial opinions but are not well-documented or explored in the literature. It also revisits better-known cases in light of newly unearthed docket entries and diplomatic correspondence and explores the interplay between legal and diplomatic considerations in the resolution of these disputes.

Part III extends the historical narrative to encompass the twentieth century and recounts the previously untold backstories of a trilogy of cases involving foreign ships. In the latter two cases, the U.S. Supreme Court accepted a new, more robust role for the Executive Branch in making binding immunity determinations.[14] These cases form the touchstone of the Executive Branch's current view that it is entitled to absolute judicial deference in cases involving claims to non-statutory forms of immunity. Part IV concludes.

Judicial deference to Executive Branch determinations regarding foreign ships does not self-evidently compel absolute deference in cases involving foreign officials. This is especially true where a foreign official's entitlement to immunity does not turn on whether the Executive Branch has recognized him or her as a *bona fide* representative of a foreign state. The question of degree of deference is more than merely academic. Although cases against foreign officials were relatively sparse during most of the twentieth century,[15] the advent of modern human rights litigation inaugurated a new wave of cases against foreign officials for conduct such as torture[16] and genocide.[17] Today, in the twenty-first century, privately initiated civil suits continue to be brought against current and former foreign officials in the United States for conduct ranging from torture, war crimes, and kidnapping to domestic worker

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[14] *See infra* Section III.A.2.

[15] A compilation of the State Department's immunity decisions from 1952 to 1977 contains 110 decisions, only four of which involved individual defendants who claimed immunity on the grounds that they had acted on behalf of a foreign state. *See* Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977, 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1017, 1020.

[16] *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that 28 U.S.C. § 1350 provides federal jurisdiction "whenever an alleged torturer is found and served with process by an alien within our borders").

[17] *See* Kadic v. Karadžić, 70 F.3d 232, 248 (2d Cir. 1995) (discussing how federal common law immunity may apply to a United Nations' invitee).

abuse.[18] In a case decided in August 2019 by the U.S. Court of Appeals for the Ninth Circuit, the panel declined to decide "the level of deference owed to the State Department's suggestion of immunity" because giving the suggestion either "substantial weight" or "absolute deference" would have yielded the same result of dismissal.[19] At the time of writing, a petition for certiorari was pending in another case in which the D.C. Circuit found that the defendants were "not entitled to foreign official immunity under the common law,"[20] in part because the State Department "never issued a request that the District Court surrender its jurisdiction."[21]

The development of common law immunity doctrine by the courts should take account of the historical immunity practice elucidated here. This research shows that the deferential judicial posture of the 1940s was an aberration and that courts remain free to examine the rationales for varying degrees of judicial deference in different types of cases. By holding that "common law immunity" may apply in cases against foreign officials, the *Samantar* Court evoked—although it did not explore—a long line of cases that have straddled, and sometimes blurred, the border between law and diplomacy.[22] These cases point strongly towards the conclusion that, although the Executive Branch remains best situated to assess the potential foreign policy consequences of pending litigation, courts are

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[18] For a sampling of headlines arising from such cases, see Susan Farbstein & Tyler Giannini, *Clinic's Case Against Former Bolivian President for Role in 2003 Massacre to Proceed to Trial*, HUM. RTS. @ HARV. L. (Feb. 20, 2018), http://hrp.law.harvard.edu/alien-tort-statute/clinics-case-against-former-bolivian-president-for-role-in-2003-massacre-to-proceed-to-trial/ (discussing a suit brought against a former Bolivian president regarding his role in a 2003 massacre); Michael Booth, *NJ Court Affirms Immunity for Israeli Judges in Child Custody Dispute*, N.J. L.J. (Feb. 6, 2018, 4:33 PM), https://www.law.com/njlawjournal/sites/njlawjournal/2018/02/06/nj-court-affirms-immunity-for-israeli-judges-in-child-custody-dispute/ (explaining that because the U.S. State Department conferred conduct-based immunity on such institutions acting within their official capacities, the court held the plaintiff could not sue an Israeli court); Kaelyn Forde, *Nannies Suing Diplomat Were "Lured to the US," Endured "Grueling" Conditions, Complaint Says*, ABC NEWS (Nov. 10, 2017, 5:18 PM), http://abcnews.go.com/US/nannies-suing-diplomat-lured-us-endured-grueling-conditions/story?id=50987486; Diane Taylor, *Domestic Workers Win Supreme Court Case Against Saudi Diplomat*, GUARDIAN (Oct. 18, 2017, 7:00 AM), https://www.theguardian.com/law/2017/oct/18/former-saudi-diplomat-does-not-have-immunity-supreme-court-rules.

[19] Doğan v. Barak, 932 F.3d 888, 893 (9th Cir. 2019).

[20] Lewis v. Mutond, 918 F.3d 142, 144 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-185 (U.S. Aug. 9, 2019).

[21] *Id.* at 146.

[22] *See* Samantar v. Yousuf, 560 U.S. 305, 320 (2010).

ultimately responsible for making jurisdictional determinations, including decisions regarding immunity.

II. THE HISTORICAL ROOTS OF FOREIGN OFFICIAL IMMUNITY

During the Founding Era, a select group of lawyers and statesmen faced the task of establishing the United States as a full-fledged member of the community of "civilized nations."[23] Jurisdictional disputes in matters involving foreign countries presented some of the most challenging, and potentially disruptive, questions for the new legal and political system they helped create. As the cases explored in this Part illustrate, many of the themes that emerged during this formative period and in the century that followed continue to animate debates about the contours of foreign official immunity today.

Every assertion of jurisdiction is a claim of legitimate authority; conversely, every assertion of immunity is a claim to exemption from the exercise of that authority. The baseline assumption in international law has long been that claims relating to persons, property, or activities within a country's territory fall within the jurisdiction of that country's courts.[24] As Chief Justice Marshall pronounced in an 1812 Supreme Court case, *The Schooner Exchange v. McFaddon*, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[25] Yet, in the same opinion, Chief Justice Marshall held that friendly foreign states, including their heads of state and ambassadors, should be exempt from this general rule.[26] He reasoned that a sovereign would only enter foreign territory "in the confidence that the immunities belonging to his independent sovereign station, though not

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[23] For an in-depth development of this thesis, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934 (2010); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 493 (1989).

[24] *See* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 816 (2011) (discussing how international law considers "the domestic courts of the state where the human rights violation or international crime occurred" to be a "primary" location for judicial enforcement).

[25] 11 U.S. (7 Cranch) 116, 136 (1812).

[26] *Id.* at 137.

expressly stipulated, are reserved by implication, and will be extended to him."[27] This tension between the territorial sovereignty of the forum state and the idea that exercising jurisdiction over a foreign sovereign "degrade[s] the dignity of his nation"[28] remains central to disputes over the scope of foreign state and foreign official immunities.

Historical accounts of foreign sovereign immunity in U.S. courts generally start with *The Schooner Exchange* and focus on cases involving competing claims to vessels and their cargo.[29] Yet cases involving individuals as defendants were not unknown in the late eighteenth and nineteenth centuries, as this Part explores. Although it would be anachronistic to transpose the understandings animating those cases directly to the present day, I have suggested in previous work that they nonetheless hold important insights for questions such as how to conceptualize exercises of jurisdiction over extraterritorial conduct,[30] when to attribute officials' conduct to the state,[31] and which types of disputes lie beyond domestic judicial competence.[32]

Taken together, judicial opinions, Executive Branch documents, and diplomatic correspondence from the Founding Era and the Early Republic indicate that: (1) the Executive Branch believed the separation of powers prevented it from instructing a court to dismiss a case, even on immunity grounds; (2) foreign officials who were invested with the capacity to represent their countries in foreign relations enjoyed immunity from U.S. legal proceedings based on their official status, but all other foreigners were on the same jurisdictional footing as any other person hauled before a U.S. court; and (3) the claim that the defendant had performed the challenged acts in his official capacity on behalf of a foreign state did not

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[27] *Id.*

[28] *Id.*

[29] *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763, 770 (4th Cir. 2012) ("Foreign sovereign immunity, insofar as American courts are concerned, has its doctrinal roots in *The Schooner Exchange v. McFaddon*."); Matar v. Dichter, 563 F.3d 9, 13 (2d Cir. 2009) ("Before the FSIA, courts determined the immunity of foreign sovereigns pursuant to principles announced by Chief Justice John Marshall in *The Schooner Exchange v. McFaddon*.").

[30] *See generally* Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 94 (2013).

[31] *See generally* Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 DUKE J. COMP. & INT'L L. 451 (2016).

[32] *See generally* Chimène I. Keitner, *Adjudicating Acts of State*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 49 (John Norton Moore ed., 2013).

provide a defense to jurisdiction, but it could serve as a substantive defense on the merits. These understandings formed the pillars of immunity determinations by U.S. courts well into the twentieth century, when the first pillar came under strain, as explored in Part III.

A. EXECUTIVE DISCLAIMERS: SINCLAIR AND COLLOT

Executive Branch officials in the fledgling United States exhibited contradictory impulses to be responsive to—and to avoid—diplomatic pressure from foreign states. Such pressures could reach a fever pitch when foreign ships or foreign officials were the subject of legal proceedings in U.S. courts. A handful of pivotal cases established the template for the U.S. government's response to diplomatic protestations.

One of the earliest cases to raise these issues involved a private suit against Captain Henry Sinclair, a British privateer, who earned his living by capturing enemy ships and their cargo as prizes of war.[33] To avoid accusations of piracy, he cruised under the legal authority conferred by a letter of marque issued by the High Court of Admiralty in England.[34] On March 17, 1797, Sinclair and his crew captured and boarded the *Atlantic*, an American ship traveling from the West Indies to Baltimore.[35] Sinclair suspected that the *Atlantic* was carrying enemy cargo, which he hoped to claim as a prize.[36] He would come to regret this encounter. A court at St. Kitts in the West Indies cleared the *Atlantic* and its cargo rather than condemning it as a prize, leaving Sinclair empty-handed.[37] The *Atlantic*'s captain, Henry Stockett, reported that the *Atlantic* was later re-captured by

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[33] Letter from R. Liston to Colonel Pickering, Sec'y of State (Dec. 15, 1797), *microformed on* M50, Roll 3 (NARA Microfilm Publ'n) (on file with author) [hereinafter Liston to Pickering]. For an exploration of all cases that could be located involving individual foreign officials who were not consuls or diplomats, see generally Keitner, *supra* note 1. This Section reprises key aspects of those cases and expands the analysis to include diplomatically significant cases involving foreign consuls and foreign ships.

[34] Liston to Pickering, *supra* note 33.

[35] Memorial of Henry Sinclair, from Henry Sinclair to Robert Liston, His Britannick Majesty's Minister Plenipotentiary to the United States (Dec. 6, 1797), *microformed on* M50, Roll 3 (NARA Microfilm Publ'n) (on file with author) [hereinafter Memorial of Henry Sinclair].

[36] *Id.*

[37] *Id.*

two other ships, and he blamed Sinclair for diverting his route and causing this misfortune.[38] When Sinclair's ship, the *Swinger*, arrived in the port of Alexandria in Virginia eight months later, Sinclair was arrested and imprisoned in the county jail.[39] The *Atlantic*'s owners, John Parnell and David Stewart of Baltimore, had sued him for $20,000 in damages in a Virginia court, and he was unable to post bail.[40]

Parnell and Stewart presumably viewed their ability to seek judicial redress against Sinclair in a U.S. court as justified and appropriate. But the lawsuit came as a thunderbolt to Sinclair.[41] Plagued by anxiety about his future prospects, Sinclair penned a detailed and impassioned memorial to Robert Liston, the British Minister to the United States.[42] Sinclair pleaded that his inability to return immediately to "his customary occupation" of privateering would reduce him "to entire ruin."[43] He blamed the French privateer who had re-captured the *Atlantic* for destroying the "[l]etters and [p]apers" that would have substantiated his original suspicion that the *Atlantic* was carrying enemy goods ripe for capture.[44] And although he acknowledged—as alleged in the lawsuit—that he had taken some property from the *Atlantic* when he boarded it, he assured Liston that he had done so only because he was "in want of [b]read" and that he had promised the *Atlantic*'s captain that he would be reimbursed if the cargo were not condemned as a prize by the admiralty court.[45]

At the most basic level, Sinclair could not understand why he was being called to account for his conduct as a British privateer acting under the authority of the British government in a U.S. court.[46] If his authority to capture ships came from the British government, Sinclair pleaded to Liston, he should not be "amenable to the Laws of the United States, but to those of his own Country, from whence

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[38] ALEXANDRIA ADVERTISER, Dec. 2, 1797, at 3.

[39] FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Nov. 22, 1797, at 3. During this period, defendants in civil suits could be detained by the sheriff if they were considered a flight risk. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *281–83.

[40] ALEXANDRIA ADVERTISER, Dec. 1, 1797, at 3.

[41] Memorial of Henry Sinclair, *supra* note 35.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

he received his Commission."[47] The whole point of a letter of marque, as Liston subsequently emphasized in his report on the matter to British Foreign Secretary William Grenville, was to authorize Sinclair "to cruise [sic] against His Majesty's enemy [and to give him] a right to stop any ships which he might have cause to suspect of having French or Spanish [enemy] goods on board."[48] If Sinclair "had been guilty of any irregularity" in carrying out this function, Liston continued, he could be punished by the British High Court of Admiralty.[49]

Although the claim against Sinclair was brought by private parties, Liston thought the U.S. government should intervene to quash the suit to prevent any future "departure from the usage of nations."[50] In an attempt to secure such intervention, he transmitted Sinclair's memorial to U.S. Secretary of State Timothy Pickering, who, in turn, forwarded Liston's letter and Sinclair's memorial to U.S. Attorney General Charles Lee.[51] Pickering sought Lee's legal opinion on whether Sinclair was indeed entitled to "an exemption from all responsibility in the case to the laws of any other country than his own"[52]—that is, if he was answerable exclusively to British authorities and not a U.S. court—and, if so, how the Executive Branch should respond to the suit.

In crafting his response, Lee did not start from a blank slate. Three years earlier, Attorney General William Bradford had received a similar request to opine on a civil suit filed against Victor Collot, the former Governor of Guadeloupe.[53] Under the law of nations, heads of state and diplomatic representatives

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[47] *Id.*

[48] Letter from Robert Liston to Lord [Grenville] (Feb. 6, 1798) [hereinafter Liston to Greenville], *in* British National Archives, F.O. 5/22, 94–95 (on file with author).

[49] *Id.*

[50] *Id.* By "the usage of nations," Liston was invoking the authority of international law. As Daniel Hulsebosch and David Golove have emphasized, "[f]ew maxims were more settled in the eighteenth-century laws of war than that the validity of a prize captured on the high seas was a matter for the captor nation's courts alone"—a maxim that U.S. judges applied as "part of the law of the United States." *See* Golove & Hulsebosch, *supra* note 10, at 1642. For more on Founding Era understandings of the law of nations, see William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1560, 1569–72 (2018).

[51] Letter from Timothy Pickering to Charles [Lee], Att'y Gen. (Dec. 23, 1797) [hereinafter Pickering to Lee], *in* 10 DOMESTIC LETTERS OF THE DEPARTMENT OF STATE 276 (1943).

[52] *Id.*

[53] *See* William Bradford, Suits Against Foreigners, 1 Op. Att'y Gen. 45 (1794).

(denominated "public ministers") were entitled to absolute immunity from foreign legal proceedings during their terms in office.[54] Collot, however, was neither a head of state nor a public minister at the time he was sued. Instead, he was sued after having surrendered to the British during their short-lived occupation of Guadeloupe in 1794.[55] The lawsuit alleged that Collot had abused his authority as Governor to confiscate an American brig, the *Kitty*.[56] The *Kitty*'s captain, William Waters, filed suit against Collot in the Pennsylvania Supreme Court.[57] When Collot stopped in Philadelphia en route back to France, the sheriff of Philadelphia County arrested him on a *writ of capias* issued by the court that required him to respond to the suit.[58]

Attorney General Bradford opined that "[w]ith respect to his suability," Collot "is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts."[59] A "public minister" (such as an ambassador or minister plenipotentiary appointed to represent a foreign country) was entitled to absolute, status-based immunity from foreign legal proceedings during his term of appointment.[60] Other foreign officials, however, could not claim a similar exemption from U.S. jurisdiction.[61] Instead, they had to argue on the merits that they did not bear personal responsibility for the challenged acts (here, the

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[54] *See, e.g.*, 1 EMER DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 131 (1760) (indicating that "[t]he consul is no public minister . . . and cannot pretend to the privileges appertaining to such character"). On the distinction between "status-based" and "conduct-based" immunity, see, for example, Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 62–66 (2010) (distinguishing between status-based and conduct-based immunity), *quoted in* Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012). *See also* Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019) (distinguishing between status-based and conduct-based immunity under the doctrine of common law foreign immunity).

[55] *See* George W. Kyte, *A Spy on the Western Waters: The Military Intelligence Mission of General Collot in 1796*, 34 MISS. VALLEY HIST. REV. 427, 430 n.9 (1947).

[56] *See* Waters v. Collot, 2 U.S. (2 Dall.) 247, 247 (Pa. 1796).

[57] *Id.*

[58] *See* V. Collot, *Mon Arrestation dans les Etats-Unis de L'Amerique pour fait de mon Administration* (explaining that Collot was ill-received in Pennsylvania and, despite his claim of innocence, was publicly arrested based on Captain Waters' claim), *in* PRECIS DES EVENEMENTS QUI SE SONT PASSES A LA GUADELOUPE PENDANT L'ADMINISTRATION DE GEORGE HENRY VICTOR COLLOT 35, 35 (1795).

[59] William Bradford, Suits Against Foreigners, 1 Op. Att'y Gen. 45, 46 (1794).

[60] *See* Keitner, *supra* note 54, at 63 (explaining diplomatic immunity for "public ministers").

[61] William Bradford, Suits Against Foreigners, 1 Op. Att'y Gen. 45, 46 (1794).

confiscation of the *Kitty*) because they had acted on behalf of a foreign state.[62]

Collot's lack of status-based immunity did not necessarily mean that Waters would prevail in seeking damages against him. Notably, Bradford ventured that Collot could invoke the official capacity in which he had acted as a defense on the merits because "if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action."[63] Waters discontinued the suit before a trial could take place, so there was no judgment on the merits.[64] In contemporary terms, although Collot attempted to invoke his exercise of official capacity as a defense to the court's jurisdiction, Bradford believed that such a claim could instead provide an affirmative defense on the merits. As a practical matter, this meant that Collot could not seek a dismissal for lack of jurisdiction but instead could move for summary judgment. To be successful, however, he would have to show he had acted with actual, and not merely apparent, authority.[65]

Three years after the Collot case, Secretary of State Pickering asked Attorney General Lee to opine on how the United States should respond to British Minister Liston's diplomatic protests about the suit against Sinclair.[66] In providing his views, Lee explicitly referenced Bradford's prior opinion.[67] Lee echoed Bradford's insistence that "the Executive cannot interpose with the judiciary proceedings between an individual and Henry Sinclair, whose controversy is entitled to a trial according to law."[68] Like Bradford, however, Lee volunteered that Sinclair "ought to prevail" at trial in light of the well-settled principle of admiralty law that "a person acting under a commission from the sovereign of a foreign

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[62] *Id.*

[63] *Id.*

[64] Discontinuance, June 29, 1798, Pa. State Archives, RG-33, Records of the Sup. Ct. of Pa., E. Dist., Discontinuance Papers, series #33.38 (Dec. 1796) (on file with author).

[65] *See* Keitner, *supra* note 54, at 68–69 (explaining when foreign officials act under actual or apparent authority).

[66] Actions Against Foreigners, 1 Op. Att'y Gen. 81 (1797).

[67] *Id.*

[68] *Id.*

nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States."[69] Lee thus agreed with Bradford that a defendant's claim that he acted on behalf of a foreign state was not enough to support dismissal for lack of jurisdiction. Instead, if substantiated, it could serve as a defense on the merits. Although this response was well-founded doctrinally, it was problematic because it left the defendant with the burdens of litigation. These are precisely the burdens that individuals who claimed they acted on behalf of foreign states argued they should not have to bear.

The ability to raise a defense on the merits offered little comfort to Sinclair, whose livelihood depended on his ability to return to sea without waiting to be vindicated at trial. Eager to put an end to his unexpected sojourn in the United States, he opted to settle the claims against him.[70] His willingness to settle was likely also increased by his consciousness, acknowledged in his memorial, of "some irregularity of conduct in having in fact carried off certain articles from the American Ship."[71] This awareness facilitated a negotiated settlement and averted further diplomatic friction.[72] But it also left unresolved the question of whether his "official capacity" defense would have succeeded on the merits.

The *Collot* and *Sinclair* cases raised issues that remain salient for U.S. courts today. At the most basic level, the initiation of civil proceedings in the United States challenged the exclusive jurisdiction of foreign admiralty courts. Viewed more broadly, such proceedings raised the difficult question of whether, and under what circumstances, U.S. courts could and should adjudicate the lawfulness of acts performed under color of foreign law—and how to make this decision. The plenary territorial jurisdiction conferred on U.S. courts placed the burden on defendants to establish that they were not properly subject to the courts' adjudicatory authority.[73] This, in turn, pressured the Executive Branch to devise strategies for diffusing diplomatic pressures created by private litigation that

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[69] *Id.*

[70] Memorial of Henry Sinclair, *supra* note 35.

[71] *Id.*

[72] *Id.*

[73] *See* Lewis v. Mutond, 918 F.3d 142, 145 (D.C. Cir. 2019) ("The defendant bears the burden of proving foreign official immunity.").

implicated the interests of foreign states.[74] It also put courts in the difficult position of endeavoring to maintain a rules-based approach to adjudication while considering the potential costs of proceeding in diplomatically sensitive matters.[75]

B. EXECUTIVE SUGGESTIONS: *THE CASSIUS*

The overwhelming majority of suits involving claims against foreigners during this early period were filed under the federal courts' admiralty jurisdiction and sought restoration of vessels that had allegedly been captured unlawfully.[76] Several suits, however, were filed against individuals who came within the territorial jurisdiction of U.S. courts, such as Collot and Sinclair.[77] Since foreigners who were not diplomatic representatives of a foreign state could not claim jurisdictional immunity from suit, they instead had to invoke the affirmative defense that a foreign government had authorized their conduct.[78] This situation vexed foreign ministers who thought that suits against individuals acting under foreign governmental authority should not be entertained at all in U.S. courts.[79]

A lawsuit filed by Philadelphia merchant James Yard fueled France's diplomatic ire and illustrated the serious diplomatic consequences of the Executive Branch's policy of non-intervention.[80] Yard sought damages resulting from the allegedly unlawful capture of his schooner, the *William Lindsay*, by a French corvette (a small

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[74] See Keitner, *supra* note 54, at 73 (noting that "[t]he Executive has argued that it is entitled to absolute deference on questions of both status-based and conduct-based immunity based on cases involving foreign ships").

[75] *Id.* at 62.

[76] For a detailed account of these cases, see Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1, 27 (2017); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 27 AM. J. LEGAL HIST. 117, 117 (1993) ("[A]bundant evidence of the origins of federal admiralty jurisdiction lies hidden in plain sight.").

[77] *See supra* Section II.A.

[78] *See supra* Section II.A.

[79] *See supra* Section II.A.

[80] This litigation is described in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 719–27 (Maeva Marcus ed., 1998) (referring to *Yard v. Ship Cassius*, a case initiated on August 5, 1795 in the federal district court of Pennsylvania).

warship), the *Cassius*.[81] When Yard learned that the *Cassius* had entered the port of Philadelphia, he filed a "libel"—a legal instrument detailing his claims and initiating a civil case in admiralty by seeking the attachment (seizure) of the *Cassius*, as well as the arrest of its captain, Samuel Davis.[82] Captain Davis happened to be both a U.S. citizen and a commissioned officer in the French navy.[83] Yard alleged that Davis had unlawfully captured the *William Lindsay* and caused the ship and its cargo to be detained wrongfully at Port au Paix, on the north coast of Haiti.[84] He sought to hold Davis legally responsible for the financial loss caused by the resulting delay.[85]

French Minister Adet instructed French consul-general Joseph Létombe to give bail for Captain Davis, and he wrote to Secretary of State Randolph to protest the ship's attachment and Davis's arrest.[86] Adet argued that Davis should have been exempt from arrest for his actions because Davis had acted on behalf of France.[87] In contemporary terms, Adet argued that Davis, as an agent of France, was entitled to jurisdictional immunity from suit based on the official nature of his alleged conduct:

> [T]he acts of a man in the character of a public agent are not his own; he represents his Government; and if he conducts [himself] so as to excite the complaints of the citizens of another State, or of this State, justice should not be required of him, but of the Government from whom he holds the authority in virtue of which he has done the act complained of.[88]

In Adet's view, Yard could complain to France directly, or the United States could espouse Yard's claim against France under international law.[89] Adet believed that Yard should not be able to

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Letter from P.A. Adet, Minister Plenipotentiary of the French Republic, to Mr. Randolph, Sec'y of State of the U.S. (Aug. 9, 1795) [hereinafter Adet to Randolph], *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 629 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).
[87] *Id.*
[88] *Id.*
[89] *Id.*

seek a remedy in U.S. court, however, because only France could "judge whether the orders it has given [to its official] have been well executed or not, and to approve or punish its agent, accused of an improper act towards neutral or allied nations, and to make such reparations as it seems just and equitable."[90] If a U.S. court were to adjudicate the lawfulness of Davis's actions, Adet warned, "one Government would become amenable to another; which would reverse the first principles of the rights of nations."[91] In other words, in Adet's view, the U.S. proceedings were fundamentally incompatible with the *par in parem* principle.[92]

On August 20, 1795, Randolph—accused on shaky evidence of having solicited a bribe from Adet's predecessor Joseph Fauchet—resigned as Secretary of State.[93] Timothy Pickering succeeded Randolph, first on an interim basis and then on a permanent basis.[94] Before he resigned, Randolph consulted the U.S. Attorney for the District of Pennsylvania, William Rawle, about the diplomatic crisis triggered by the district court's attachment of the *Cassius*.[95] Rawle told Pickering that he had verbally advised Randolph of his view that a vessel belonging to a foreign sovereign nation should not be subject to "the process of our courts," because "[o]ne sovereign is not amenable to the tribunals of another."[96] In this respect, Rawle's first reaction to hearing of the case was similar to Adet's view. His concern about the foreign relations implications of the lawsuit prompted him to think creatively about possible interventions that would not violate the constitutional separation of powers as it was then understood.

In Rawle's assessment, seizing the *Cassius* was tantamount to allowing a suit against France itself because attaching a foreign

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[90] *Id.*

[91] *Id.*

[92] *See supra* note 6 and accompanying text.

[93] For an account sympathetic to Randolph, see Mary K. Bonsteel Tachau, *George Washington and the Reputation of Edmund Randolph*, 73 J. AM. HIST. 15, 15 (1986) ("Randolph resigned as secretary of state in 1795 after his fellow cabinet members accused him of having held improper communications with the French minister to the United States and of having solicited a bribe from him . . . .").

[94] On Pickering's inauspicious appointment, see GERALD H. CLARFIELD, TIMOTHY PICKERING AND THE AMERICAN REPUBLIC 163 (1980).

[95] Statement of W. Rawle to Timothy Pickering (Dec. 21, 1796) [hereinafter Statement of Rawle to Pickering], *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 637 (1833).

[96] *Id.*

sovereign's property "indirectly brings the sovereign to submit to the tribunal, or to abandon the property."[97] This reasoning presaged later arguments that a suit against a foreign sovereign's property, or against its officials, indirectly impleads the sovereign. Rawle opined that there is "little difference between the direct and indirect mode of effectuating this event, since an attachment of some moveable article must be, in general, the mode of compelling the appearance of a foreign sovereign."[98] He cautioned that "[i]nconceivable evils" would result from allowing this to happen.[99] He further predicted that "[a]n imprudent individual might, at least, endeavor to detain a whole squadron by process, which it would be fortunate, if it only exposed the judicial authority to ridicule, and did not involve our country in hostilities."[100] In Rawle's assessment, the abuse of legal process could literally lead to war.

Even though the U.S. government was not a party to the proceedings between Yard and the *Cassisus*, Rawle informed Pickering that Randolph had instructed him to adopt "the speediest method for obtaining a decision of the question."[101] Since Rawle did not have legal authority to enter a plea in the name and on behalf of France (which refused to appear in the proceedings), he invoked the United States' interest in the question and cited "authorities where the interests of third persons had been effectually brought before even courts of common law."[102] Based on this assertion of a U.S. interest, he filed what he called a "suggestion" with the court, enabling him to convey the United States' objections to the court's exercise of jurisdiction in "a more solemn form of motion" without violating the separation of powers.[103]

Rawle explained that he resorted to this "somewhat novel" mode of proceeding because Adet "disclaimed the jurisdiction of the court,

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* Rawle's concern was not fanciful, as the British used litigation as a tactic to detain French privateers. *See, e.g.*, David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 173–74 (2008) (describing how the British filed in rem actions in American courts to "[detain] the privateers' property for extended periods of time and make it difficult for privateers to initiate additional attacks").

[101] Statement of Rawle to Pickering, *supra* note 95, at 637.

[102] *Id.*

[103] *Id.* Today, suggestions of immunity and statements of interest are filed pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to send the Solicitor General, or any officer of the Department of Justice, "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State."

and called, as it appeared, with no very clear conception of the constitutional powers of the Executive, for a direct interference to annul the judicial proceedings."[104] France's expectation that the Executive Branch could and would order termination of the proceedings created a need for U.S. officials to engage in creative lawyering to appease France, while also respecting the foundational separation of powers principles reflected in Bradford's and Lee's denials of the authority to instruct a U.S. court to dismiss a civil suit.[105]

Attorneys for Captain Davis, meanwhile, sought a writ of prohibition from the U.S. Supreme Court to enjoin the district court proceedings against him and the ship.[106] In the Supreme Court, Alexander Dallas argued on behalf of Davis that "[t]he *Cassius,* being then the property of a sovereign and independent nation, cannot be attached for any supposed delinquency of her commander, committed on the high seas" because it would amount to "making public property responsible for private wrongs."[107] He also invoked the established principle of prize law that "the courts of the captor have a right to decide."[108] Failure to respect this principle would mean that "[e]very owner, freighter, master, [and] seaman[] of a vessel taken as prize[] might sue the Captor in every Court of every Country," which would create "intolerable inconveniences."[109] On August 24, 1795, Chief Justice Rutledge announced that "though a difference of sentiment exists, a majority of the Court are clearly of the opinion[] that the motion [to enjoin the district court proceedings] ought to be granted."[110]

The drama, however, had only just begun. Moving quickly, one of Yard's associates, John Ketland, filed a *qui tam* action—which

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[104] Statement of Rawle to Pickering, *supra* note 95, at 637.

[105] As it happens, on the same day that Rawle filed his suggestion, Captain Davis's attorneys independently entered a plea objecting to the suit. *Id.* Rawle recounted that "[t]he intention of doing this had not been communicated, or the suggestion would have been deemed unnecessary; but, so far from interfering with, they tended to support each other." *Id.*

[106] United States v. Peters, 3 U.S. (3 Dall.) 121 (1795).

[107] *Id.* at 127.

[108] *Id.* One might think of this as a type of "improper venue" argument under today's Rule 12(b)(3) of the Federal Rules of Civil Procedure.

[109] *Id.* at 128.

[110] *Id.* at 129.

allows private whistleblowers to initiate certain enforcement measures—in the Philadelphia circuit court.[111] Ketland asked the court to reattach the *Cassius* because the vessel, previously named *les Jumeaux*, had been armed in the Philadelphia port in violation of the Neutrality Act of 1794.[112] Pickering sought to fend off Adet's continued diplomatic protests by emphasizing that, as Randolph had previously indicated, "as long as the question is in the hands of our courts, the Executive cannot withdraw it from them."[113] Separation of powers principles thus made it more difficult to reach a diplomatic solution, but they also gave the Executive Branch some (albeit not much) diplomatic cover in refraining from taking a public position in favor of France and against the interests of a U.S. citizen claimant. Had the United States' relationship with France not been deemed so vital at this juncture, the Executive Branch might have persisted in maintaining a more neutral posture.

As he had done previously, Rawle filed a suggestion to the circuit court recommending that it dismiss the *qui tam* action.[114] This time, the suggestion included two certificates provided by Adet attesting to the French Republic's ownership of the *Cassius*.[115] On June 3, 1796, Pickering reported to Adet that "the fate of the armed vessel *les Jumeaux*, now called *le Cassius*, [was] still in suspense."[116] Counsel for Ketland objected to the certificates, arguing that they would not be admissible to prove ownership of a ship at trial, so "they ought not now . . . be admitted" to support "receiving a suggestion."[117] The court continued the proceedings from May until

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111 Ketland v. The Cassius, 2 U.S. (2 Dall.) 365, 14 F. Cas. 431 (C.C.D. Pa. 1796).

112 *Id.*

113 Letter from Timothy Pickering to Mr. Adet, Minister Plenipotentiary of the French Republic (Aug. 25, 1795), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 631 (1797); *see also id.* at 634 ("If the Executive were to attempt (and it could only attempt—for it would be the duty of the court to resist its mandate) to remove the question from the judiciary, it would be a violation of the constitution: and you will see immediately that the measure would be as unsafe as unconstitutional.").

114 Letter from William Rawle to the Secretary of State (May 28, 1796) [hereinafter Rawle to Secretary of State], *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 636 (1797).

115 *Id.* Although he filed the suggestion, Rawle confided to Pickering that he "scarcely expect[ed], with the aid of those two certificates only, to succeed." *Id.*

116 Letter from Timothy Pickering to Mr. Adet, Minister Plenipotentiary of the French Republic (June 3, 1796), *in* 2 STATE PAPERS RELATING TO THE DIPLOMATICK TRANSACTIONS BETWEEN THE AMERICAN AND FRENCH GOVERNMENTS, FROM THE YEAR 1793, TO THE CONCLUSION OF THE CONVENTION, ON THE 30TH OF SEPTEMBER, 1800, at 287 (A.G. Gebhardt ed., 1816) [hereinafter DIPLOMATICK TRANSACTIONS].

117 Letter from William Rawle to the Secretary of State (May 28, 1796), *in* DIPLOMATICK TRANSACTIONS, *supra* note 116, at 287–88.

its next sitting in October because it had insufficient time to hold argument on this somewhat technical point.[118] Meanwhile, the *Cassisus*, which was still subject to the second writ of attachment, literally rotted in port.[119]

Adet was outraged at the notion that France should be required to prove its ownership of the *Cassius* by any means other than furnishing the commission issued to Captain Davis, which authorized him to cruise against enemy vessels.[120] When the circuit court reconvened in October, the judges heard arguments from Rawle and from Ketland's attorneys.[121] The following morning, the court dismissed the *qui tam* action on the grounds that it fell within the exclusive jurisdiction of the district—not the circuit—court.[122] By this time, the *Cassius* had been detained in port for over a year. An observer later reported that "[w]hen it came out of judicial custody, [the *Cassius*] was a stripped, deteriorated, and abandoned hulk, and was sold as such by public auction."[123]

The Executive Branch's practice of disclaiming the authority to order dismissal of a private suit remained consistent through the eighteenth and nineteenth centuries, even—and perhaps especially—in cases with potential foreign relations implications. Nevertheless, foreign governments persisted in requesting that the Executive Branch intervene when individuals acting on behalf of those governments were sued in U.S. courts.[124] Although civil suits

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[118] *Id.*

[119] Letter from Citoyen Adet to Mr. Pickering (June 3, 1796), *in* DIPLOMATICK TRANSACTIONS, *supra* note 116, at 289–90.

[120] *Id.*

[121] Letter from Timothy Pickering to Mr. Adet (Oct. 19, 1796), *in* DIPLOMATICK TRANSACTIONS, *supra* note 116, at 290–91.

[122] *Id.*

[123] Henry Wheaton, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 549 (Richard Henry Dana, Jr. ed., 8th ed. 1866). Even before the conclusion of the proceedings in June 1796, Adet ordered the ship to be dismantled and turned over to the U.S. government, accompanied by a formal reclamation for damages. *Id.* at 548 ("[T]he French Government had ordered . . . the reparation for the injuries and damages from the proceedings in the matter of [the Cassius].").

[124] *See, e.g.*, Letter from George Hammond to Edmund Randolph (July 25, 1794), British National Archives, F.O. 5/5 at 229 (manuscript copy on file with author), *reprinted in* U.S. National Archives, Notes from the British Legation, NS 1323, M.50 Roll 1 (objecting to suit against Captain Alexander Cochrane); Letter from [French consul-general Joseph Létombe] to Talleyrand, Minister of Foreign Relations (Nov. 29, 1797), *in* 2 CORRESPONDENCE OF THE FRENCH MINISTERS TO THE UNITED STATES, 1791–1797, at 1083 (Frederick J. Turner ed., 1903) (explaining objections raised in a suit against Létombe).

against individuals appear to have been much less common during this period than *in rem* actions claiming ownership of ships and their cargo, the tenor of the diplomatic correspondence they provoked attests to their significance.

Privately initiated proceedings, brought by U.S. plaintiffs against defendants who were physically present in the United States, caused diplomatic consternation at best and outrage at worst. They raised novel and difficult questions about (1) the authority of a U.S. tribunal to inquire into the contours of a foreign official's lawful authority; (2) the deference owed to a foreign government's representation that its official had acted within the scope of that authority; and (3) the role of the U.S. Executive Branch, if any, in intervening in such proceedings, either in an attempt to compel dismissal at the pleadings stage (which the Executive Branch disclaimed any authority to do) or to provide information and legal analysis to the court in the form of a "suggestion." Many of the same questions remain central to determining the scope of jurisdictional immunity for foreign officials today.

C. EXECUTIVE CLASSIFICATIONS: DIPLOMATS AND CONSULS

As chronicled above,[125] diplomatic protests sparked by civil suits against foreign officials, and by *in rem* proceedings against foreign ships, forced the Executive Branch to confront potentially thorny separation of powers questions. Because these proceedings raised domestic and international legal questions, successive secretaries of state (in what was then U.S. Department of Foreign Affairs) sought advice from successive attorneys general (in the Office of the Attorney General, before the Department of Justice was created).[126] One set of questions involved whether the Executive Branch could direct the termination of legal proceedings against foreign officials who were not entitled to status-based immunity because they were not public ministers.[127] Successive attorneys general answered this question with a resounding "no."[128] Another set of questions involved identifying which foreign officials were entitled to special

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[125] See *supra* Section II.B.

[126] *See* John A. Fairlie, *The United States Department of Justice*, 3 MICH. L. REV. 352, 352 (1905).

[127] *See supra* Section II.A.

[128] *See supra* Section II.A.

privileges, including status-based immunity—a question that remains salient today.[129] Not surprisingly, foreign officials often attempted to claim this special status, and the Department of Foreign Affairs and Office of the Attorney General had to grapple with where to draw the line.

In an early example from 1794, Secretary of State Edmund Randolph sought advice from Attorney General William Bradford about a dispute involving the British consul at Norfolk, Virginia.[130] The consul, John Hamilton, had complained of "a riot committed by a number of persons tumultuously assembled" in front of his house who, among other affronts, had allegedly "insult[ed] him with improper language."[131] Hamilton complained that Alexander Campbell, the U.S. Attorney for the District of Virginia, had wrongfully declined to prosecute the demonstrators in U.S. federal court.[132] In Hamilton's view, the rioters should have been liable to prosecution under the Crimes Act of 1790 for the federal crime of "infract[ing] the law of nations, by offering violence to the person of an ambassador or other public minister."[133] Attorney General Bradford, however, agreed with Campbell's decision not to bring charges because federal law did not criminalize offenses against consuls.[134] Relying on the authority of "writers on the law of nations," Bradford reasoned that a consul, unlike a public minister, "is not in any degree invested with the representative character."[135] Consequently, Bradford opined that the Act "cannot reach the offence [sic] in question, because it is now fully settled that a consul is not a public minister."[136] Thus, Hamilton was not legally entitled

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[129] For recent cases involving claims to status-based immunity, see *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013); *Tawfik v. Al-Sabah*, No. 11 Civ. 6455(ALC)(JCF), 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012); *Smith v. Ghana Commercial Bank, Ltd.*, No. 10-4655 (DWF/JJK), 2012 WL 2930462, at *9 (D. Minn. June 18, 2012).

[130] William Bradford, Respect Due to Consuls, 1 Op. Att'y Gen. 41 (1794).

[131] *Id.* at 41–42.

[132] *Id.* at 42.

[133] Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 28, 1 Stat. 112 (1790).

[134] *See id.*; *see also* William Bradford, Respect Due to Consuls, 1 Op. Att'y Gen. 41, 42–43 (1794).

[135] *Id.*

[136] *Id.* at 42.

to the protections he claimed under either international or domestic law.[137]

Unlike consuls, who do not represent their countries in the conduct of foreign relations, ambassadors and public ministers with diplomatic functions are accorded special treatment under the law of nations and under U.S. law. The Crimes Act of 1790 protected foreign ambassadors and public ministers, but not consuls, by making assaults on them a federal crime.[138] U.S. and international law also shielded foreign ambassadors and public ministers from being subjected to legal proceedings in U.S. courts by according them *ratione personae*, or status-based, immunity from jurisdiction.[139] As Attorney General Charles Lee explained in a 1797 opinion, "an ambassador is not liable in any case, according to the law of nations, to answer either criminally or civilly before any court of the foreign nation to which he is sent."[140] Lee noted that § 25 of the Crimes Act was "[c]onformable to this principle," as it rendered void any process issuing from a U.S. state or federal court against "the person of any ambassador or other public minister of any foreign prince or state."[141] Moreover, like the analogous English statute, § 26 of the Act rendered any persons who "sue[d] forth or prosecuted any such writ or process," their attorneys, and any officers who executed such a writ or process liable to a fine and up to three years' imprisonment as "violaters [sic] of the laws of nations, and disturbers of the public repose."[142] Under this

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[137] For historical background on diplomatic and consular immunities, see, for example, LINDA S. FREY & MARSHA L. FREY, THE HISTORY OF DIPLOMATIC IMMUNITY (1999) (analyzing the practice of diplomatic immunity from ancient times to the present); JULIUS I. PUENTE, THE FOREIGN CONSUL: HIS JURIDICAL STATUS IN THE UNITED STATES (1926) (chronicling U.S. practice with regard to consular, as opposed to diplomatic, immunity); ELLERY C. STOWELL, CONSULAR CASES AND OPINIONS: FROM THE DECISIONS OF THE ENGLISH AND AMERICAN COURTS AND THE OPINIONS OF THE ATTORNEYS GENERAL (1909) (collecting and reprinting cases on consular immunity).

[138] Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 28, 1 Stat. 112 (1790).

[139] *See, e.g.*, VATTEL, *supra* note 54, at 131 (indicating that "[t]he consul is no public minister . . . and cannot pretend to the privileges appertaining to such character").

[140] Charles Lee, Libellous Publications, 1 Op. Att'y Gen. 71, 74 (1797).

[141] *Id.*; Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 25, 1 Stat. 112 (1790).

[142] Section 25 of the Crimes Act specified that the ambassador must have been "authorized and received as such by the President of the United States" and that the ambassador's immunity extended to "any domestic or domestic servant of any such ambassador or other public minister" and to "his or their goods or chattels." Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 25, 1 Stat. 112 (1790). *Cf.* William Wirt, Foreign

framework, an ambassador or public minister recognized as such by the U.S. government would not have to plead jurisdictional immunity from suit, because any process issued from a U.S. state or federal court would be considered "null and void" from the outset. The Executive Branch's role, if any, was to certify to the court that the defendant possessed the requisite status, if there was a dispute on this point.

The distinction between foreign officials who were "invested with the representative character" and other individuals acting on behalf of foreign states was crucial in drawing the line between those exempt from U.S. legal process and those subject to it.[143] As indicated in Section II.A above, successive attorneys general confirmed that those who did not qualify as public ministers were "with respect to [their] suability . . . on a footing with every other foreigner . . . who comes within the jurisdiction of our courts."[144] Because they were not shielded from U.S. legal proceedings by virtue of their official positions, these individuals were left to defend their conduct on the merits. One of the defenses available to them, however, was that they did not bear personal responsibility for any damages caused by their actions taken within the scope of the powers lawfully conferred on them by a foreign government.[145]

Other cases that arose during this period also turned on the difference between the status-based immunity accorded diplomats

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Ministers, & Consuls, 1 Op. Att'y Gen. 406, 408 (1820) (asserting consuls are not within the function areas protected by the act).

[143] *See supra* note 139 and accompanying text.

[144] William Bradford, Suits Against Foreigners, 1 Op. Att'y Gen. 45 (1794); *see also* Charles Lee, Actions Against Foreigners, 1 Op. Att'y Gen. 81 (1797) ("[A] person acting under a commission from the sovereign of a foreign nation is not amenable . . . to any judiciary tribunal in the United States."); William Bradford, Suits Against Foreigners, 1 Op. Att'y Gen. 49 (1794) (being of the "opinion that it does not appear from this state of facts that the defendant has any legal claim to be privileged from arrest").

[145] This defense appears to have carried particular weight in the commercial context. *See, e.g.*, Dugan v. United States, 16 U.S. (3 Wheat.) 172, 178 (1818) (citing *Jones v. Létombe*, 3 U.S. (3 Dall.) 384 (1798), for the proposition that "all the authorities show that an agent contracting on the behalf of government is not personally liable"); *see also* Greenspan v. Crosbie, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *1 (S.D.N.Y. Nov. 23, 1976) (finding individual officials immune for a state's commercial transactions). The same appears to have been true for "claims sounding in contract" brought against domestic officials because "the liability did not run against the officer as such but against the government." James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871 n.37 (2010).

under the law of nations and U.S. law, and the defense of official capacity—and corresponding lack of personal liability—that other foreign officials could attempt to invoke on the merits at trial.[146] These cases are significant because they underscore the extent to which early understandings of jurisdictional immunity based on status were treated as conceptually and doctrinally distinct from the merits question of whether or not a defendant who had acted on behalf of a foreign state, and who was not entitled to status-based immunity, could be held liable for her actions in a U.S. court. Today, we understand such claims to rest on a principle of *ratione materiae* or conduct-based immunity from jurisdiction, not simply freedom from liability on the merits. This different understanding carries implications for pleading standards, burdens of proof, and the respective roles of the judicial and executive branches.

A suit brought against Louis André Pichon, the French chargé d'affaires, further illustrates the point and helps to fill in the historical record of notable cases against consuls. It also sheds light on the difficulty of making factual determinations at the pleadings stage, when the plaintiff's claims are generally treated as true.[147] Pichon was sued in 1805 for payment on bills of exchange that he had signed in the course of equipping French frigates in New York.[148] Pichon claimed that his position as chargé d'affaires entitled him to status-based immunity and thus compelled immediate discharge of the process against him.[149] The Pennsylvania Supreme Court agreed that the position of chargé d'affaires would entitle its holder to diplomatic immunity because of its representative function.[150] But the question remained: how could Pichon prove that he held this status? Although Pichon argued that "the notoriety of his reception by the President" was sufficient to prove his official position, the claimant insisted that

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[146] *See* Keitner, *supra* note 1, at 749–57 (discussing the nineteenth-century line of cases involving claims of foreign official immunity).

[147] For a discussion of contemporary standards, see generally A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

[148] Dupont v. Pichon, 4 U.S. (4 Dall.) 321 (Pa. 1805). Pichon reportedly borrowed "freely" from DuPont, which proved problematic when DuPont presented bills signed by Pichon for payment. *See* Bessie Gardner Du Pont, E.I. DUPONT DE NEMOURS AND COMPANY, A HISTORY, 1802–1902, at 27–28 (1920).

[149] *Dupont*, 4 U.S. (4 Dall.) at 322.

[150] *Id.* at 324.

"proof should be produced from the secretary of state of [Pichon's] reception as a minister."[151]

The task of determining Pichon's status was complicated by the fact that a new French Minister, General Louis-Marie Turreau, had arrived in the United States several months earlier.[152] Although Pennsylvania Chief Justice Edward Shippen "seemed inclined to wait for information, from the department of state, as to [Pichon's] actual reception by the president in that character [of minister]," the court ultimately agreed to discharge Pichon absolutely from the process in order to spare him from being imprisoned as a defendant in a civil suit until such proof could be obtained—a delay that Pichon's attorneys had warned "would attract the serious attention of every foreign minister and government."[153] The anticipated foreign relations repercussions of Pichon's potential detention were not lost on the Pennsylvania judges and appear to have played a role in their decision.

The question of whether consuls could claim entitlement to status-based immunity, which was later addressed by treaty, also arose during this period, notwithstanding the exclusion of consuls from the provisions of the Crimes Act.[154] In an especially colorful example, President George Washington accredited Joseph Ravara as consul general of the Doge and Governors of the Republic of Genoa in Philadelphia in 1791.[155] Less than two years later, Ravara authored anonymous letters to Washington and other public figures in an attempt at extortion, leading to his indictment for a

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[151] *Id.* at 323–24.

[152] 42 THE PAPERS OF THOMAS JEFFERSON 416 (James P. McClure ed., 2016) (indicating that Louis Marie Turreau de Garambouville was named the new French minister plenipotentiary to the United States in December 1803 but did not arrive in Washington until November 1804).

[153] *Dupont*, 4 U.S. (4 Dall.) at 323–24.

[154] *See generally* Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (providing personal inviolability for the consular); Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)–(e) (2006); *see also supra* note 138 and accompanying text.

[155] For more about this saga, see the annotated letter to George Washington from Joseph Ravara (May 10, 1793), 12 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 563–65 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

misdemeanor.[156] Alexander Dallas argued on behalf of Ravara that "considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted."[157] William Rawle countered on behalf of the United States that "the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution agreeably to the law of nations."[158] The circuit court agreed that Ravara's consular appointment did not confer status-based immunity from prosecution.[159]

Similarly, in December 1820, Attorney General William Wirt was asked to opine on whether the Spanish vice-consul at New Orleans, Josef Nicolás de Villavazo, was entitled to immunity from suit in a U.S. court.[160] Luis Seré, owner of the corvette *Cora*, sued Villavazo for allegedly providing information that caused the ship to be detained at Campeche on the Gulf of Mexico by the Captain General (governor) of Yucatán.[161] The Spanish Minister to the United States, General Francisco Dionisio Vivés, called on the President "to suspend the proceedings in this case" because Villavazo, "being a public functionary of his Catholic Majesty, is protected from arrest by the law of nations . . . and can be made to answer for this alleged injury only to the sovereign from whom he derives his commission."[162] Wirt responded that "the subject being a civil individual suit, of which the judiciary has possession, the President has no authority to interpose in the case" and that the vice-consul, who was neither an ambassador nor a public minister received as

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[156] *See* United States v. Ravara, 27 F. Cas. 714 (C.C.D. Pa. 1794) [hereinafter *Ravara II*]; United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793) [hereinafter *Ravara I*]; *cf. The Washington-Madison Papers: Catalogue Compiled and Sale Conducted by Stan. V. Henkels* (1892) (identifying Item 478 as "[t]he anonymous letters sent to General Washington by Joseph Ravara, Consul from Genoa, for the purpose of extorting money" and describing "the spelling, bad" and "the writing in script and block-letter").

[157] *Ravara II*, 27 F. Cas. at 714; *Ravara I,* 2 U.S. (2 Dall.) at 297.

[158] *Ravara II*, 27 F. Cas. at 714.

[159] *Id.* at 715.

[160] William Wirt, Foreign Ministers, Consuls, & c., 1 Op. Att'y Gen. 406 (1820).

[161] *Id.*; *see also* Letter from Hilario de Rivas y Salmon to Secretary of State Henry Clay (Mar. 31, 1826) in DNA, RG59, 8 NOTES FROM SPANISH LEGATION (M59, R11) (on file with author) [hereinafter Hilario de Rivas y Salmon to Secretary of State Henry Clay] (referring to a letter from Vives to John Quincy Adams that argued that "in no case could an agent of His Majesty, acknowledged by the President, be responsible to the American authorities for his official acts" and that reported that Villavazo "is at present unwell, and without means wherewith to satisfy the amount of the fine to which he has been condemned, and on the eve of being dragged to a public prison for it").

[162] Hilario de Rivas y Salmon to Secretary of State Henry Clay, *supra* note 161.

such by the President, could not seek to nullify the suit on the grounds of status-based immunity.[163] After canvassing multiple authorities on the law of nations, Wirt concluded that "there is no author of general notoriety in this country, who maintains the exemption of the consul from . . . [civil] jurisdiction; and no one, who descends to the particular question at all, that does not, on the contrary, admit it."[164] In this regard, Wirt averred that consuls present in the United States "are on the same footing here as in other countries."[165] Accordingly, the President could not—and would not—"suspend the proceedings" in response to the Spanish Minister's request.[166]

In this manner, successive U.S. attorneys general fended off pressure from foreign states to intervene in civil proceedings initiated against foreign consuls in U.S. courts. They emphasized that domestic constitutional law forbade intervention and that international law permitted the exercise of domestic jurisdiction over consuls in the absence of status-based immunity. The core practical problem with this approach was that the substantive defense of lack of personal responsibility took time to adjudicate. Some courts convened infrequently, and hearings could be scheduled months apart.[167] In the meantime, foreign defendants arrested in civil suits had to post bail to secure their release and could not leave the United States until the claims against them were dismissed or resolved in their favor.[168]

In the context of private litigation (as opposed to criminal prosecutions initiated by the U.S. government), the lack of a "gatekeeping" function gave the Executive Branch a basis to decline foreign requests to intervene. At the same time, however, it deprived the Executive of an expedient way to secure the dismissal of cases that, in its view, interfered with the conduct of foreign relations. Allowing suits against foreign defendants—in contemporary terms, by recognizing a cause of action and treating

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[163] William Wirt, Foreign Ministers, & Consuls, 1 Op. Att'y Gen. 406 (1820). He did, however, concede that Villavazo could be sued only in federal court, not in state court. *Id.*

[164] *Id.* at 410.

[165] *Id.* at 413.

[166] *Id.* at 406.

[167] *See supra* note 118 and accompanying text.

[168] *See supra* note 40 and accompanying text.

service of process as a valid means of bringing the defendant within the court's personal jurisdiction—created pressure for immunity doctrines to provide a "safety valve" for suits with potentially negative foreign relations consequences. Without settled abstention doctrines, judges had to navigate questions of jurisdiction and justiciability based on their understandings of common-law and law-of-nations restrictions on the scope of their judicial power. This pushed such questions toward resolution as a matter of law by the courts, rather than diplomacy by the Executive Branch, notwithstanding the high diplomatic stakes involved in certain high-profile cases, as detailed in Section II.D.

D. EXECUTIVE PREDICAMENTS: *THE SCHOONER EXCHANGE* AND SPANISH CARGO

If the *Cassius* debacle had put private litigation on a collision course with the conduct of foreign relations, an ownership dispute involving the schooner *Exchange* threatened to alienate France just as the United States was on the brink of war with Great Britain.[169] It also provided an occasion for the U.S. Supreme Court to articulate limits on the assertion of jurisdiction over foreign ships in U.S. ports, which it had earlier expanded in the prize context.[170] Executive Branch lawyers argued strenuously—and successfully—for this result, even though it left two U.S. shipowners empty-handed.

1. An Analysis of The Schooner Exchange.

In July 1811, during the height of the Napoleonic Wars, a public ship of war in the service of French Emperor Napoleon I came into the port of Philadelphia for refreshment and repairs.[171] It was commanded by Captain Dennis M. Begon and named the *Balaou No. 5*.[172] Upon learning of the ship's presence, Maryland residents John McFaddon and William Greetham filed a libel against the ship to prevent it from departing.[173] The libel claimed that the vessel,

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[169] *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), *reversing* McFaddon v. The Exchange, 16 F. Cas. 85 (C.C.D. Pa. 1811).

[170] *See* Glass v. The Betsey, 3 U.S. (3 Dall.) 6 (1794); *see also* Golove & Hulsebosch, *supra* note 23, at 1025–27.

[171] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

[172] *Id.*

[173] *Id.*

which they called the *Exchange*, rightfully belonged to them.[174] According to their account, the *Exchange* had set sail from Baltimore on October 27, 1809 en route to St. Sebastian in Spain.[175] The following year, it allegedly had been captured unlawfully by persons acting under the "decrees and orders" of Napoleon.[176] McFaddon and Greetham sought to have the ship restored to them by an order of the court.[177] On August 24, as the ship was about to leave the port, it was seized and arrested pursuant to the libel.[178]

The French Minister to the United States, Louis Sérurier, petitioned Secretary of State James Monroe to intervene and have the ship released immediately based on the "universally recognized principle" that courts lack jurisdiction over private claims against a foreign sovereign.[179] Meanwhile, Sérurier instructed the French Vice Consul in Philadelphia, Honoré Felix de Douzy, to protest the court's action without entering an appearance, so that he would not be deemed to have accepted the court's jurisdiction.[180] The trial judge, who apparently had been treating the case like an ordinary property dispute, was reportedly disconcerted by this protest.[181] To

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 118.
[179] *See* Letter from Louis Sérurier, French Minister to the United States, to Hugues-Barnard Maret, Duc de Bassano (Oct. 9, 1811) (on file with author) [hereinafter Sérurier to Maret] ("[L]e principle universellement reconnu de l'incompétence des tribunaux pour connaître des reclamations de particulier à souverain, de toute juridiction étrangère." ["[T]he universally recognized principle of the incompetence of courts to know the claims [unique to the sovereign] of all foreign jurisdictions."]). In a letter from November 3, 1811, Sérurier wrote to Monroe citing his previous letter of October 3, 1811, "relating to the violation of the law of nations that took place with respect to the *Balaou* of His Imperial Majesty *Nov. 5* by the Pennsylvania authorities," and indicated that the continued arrest of the *Balaou* despite the Philadelphia Vice-Consul's protest and Sérurier's own demarche to the U.S. government showed a disregard for the dignity of the sovereign and for accepted general principles of law ("droit commun des nations"). Letter from Louis Sérurier, French Minister to the United States, to James Monroe, Secretary of State, U.S. (Nov. 3, 1811) (on file with author).
[180] *See* Sérurier to Maret, *supra* note 179.
[181] *Id.* A letter partially reprinted in the *Alexandria Daily Gazette* on September 7, 1811 and originally sent to the editors of the *Baltimore Federal Republican* on August 30 recounted: "The Frenchmen employed no lawyer to appear for them, but soon after the business commenced, the French consul handed the judge a paper, in form of a protest, against the libellants and the court, saying, THAT IF THEY CONDEMNED THE SCHOONER, HIS MASTER WOULD LOOK TO THEM [THE COURT] FOR

Sérurier's consternation, Monroe responded that courts in America were beyond the power of the government to control but that he would write to the U.S. Attorney for the District of Philadelphia to inform him of the Executive Branch's opinion on the matter.[182] Sérurier complained to the French Foreign Minister that the independence of U.S. courts gave the Executive Branch an "admirable excuse for not rectifying grievances that it does not want to remedy, or fully to acknowledge."[183]

The continued detention of the *Balaou No. 5* risked further provoking France's ire at a time when the United States found itself inching towards war with Great Britain.[184] Prompted by Monroe, Alexander Dallas, who had been appointed U.S. Attorney for the District of Pennsylvania in 1801, followed William Rawle's example in the *Cassius* case and filed a suggestion in the district court, arguing that applicable law did not permit the attachment of a French ship of war in response to a private suit.[185] Over the

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INDEMNIFICATION." Letter from Philadelphia to the Editors of the Baltimore Federal Republican (Aug. 30, 1811), *in* ALEXANDRIA DAILY GAZETTE, Sept. 7, 1811. The letter indicated that district Judge Richard Peters treated the protest "with becoming indignation, as an insult to the court, and said, that he had never seen or heard of any thing [sic] like it since the days of [Citizen] Genet." *Id.* Peters handed the paper to Dallas and told him "he might do with it what he pleased; but it should not go on the files of the court." *Id.* The letter concluded by surmising that "the paper will be handed to the President at Washington, and then we shall see how far French influence will go." *Id.* Indeed, Secretary Monroe reported to President James Madison that he had "received a statement from Mr[.] Dallas of the conduct of the French consul" in the case. Letter from James Monroe, Secretary of State, to James Madison, President (Sept. 7, 1811), https://founders.archives.gov/documents/Madison/03-03-02-0533.

182 Sérurier to Maret, *supra* note 179 ("[L]es tribunaux, en Amérique, étaient places hors du contrôle du Governement." ["[T]he courts, in America, were placed outside the control of the government."]).

183 *Id.* ("[C]ette independence des tribunaux qui gêne souvent le gouvernement, lui sert aussi quelquefois d'admirable excuse pour ne pas redresser des griefs qu'il ne veut ni réparer, ni avouer tout à fait." ["[T]his independence of courts, that often [bothers] the government, serves it also as an admirable excuse not to rectify the grievances that it does not want to [sort out], nor admit at all."]).

184 *See, e.g.*, J.C.A. Stagg, *James Madison and the "Malcontents": The Political Origins of the War of 1812*, 4 WM. & MARY Q. 557, 583 (1976) (indicating that "[d]iplomatically and politically, . . . Madison was in an intolerable position in the summer of 1811").

185 As described in the *Alexandria Daily Gazette* on March 7, 1812, the suggestion had indicated that

> inasmuch as there exists between the United States of America and Napoleon, Emperor of France and King of Italy, . . . a state of peace and amity; the public vessels of his said Imperial and Royal Majesty, conforming to the laws of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation.

claimants' objections, the court ultimately agreed that it could not exercise jurisdiction over a French ship of war that was "actually employed" in the service of Napoleon.[186]

The matter did not end there. On appeal, the circuit court reversed the district court's decision to release the ship.[187] Supreme Court Justice Bushrod Washington, sitting as a justice of the circuit court, found that there was no applicable exception to the court's plenary territorial jurisdiction over a ship in port.[188] Washington accepted Dallas's "suggestion"—which was still a relatively novel form of pleading—as a permissible method for conveying information to the court "upon subjects which concern the peace of the nation, or which the executive deems essential for the public good."[189] He noted that, because France had declined to appear, Dallas had also proffered Captain Begon's commission from Napoleon as evidence of Begon's authority to capture ships.[190] He commended both sides for having presented their legal arguments "with great ability."[191] However, without "a solid ground for excluding the present case" from the "general rule" of plenary jurisdiction over persons and objects within U.S. territory, Washington declined to invent one—while at the same time

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Supreme Court of the U. States: Case of the Schooner Exchange, ALEXANDRIA DAILY GAZETTE, Mar. 7, 1812. By contrast, in 1799, Attorney General Lee had advised that

> [t]he officers and crew of a public ship-of-war, being admitted into the United States, are entitled to be treated with hospitality and kindness; but this does not, in reason, require that the ship should be exempt from judicial process; and more especially when they are bound by every kind of obligation to act in conformity to the laws of the country which affords them and their ship its sovereign protection while within its jurisdiction.

Charles Lee, Service of Process on a British Ship-of-War, 1 Op. Att'y Gen. 87, 89 (1799).

[186] *See* McFaddon v. The Exchange, 16 F. Cas. 85 (C.C.D. Pa. 1811) (reversing the district court's decision), *rev'd* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

[187] *Id*. Sérurier harbored suspicions that the British had encouraged McFaddon and Greetham to file an appeal and complained that the circuit court was known to be hostile to France. *See* Letter from Louis Sérurier, French Minister to the United States, to Hugues-Barnard Maret, Duc de Bassano (Nov. 16, 1811) [hereinafter Sérurier to Maret] (on file with author).

[188] *The Exchange*, 16 F. Cas. at 86, 88 ("I am at a loss for a solid ground for excluding the present case from the jurisdiction of the district court.").

[189] *Id.* at 86.

[190] *Id.*

[191] *Id.* at 87.

expressing some relief that, if his judgment proved wrong, his colleagues on the Supreme Court would correct it.[192]

Upon learning of the circuit court's decision, Sérurier went straight to Secretary Monroe's office and announced that he now had proof that, as far as Pennsylvania was concerned, there was no international law.[193] A long discussion ensued during which Monroe attempted to explain principles of federalism, separation of powers, and appellate review to the irate ambassador.[194] In Sérurier's view, the Executive was charged with the conduct of foreign relations, and it was therefore the Executive's responsibility to ensure the United States' observance of international law, including foreign sovereign immunity.[195]

Although the Executive Branch remained unable and unwilling to compel a particular judicial result, Attorney General William Pinkney requested that the Supreme Court expedite oral argument, and the Court granted his request.[196] Dallas, together with Pinkney, argued that the *Balaou No. 5* was entitled to the same status-based immunity from U.S. jurisdiction owed a foreign ambassador or head of state on the grounds that—as Rawle had argued years earlier in the *Cassius* case—"[t]he arrest of the thing is to obtain jurisdiction over the person" of the foreign sovereign.[197] Dallas warned the Court that exercising jurisdiction over the ship would "amount to a judicial declaration of war" against France.[198] Counsel for McFaddon and Greetham countered that Dallas and Pinkney bore the burden of proving an exception to the general rule of territorial jurisdiction over ships in U.S. ports.[199] Any other approach, they cautioned,

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[192] *Id.*

[193] Sérurier to Maret, *supra* note 187 ("Je lui dis que je venais d'acquérir la preuve qu'il n'y avait pas de droit des gens pour la Pennsylvanie." ["I told him that I just acquired the evidence that there was no international law for Pennsylvania."]).

[194] *Id.*

[195] *Id.* (explaining to Monroe that "je ne connais que le Gouvernement; que c'était à lui qui étaient confiés les relations avec les nations étrangères, et le soin de faire observer à leur égard les loix de l'hospitalité et des droit des gens" ["I only know the government; that it was to it [the government] that were entrusted relations with foreign nations, and the care to make them observe laws of hospitality and international law"]).

[196] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

[197] *Id.* at 133. Although Dallas was not part of the Office of the Attorney General, Pinkney asked President James Madison to instruct Treasury Secretary Albert Gallatin to employ Dallas "to assist in the Cases in the supreme Court of the US in which it was thought his Aid would be advisable." *See* Letter from William Pinkney to James Madison (Jan. 22, 1812), https://founders.archives.gov/documents/Madison/03-04-02-0161.

[198] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 126.

[199] *Id.* at 127–28.

would neglect the wrongs inflicted on U.S. citizens and give "a sanction to their spoliators."[200] It was not lost on the claimants—and they emphasized to the Court—that the United States was taking a position favorable to France and against the interests of injured U.S. citizens.

Pinkney argued in response that any claims relating to the ship should be resolved between the governments of France and the United States rather than through private litigation.[201] He invoked the fiction of "exterritoriality"—the idea that certain foreign officials should be treated, as a legal matter, as if they were located outside the forum's territory—to support an exception to the general rule of territorial sovereignty.[202] Under this fiction, a foreign sovereign "is supposed to be out of the country, although he may happen to be within it."[203] The same was true, Pinkney argued, of the *Balaou No. 5*.[204]

The Supreme Court found Dallas's and Pinkney's reasoning persuasive. Chief Justice Marshall, who wrote the opinion for a unanimous court within less than a week, apparently did not share his colleague Justice Washington's inhibitions about crafting new doctrine. He acknowledged that the Court was "exploring an unbeaten path, with few, if any, aids from precedents or written law."[205] Nevertheless, he situated this case within a "class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[206] These cases include the personal (status-based) immunities of ambassadors and heads of state, as well as guarantees of safe passage given to foreign troops by the general or specific consent of the territorial sovereign.[207] By analogy, Chief Justice Marshall reasoned that the *Balaou No. 5* had entered the port of Philadelphia with the implied

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[200] *Id.* at 128.

[201] *Id.* at 132 (stating that "[w]hen wrongs are inflicted by one nation upon another . . . [t]he right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations").

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 136.

[206] *Id.*

[207] *Id.* at 137–39.

assent of the United States that it would be able to depart freely. While Chief Justice Marshall emphasized that the territorial sovereign retains the power to exercise jurisdiction over foreign public vessels "either by employing force or by subjecting such vessels to the ordinary tribunals," the territorial sovereign's intent to subject such vessels to jurisdiction should not be presumed "until such power be exerted in such a manner not to be misunderstood."[208] In other words, the presumption should be that foreign public vessels are exempt from the host country's jurisdiction, rather than vice versa.

Chief Justice Marshall's approach turned on its head the legal opinion offered a decade earlier by Attorney General Lee, who had advised that "the judicial power of a nation extends to every person and every thing [sic] in its territory, excepting only such foreigners as enjoy the right of extraterritoriality" (which Chief Justice Marshall would have agreed with), and that "[i]f an exemption from this rule is claimed by a foreign ship-of-war, it is incumbent on such ship to set forth and maintain clearly and satisfactorily its right to the exemption, or it must be deemed within the general rule" (a burden that Chief Justice Marshall reversed).[209] Although Dallas and Pinkney persuaded the Supreme Court that the *Exchange* was entitled to immunity from U.S. jurisdiction under applicable law, they did not argue that the Executive Branch could order the court to relinquish jurisdiction, which would have gone a step further.[210]

While the litigation was pending, Secretary of State James Monroe wrote to the U.S. Minister Plenipotentiary to France, Joel Barlow.[211] Monroe indicated that he had been corresponding with French Minister Sérurier about the case.[212] He stated that the United States was conducting the "whole process in favor of the

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[208] *Id.* at 146.

[209] Charles Lee, Service of Process on a British Ship-of-War, 1 Op. Att'y Gen. 87, 88–89 (1799).

[210] *See The Schooner Exchange*, 11 U.S. at 132–34, 147 (arguing successfully that the vessel should be granted "immunity from the ordinary jurisdiction, as extensive as that of an ambassador, or of the Sovereign himself;—but no further").

[211] *See* Letter from Secretary of State James Monroe to Joel Barlow, U.S. Minister Plenipotentiary to France (Nov. 21, 1811) [hereinafter Monroe to Barlow] (concerning the seizure of the vessel *Balaou*), *in* 3 AMERICAN STATE PAPERS: FOREIGN RELATIONS 513 (Walter Lowrie & Matthew St. Clair Clarke eds., 1815).

[212] Monroe to Barlow, *supra* note 211, at 515; *see also* Letter from James Monroe to James Madison (Sept. 7, 1811), https://founders.archives.gov/documents/Madison/03-03-02-0533 (enclosing a draft response to a complaint about the *Balaou*'s seizure received from French Minister Louis-Barbé-Charles Sérurier).

French Government" at its own expense, but that it was not becoming an actual party to the litigation.[213] The United States was proceeding in this indirect fashion, he explained, because for the President to take the vessel away from the court and from its U.S. owners "even if under any circumstances lawful, would have excited universal discontent."[214] Monroe was mindful of the political, as well as legal, constraints on the Executive Branch's ability to use the tools at its disposal to bring about a desired outcome—namely, the return of the ship to the French consul.[215]

Despite the United States' willingness to defend France's interests in court, Monroe emphasized to the French ambassador that the United States viewed France's seizure of the *Exchange* as unlawful and would seek an indemnity from France for its loss.[216] He also expressed doubt about whether the *Balaou No. 5* really had been in distress when it entered the Philadelphia port for repairs, noting that "[s]he having on board a cargo, distress may have been a pretext."[217] Secretary Monroe, a lawyer, further confided to U.S. Ambassador Barlow that "it is painful to see a question connected with the public law originate under such circumstances."[218] Indeed, although the Supreme Court's decision succeeded in averting the diplomatic crisis at hand, Chief Justice Marshall's creative opinion also became—for better or for worse—the standard reference for the U.S. law of foreign sovereign immunity.[219]

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213 Monroe to Barlow, *supra* note 211, at 515.

214 *Id.*

215 Sérurier to Maret, *supra* note 187 (recounting Monroe's concern that a heavy-handed reaction by the Executive Branch contrary to the interests of American citizens would be perceived by the public as "an act of excessive partiality towards France").

216 *See* Monroe to Barlow, *supra* note 211, at 515. This is an interesting contrast to Dallas's suggestion, which did not take a position on the lawfulness of the alleged seizure. *See* ALEXANDRIA GAZETTE, March 7, 1812.

217 Monroe to Barlow, *supra* note 211, at 515.

218 *Id.*

219 Sérurier had taken some comfort in the precedential value of a judgment in France's favor, although he had hoped that the district court's judgment would be the final word on the matter. *See* Sérurier to Maret, *supra* note 179 ("Je compte que, au moins, ce judgement servira de règle pour les cas semblables qui pourraient se représenter." ["I [reckon] that, at least, this judgment will serve as a rule for similar cases [that could appear.]]").

2. An Analysis of The Santissima Trinidad.

The Schooner Exchange was not the only significant case Chief Justice Marshall adjudicated involving claims to jurisdictional immunity by a foreign ship. Five years later, he again considered arguments that a foreign public ship was exempt from U.S. jurisdiction in a case that arose while he was riding circuit and sitting as an appeals court judge in Virginia.[220] Although *The Schooner Exchange* is more famous, the story of the *Santissima Trinidad* illustrates powerfully the push-and-pull between legal process and diplomatic pressure in virtually every case involving jurisdictional immunities. Justice Joseph Story, who had joined Chief Justice Marshall's opinion in *The Schooner Exchange*, authored the Supreme Court's eventual decision in the case, which introduced the idea of "comity" as a basis for according jurisdictional immunities to foreign ships.[221] To this day, Justice Story's framing has contributed to a view of foreign sovereign immunity under U.S. law as a matter of "grace" or discretion, rather than legal obligation.[222]

In March 1817, the South American vessel *Independencia del Sud* (*Independencia*) came into the port of Norfolk, Virginia seeking repairs.[223] Its cargo was placed in a U.S. custom-house for safekeeping.[224] In April, Spanish consul Antonio Argote Villalobos filed a libel in the district court of Norfolk claiming that the *Independencia* and another ship had unlawfully captured cargo from the *Santissima Trinidad* and the *St. Ander*, two Spanish ships.[225] Villalobos's successor, Pablo Chacon, ultimately persuaded the court to order the seized property restored to Spain.[226] The *Independencia*'s captain appealed, arguing that the cargo was exempt from the jurisdiction of a U.S. court.[227]

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[220] The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822).

[221] *Id*. *See also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2091 (2015) ("Justice Story, who joined the opinion in *The Schooner Exchange*, would write just a decade later that the doctrine expounded in that case 'stands upon principles of public comity and convenience.'" (citing *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353)).

[222] *See* Dodge, *supra* note 221, at 2091 ("[T]he Supreme Court has consistently characterized foreign sovereign immunity as 'a matter of grace and comity on the part of the United States.'" (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983))).

[223] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 288.

[224] *Id*. at 286.

[225] *Id.* at 284–85.

[226] *Id.* at 290.

[227] *See* Chacon v. Eighty-Nine Bales of Cochineal, 5 F. Cas. 390, 391 (C.C.D. Va. 1821).

This dispute about the ownership of cargo involved a much larger political picture. Just as France and Great Britain had used litigation as a means of waging maritime war in the 1790s, Spain similarly resorted to judicial process to pursue its foreign policy agenda. The litigation surrounding the *Santissima Trinidad* unfolded against the backdrop of Spain's continued objection to the arming in U.S. ports of privateers who then cruised against, and captured, Spanish ships during the Spanish-American Wars of Independence.[228] Spanish Minister Luis de Onís complained vociferously to Secretary of State Monroe in January 1817 about

> [t]he mischiefs resulting from the toleration of the armament of privateers in the ports of this Union, and of bringing into them, with impunity, the plunder made by these privateers on the Spanish trade, for the purpose of distributing it among those merchants who have no scruple in engaging in these piracies.[229]

In his view, the United States should have repressed and punished privateering, rather than tolerate it.[230]

When John Quincy Adams was appointed Secretary of State, he sought to defend U.S. practices to Onís.[231] At the same time, however, he took the proactive step of instructing U.S. representatives to the South American provinces to "remonstrate to them" about the practice of fitting out privateers in U.S. ports and to convey "that the licentious abuse of their flags by these freebooters, of every nation but their own, has an influence unpropitious to the cause of their freedom, and tendency to deter

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[228] *See* Letter from Don Luis de Onís to the Secretary of State (Jan. 2, 1817) [hereinafter Luis de Onís to the Secretary of State] (documenting Spanish Minister Don Luis de Onís's complaint as to America's lack of oversight over privateers arming themselves in U.S. ports), *in* ANNALS OF CONGRESS, 15th Cong., 1st Sess., Vol. 2 at 1899–1900 (1818).

[229] *Id.*

[230] *Id*. at 1901.

[231] *See* John Quincy Adams, Secretary of State, to Caesar A. Rodney, John Graham, and Theoderick Bland, Special Commissioners of the United States to South America (Nov. 21, 1817), *quoted in* Samual Flagg Bemis, *Early Diplomatic Missions from Buenos Aires to the United States 1811–1824*, 49 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 11, 48 n.1 (1939).

other countries from recognizing them as regular Governments."[232] He emphasized that if these provinces wanted to join the community of nations, they had to play by certain rules.

The *Independencia* was a case in point, since it sailed under a commission from the revolutionary government in Buenos Aires.[233] The Collector of Norfolk, Charles K. Mallory, who was responsible for collecting import duties on foreign goods that entered the United States by ship, observed that available documentation indicated that the *Independencia* was "a public armed vessel, not a privateer, and commenced her cruise from Buenos Ayres [sic] under the orders of that Government (be it whatever you may please to term it) in May, 1816."[234] Based on this documentation, he treated the *Independencia* as a public armed vessel entitled to the same courtesies he would have extended to any public vessel of a friendly foreign state.[235] This explanation did not appease Spanish consul Villalobos, who objected that "these violators of all law pretend to shield their conduct under a commission from a Government the existence of which is not acknowledged by this or any other civilized country."[236] In his view, and that of Spanish Minister Onís, the *Independencia* was no better than a pirate ship, and should have been treated as such.[237]

The *Independencia*'s captain, James Chaytor, insisted that he had seized cargo from the Spanish ships under the authority of a commission from the government of Buenos Aires and that the captured property had been duly condemned as a prize by a tribunal of the United Provinces (which had declared its independence on July 9, 1816) at Buenos Aires.[238] The dispute over the cargo risked

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[232] *Id.*

[233] Letter from Charles K. Mallory to Antonio A. Villalobos (Apr. 14, 1817), *in* ANNALS OF CONGRESS, *supra* note 228, at 1927.

[234] *Id.*

[235] *Id.*

[236] Letter from Antonio A. Villalobos to Charles K. Mallory, Collector of Norfolk and Portsmouth (Apr. 10, 1817), *in* ANNALS OF CONGRESS, *supra* note 228, at 1922.

[237] When the *Independencia* arrived in the port of Norfolk, Spanish Minister Onís wrote to then-Acting Secretary of State Richard Rush to complain that when its captain, the "well-known pirate, called Commodore Chaytor," saluted the U.S. fort at Norfolk, "it returned the salute upon the same terms as would have been done with a vessel of war of my Sovereign, or of any other nation acknowledged by all independent Powers." Letter from Don Luis de Onís to the Secretary of State (Mar. 26, 1817), *in* ANNALS OF CONGRESS, *supra* note 228, at 1912.

[238] Chacon v. Eighty-Nine Vales of Cochineal, 5 F. Cas. 390, 391 (C.C.D. Va. 1821).

forcing the United States to take sides in the ongoing conflict between Spain and its former colonies.

In reviewing the district court's order restoring the cargo to Spain, Chief Justice Marshall, sitting as an appeals court judge, observed that, although the question of prize "belongs solely to the courts of the captor," a belligerent might commit offenses against a neutral (such as the United States) "which the neutral ought not to permit; and which give claims upon him, to the party injured by those operations, which he is not at liberty to disregard."[239] This proposition suggested the need for a potentially more searching, fact-intensive role for U.S. courts in examining the circumstances of foreign captures than Chief Justice Marshall had contemplated when the Supreme Court was asked to restore the *Exchange* to its alleged U.S. owners. He reasoned: "If the wrong doer comes completely within [the neutral's] power, and brings that which will afford complete redress for the wrong done, the usage of nations, generally, as is believed, certainly the usage of this nation, is to restore the thing wrongfully taken."[240] Because the *Independencia* and its cargo had entered a U.S. port, Chief Justice Marshall deemed them to be "completely within" the United States' "power."[241] His analysis thus turned on whether or not Captain Chaytor had violated U.S. neutrality in seizing Spanish cargo on behalf of Buenos Aires and, if he had, whether the resulting injury to Spain should be redressed by litigation rather than diplomacy.

As a threshold matter, Chief Justice Marshall found that the newly appointed Supreme Director of the United Provinces of Rió de la Plata, Juan Martín de Pueyrredon, "had a right to grant this commission at his city of Buenos Ayres [sic]."[242] Consequently, "[c]aptures made under [that commission] will be deemed valid by that government and by all foreign nations."[243] However, he went on to find, based on a review of the extensive witness testimony offered at trial, that "nearly the whole crew of the *Independencia* was enlisted within the United States" in violation of U.S.

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[239] *Id.* at 392.
[240] *Id.* at 392–93.
[241] *Id.*
[242] *Id.* at 393.
[243] *Id.*

neutrality, and that the capture had therefore "been made, in truth, by neutral means."[244] As a result of Chaytor's violation of neutrality, "the strongest reasons of convenience, and of justice," supported restoring the cargo to Spain, even though a competent court of admiralty had previously condemned it as a prize.[245]

Having established that the privateer had been outfitted in violation of U.S. neutrality, Chief Justice Marshall turned to the question of whether a U.S. court, rather than one of the political branches, should provide redress by restoring the cargo to Spain.[246] He volunteered his "private judgment" that the responsibility for doing so should "devolve on the executive, or legislative, and not on the judicial department."[247] This was because, in his view, the exercise of such a power "must be regulated by a discretion, which courts do not possess, and may be controlled by reasons of state, which do not govern tribunals acting on principles of positive law."[248] Consequently, absent applicable judicial precedent, Chief Justice Marshall indicated that he would have found restitution appropriate as a remedy only if authorized by legislation.

Notwithstanding his preference for having the political branches apply "reasons of state" to resolve this dispute, Chief Justice Marshall upheld the restitution order based on the "principles of positive law" articulated in his opinion in *The Schooner Exchange*.[249] Citing his own prior reasoning, he held that the jurisdictional immunity claimed by national ships of war "is granted, on condition that the sovereignty of the place be respected," and that a "breach of the condition, forfeits the immunity depending on it."[250] This principle, which Chief Justice Marshall found applicable to captures made by privateers and by national ships of war and then brought into neutral U.S. territory, enabled U.S. courts to give "specific relief" to the injured party without further legislative action.[251]

Not surprisingly, Chaytor sought to have this appellate decision reversed by the Supreme Court.[252] The parties' additional

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[244] *Id.* at 396.
[245] *Id.* at 397.
[246] *See id.* ("A question of much more difficulty remains to be considered. By what department of the government is this restitution to be made.").
[247] *Id.*
[248] *Id.*
[249] *See id.* Notably, he did so without drawing attention to his authorship. *Id.*
[250] *Id.*
[251] *Id.* at 398.
[252] *See* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 290 (1822).

arguments before the Court merit unpacking, since they presage contemporary debates about the judiciary's role in resolving disputes arising from activities authorized by foreign states. The case pitted William H. Winder and David Baynard Ogden on behalf of Chaytor[253] against Littleton Waller Tazewell and Daniel Webster on behalf of Spain.[254]

Counsel for Chaytor began by insisting that the immunity of a foreign public ship, including that of its cargo, could not be forfeited based on allegations that the vessel had illegally augmented its force in a neutral U.S. port.[255] Instead, the appropriate course of action was for Spain to apply to Buenos Aires—the belligerent sovereign—for redress.[256] Winder argued that "[c]ourts of justice cannot interfere in such a case, because the sovereign cannot condescend to appear in them, and they have no regular means of knowing how far he approves of what has been done by his officers."[257] Two premises underpin this argument: (1) the *par in parem* principle prevented Buenos Aires from appearing in a U.S. court to defend Chaytor's actions, which were undertaken by virtue of the authority conferred by his commission; and (2) absent such an appearance, a U.S. court could not determine whether or not Chaytor had exceeded the scope of his commission—in other words, whether Buenos Aires had actually authorized, approved, or ratified Chaytor's acts. Consequently, Winder argued that the matter should be resolved diplomatically between sovereigns rather than through litigation.[258]

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[253] Former Attorney General William Pinkney, who had argued in support of the *Exchange*'s exemption from jurisdiction, had been expected to represent Chaytor, but Pinkney died before the arguments were held. *See* JOHN RANDOPLH TUCKER, REMINISCENCES OF VIRGINIA'S JUDGES AND JURISTS 22 (1895). Some said that Pinkney died "from too intense study of the case," but Tazewell denied such rumors, "saying the case involved no very difficult points, and that Pinkney feared the face of no man living," himself included. *Id.*

[254] *Id*. Webster argued points related to the United States' 1795 treaty with Spain. Tazewell reportedly recused himself from the treaty-based arguments on the grounds of his appointment by President Monroe as a commissioner to settle claims under the 1819 treaty by which Spain ceded Florida to the United States. *See* HUGH BLAIR GRIGSBY, DISCOURSE ON THE LIFE AND CHARACTER OF THE HON. LITTLETON WALLER TAZEWELL 45 (1860).

[255] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 290 (arguing that "there had been no such illegal outfit or augmentation of the force of the capturing vessel . . . as would entitle the original Spanish owners to restitution").

[256] *Id.* at 313.

[257] *Id*. at 297–98.

[258] *Id*. at 298.

Tazewell countered that absent a suggestion of immunity for the *Independencia* and its cargo, Buenos Aires should be deemed to have waived its objections to jurisdiction.[259] In his view, a suggestion of immunity filed by the Executive Branch is "the only proper mode in which the matter of sovereign right can, duly and orderly, be set before the Court" and the exclusive basis upon which a court could justly refuse to proceed.[260] Moreover, the availability of Executive Branch suggestions of immunity "avoids all the technical difficulties of pleading and practice, and places the matter where, according to the argument, it ought to rest, with the sovereign."[261] Under Tazewell's theory, a suggestion by the Executive Branch should "constitute the law of the Court," thereby avoiding a situation in which different branches of government reach inconsistent conclusions, which would produce "a monstrous anarchy."[262]

Tazewell also articulated what we might today consider a "restrictive theory" of foreign sovereign immunity under which the *Independencia*'s cargo should not be treated as immune.[263] He argued that any exemption from jurisdiction only applies to the regalian rights of the sovereign—those which are "necessary to maintain his faith, dignity, and security."[264] Furthermore, he reasoned that prizes made by public ships should be treated the same as those made by privateers, even if the public ship itself is exempt from jurisdiction.[265] This was because prize goods "are not the regalian rights of the sovereign" but rather "a mere accidental, military possession, which are not indispensably necessary to

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[259] Today, courts may allow a special appearance by a defendant for purposes of challenging a court's jurisdiction without conceding that jurisdiction. *See generally* Galveston, H. & S.A. Ry. Co. v. Gonzales, 151 U.S. 496 (1894); Mexican Cent. Ry. Co. v. Pinkney, 149 U.S. 194 (1893) (finding defendant's answer challenging jurisdiction did not waive defense).

[260] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 302. On the historical origin of suggestions of immunity, see Section II.B.

[261] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 302.

[262] *Id.* at 304; *cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (indicating that a case presents a non-justiciable political question when, among other factors, resolution would involve the "potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[263] The term "restrictive theory" stands in opposition to an "absolute theory" of foreign sovereign immunity, under which a foreign sovereign and its activities are categorically exempt from local jurisdiction. *See* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 221–22 (1951).

[264] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 306.

[265] *Id.* at 308.

maintain his faith, dignity, or security."[266] Turning to the idea articulated by Chief Justice Marshall in *The Schooner Exchange* that there is an "implied pledge given to a foreign state, of exemption from the local jurisdiction," Tazewell argued that the "fiction of extraterritoriality only applies to the peaceful observers of this implied pledge," and that the pledge is "forfeited by abusing the rights of hospitality and asylum."[267] Had the *Exchange* engaged in "any misconduct," he insisted, "she would have been condemned as unhesitatingly as the most insignificant privateer."[268] The idea of forfeiting immunity thus animated both Chief Justice Marshall's decision to order the cargo restored to Spain and Tazewell's argument that the Supreme Court should uphold that decision.

Daniel Webster, also arguing for Spain, rejected the idea that there was any "general principle" precluding a U.S. court from examining acts performed by a foreign public ship on the grounds that this would impermissibly "interfere with the sovereign rights of the state" to which the ship belonged.[269] By analogy, Webster noted that, even though the U.S. federal and state governments enjoy sovereign immunity from suit, a court can nonetheless determine their "sovereign rights" in resolving "a contest between individuals or corporations."[270] Similarly, he argued, a U.S. court's ability to nullify a capture made under a foreign commission that was granted in violation of neutrality and to restore that cargo to the original owner is a "necessary and inevitable consequence" of the rules governing neutrality.[271] This would be true, he contended, even with respect to a foreign public ship that would otherwise be entitled to claim immunity from U.S. jurisdiction.[272]

Justice Story, writing for the Supreme Court, began by indicating that, consistent with "the settled practice between nations," the Court would treat the duly authenticated commission of the

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[266] *Id.* Ogden, responding for Chaytor, deemed Tazewell's reasoning about the separate status of the ship and its cargo unpersuasive and asked rhetorically: "If the fiction of extraterritoriality will protect the ship, which is the principal, why will it not protect the prize goods which are the incidents?" *Id.* at 332.

[267] *Id.* at 308–09.

[268] *Id.* at 315–16.

[269] *Id.* at 316.

[270] *Id.* at 317.

[271] *Id.* at 320–21.

[272] *Id.* at 321.

Independencia as proof of its public character, even absent a bill of sale.[273] In so doing, he accepted the idea that examining the means by which title to the ship was obtained "would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where [the sovereign] has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy."[274] Justice Story observed that U.S. neutrality in the wars between Spain and its former colonies meant that captures made by each side "must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each," without entering into arguments regarding whether any of the disputed territories should be treated as sovereign states for other purposes.[275]

Although the evidentiary record was contradictory at best, Justice Story observed that Chaytor had proffered no evidence to show that the enlistment of U.S. citizens during the *Independencia*'s stay in Baltimore was lawful.[276] Chaytor thus failed to satisfy his burden to show that he had not violated U.S. neutrality. This illegal augmentation of force "infect[ed] the captures subsequently made with the character of torts"—a proposition Justice Story deemed established by cases "so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported."[277]

Justice Story's account of jurisdictional immunity embraced Chief Justice Marshall's theory of forfeiture, which had also been adopted and advanced by Tazewell.[278] Invoking *The Schooner Exchange*, Justice Story emphasized that a foreign sovereign does not have "an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another

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[273] *Id.* at 336.

[274] *Id.*

[275] *Id.* at 337.

[276] *Id.* at 345–46 ("[T]hroughout this voluminous record, not a scintilla of evidence exists to show that any person on board of either vessel was a native of Buenos Ayres [sic].")

[277] *Id.* at 348–49. Like Chief Justice Marshall, Justice Story did not find "in reason or in policy any ground for distinction between captures in violation of our neutrality by public ships, and by privateers" acting under a commission from a foreign government. *Id.* at 351. However, he acknowledged the force of the claim that a public ship of war and, by extension, all property captured by such a ship, is "exempted from the local jurisdiction by the universal assent of nations." *Id.* at 352.

[278] *Id.* at 306–08.

sovereign, when it came within his territory" because "that would be to give him sovereign power beyond the limits of his own empire."[279] Rather, such an exemption "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations."[280] Importantly, such license or consent "may be withdrawn [by the forum state] upon notice at any time, without just offence."[281] Justice Story further reasoned that "whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings within [U.S.] ports is liable to the jurisdiction of [U.S.] Courts."[282] Because the *Independencia* had unlawfully enlisted U.S. citizens in violation of U.S. neutrality before capturing the Spanish cargo, the Supreme Court affirmed the decree restoring the cargo to Spain and awarded costs to the Spanish consul.[283]

These cases against foreign officials and foreign ships in the late eighteenth and early nineteenth centuries compelled courts to grapple with issues that continue to resonate today, including: (1) the allocation of authority between the executive and judicial branches regarding questions of jurisdictional immunities and the resolution of private disputes that implicated sovereign rights; (2) the method for communicating Executive Branch views to the courts and the deference owed those communications; and (3) the possibility that foreign sovereign immunity might be conditioned on the outcome of fact-based inquiries, even though immunity was also meant to shield a litigant from the burdens (or "indignity") of trial. Other doctrines also evolved to help courts navigate related issues, including the act of state and political question doctrines.[284] However, defendants understandably sought—and continue to seek—the dismissal of claims at the outset for lack of jurisdiction, rather than relying exclusively on justiciability doctrines.

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[279] *Id.* at 352.

[280] *Id.* at 353. "Comity" is at the heart of immunity and is frequently invoked (although less frequently defined) in transnational cases today. *See, e.g.*, Dodge, *supra* note 221, at 2071.

[281] *Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353.

[282] *Id.* at 354.

[283] *Id.* at 353–55.

[284] *See generally* John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507 (2016) (discussing the act of state doctrine in depth); Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1 (2017) (exploring the political question doctrine).

Although cases involving individual officials were rare (since the assertion of personal jurisdiction generally required the individual to be present and served with process within the United States),[285] cases involving disputes over the ownership of foreign ships continued to present these tricky issues. Part III describes the practice ultimately adopted in cases involving foreign ships, which was later supplanted by the enactment of statutes governing diplomatic immunity and foreign state immunity, respectively.[286] Certain claims to non-statutory foreign official immunity, however, continue to challenge the boundary between "principles of positive law" and "reasons of state."[287] Tracing the evolution of courts' approaches to immunity questions in the pre-FSIA period creates a more solid foundation upon which to build contemporary doctrines of common law immunity.

III. THE EVOLUTION OF COMMON LAW IMMUNITY DOCTRINE

In the late eighteenth and early nineteenth centuries, successive attorneys general deflected pressure from foreign governments to intervene in private litigation against foreign ships and foreign officials by emphasizing that the constitutional separation of powers forbade them from compelling the dismissal of suits.[288] They came to realize, however, that protracted proceedings could cause significant problems for foreign relations. Consequently, U.S. Attorneys developed a practice of submitting "suggestions of immunity" to courts in cases that implicated U.S. national interests.[289] The U.S. Supreme Court addressed claims to foreign sovereign immunity in cases, including *The Schooner Exchange* and *The Santissima Trinidad*, which treated immunity as a comity-based exception to the United States' plenary territorial jurisdiction.[290]

In *Samantar v. Yousuf*, the U.S. Supreme Court summarized the entirety of U.S. sovereign immunity law in a single paragraph,

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[285] *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877) (requiring service of process within the state in order to assert personal jurisdiction).

[286] *See* Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)–(e) (2012) (governing diplomatic immunity); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2012) (governing foreign state immunity).

[287] *See supra* note 248 and accompanying text.

[288] *See supra* Section II.A.

[289] *See supra* Section II.B.

[290] *See supra* Section II.D.

indicating that "[f]ollowing [*The*] Schooner *Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels."[291] According to the *Samantar* Court's summary of historical practice, U.S. courts "surrendered [their] jurisdiction" if the State Department filed a suggestion of immunity; if the State Department did not file a suggestion, then courts "decided for [themselves] whether all the requisites for such immunity existed."[292] The *Samantar* Court indicated that the State Department "has from the time of the FSIA's enactment understood the Act to leave intact the Department's role in official immunity cases,"[293] and that the Court was "given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."[294] As explored in Part II, however, the State Department's role was not historically understood as entailing the authority to divest courts of jurisdiction, even though its determinations (for example, regarding the status of an ambassador) could have that legal effect.[295] The summary paragraph in *Samantar* is best understood as descriptive rather than prescriptive. Because of its cursory treatment of historical practice—which was not critical to the statutory interpretation question at hand—the *Samantar* opinion leaves ample room to deepen our understanding of the historical record and its potential implications for contemporary common law immunity claims.

A. THE RISE OF JUDICIAL DEFERENCE

Although the first suggestion of immunity was filed in the 1790s,[296] the judicial practice regarding suggestions of immunity referenced by the *Samantar* Court dates back only to the late 1930s.[297] Decisions leading up to that period hewed closely to the

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[291] Samantar v. Yousuf, 560 U.S. 305, 311 (2010).
[292] *Id.*
[293] *Id.* at 324 n.19.
[294] *Id.* at 323.
[295] *See supra* Part II.
[296] *See supra* notes 101–04 and accompanying text.
[297] *See Samantar*, 560 U.S. at 311 (referencing cases adjudicating immunity—the earliest dating from 1938).

model of judicial independence established by the Founding generation.[298] Chronicling these decisions enables us to pinpoint the shift to a more deferential approach by the courts and to assess its rationale. To be sure, doctrinal change did not occur in a social and political vacuum, although documenting those broader shifts lies outside the scope of this paper. Without discounting these exogenous factors, it is still instructive to trace, and to unpack, the reasons given by judges and advocates for their approach to immunity claims.

1. The Tradition of Judicial Independence.

The path to a more deferential posture towards Executive Branch suggestions of immunity was anything but linear. For example, in 1852, the United States, through U.S. Attorney J. Prescott Hall, filed a suggestion of immunity on behalf of the steamer *Pizzaro*.[299] In that case, Judge Samuel Rossiter Betts of the Southern District of New York took the interesting approach of treating the U.S. suggestion as a request to substitute the United States for the foreign defendant.[300] In his view, *The Schooner Exchange* established

> [t]he prerogative of the government of the United States to subrogate itself a party in place of the nation owning the offending ship, with the right to supersede all inquiry into the merits of the suit by a preliminary exception to the competency of the court to take cognizance of it.[301]

The idea of subrogation went beyond that of a suggestion and considered the United States as stepping into the shoes of the foreign government. Absent such intervention by the Executive Branch, a U.S. court could consider—but was not constrained to follow—representations made by a foreign government about the public status of a ship and its corresponding exemption from

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[298] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486–87 (1983) (describing prior approach to sovereign immunity).

[299] The Pizzaro v. Matthias, 19 F. Cas. 786, 787 (S.D.N.Y. 1852).

[300] *Id.*

[301] *Id.*

jurisdiction under the principles articulated in *The Schooner Exchange*.[302]

Chief Justice Marshall's opinion in *The Schooner Exchange* grounded the jurisdictional immunity of a friendly foreign ship of war on the tacit consent of the forum state.[303] It would seem to follow that if the Executive Branch explicitly indicated a *lack* of such consent, a court would decline to recognize a ship's immunity. Not so in *Berrizi Bros. Co. v. Steamship Pesaro*, whose significance has remained under-studied.[304] In that case, the State Department expressed the view that merchant ships owned by foreign states were not entitled to immunity.[305] Notwithstanding the Executive Branch's apparent position that proceeding with the litigation would not be problematic from a foreign policy perspective, successive judicial opinions from the lower courts grappled with how to resolve the immunity question. The lack of judicial deference in *Berizzi Bros.* contrasts sharply with the deferential posture adopted in a trilogy of subsequent cases explored in Section III.A.2.

The dispute began when the *Pesaro*, an Italian steamship, carried a shipment of olive oil from Genoa to New York.[306] After reaching New York, the ship was arrested pursuant to a libel filed in district court by Giovanni Luzzato and Joseph G. Luzzato seeking $4,800 in damages.[307] They claimed that "certain merchandise" had been placed on board the steamship in good condition in Genoa, but that it had arrived in New York "not in like good order and condition as when shipped, but slack, short, seriously injured and damaged."[308] A threshold question in the litigation was whether the ship was immune from jurisdiction because it was allegedly owned by Italy.

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[302] *See supra* notes 206–08 and accompanying text.

[303] *See supra* notes 206–08 and accompanying text.

[304] 271 U.S. 562 (1926) (holding that a ship owned by a friendly government operated for merchandise for hire for the nation is immune from arrest).

[305] *See id.* at 564 ("Under the Italian law no immunity is afforded to merchant ships. It would certainly seem an anomaly to grant to the Pesaro an immunity in our courts which she would not have in her own country and which a similar ship, owned and operated by the United States, would not enjoy either in the United States or in Italy.").

[306] Traverse to Suggestion, Luzzato v. Pesaro, Case No. 71-179 (S.D.N.Y. Jan. 21, 1920) (on file with author).

[307] *Id.*

[308] *Id.*

The district court's first task was to establish the character of the ship.[309] The Italian Ambassador filed an affidavit authenticated by the State Department indicating that the ship was owned by, and was in the possession of, the Italian government, leading the Italian Ambassador to argue that it should be immune from suit on that basis.[310] In opposition, the Luzzatos submitted an affidavit by Charles Hann, Jr., an attorney and former U.S. Naval Reserve officer, who described boarding the *Pesaro* and observing that the crew members were "dressed in civilian clothes and appeared no differently from the seamen of ordinary mercantile vessels."[311] Hann attested that the captain told him that "the ship was not an Italian Navy or Italian Government ship."[312] The evidence thus pointed in different directions.

Notwithstanding these conflicting characterizations, Judge John Knox immediately entered a handwritten judgment releasing the ship from arrest:

> Upon the suggestion of the Italian Ambassador filed herein to the effect that the ship *S.S. Pesaro* is owned by the Italian Government and now in its possession and manned by a crew of said Government, I vacate the attachment [illegible], conceiving myself so bound to do under the authority of *The Carla Poma* decided by the Circuit Court of Appeals for this Circuit.[313]

Undeterred by this adverse ruling, the Luzzatos filed a "traverse," objecting to the Ambassador's characterization of the *Pesaro* and indicating that the Ambassador should have filed "a suggestion verified as to fact by the State Department of the United

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[309] Suggestion of Want of Jurisdiction, Luzzato v. Pesaro, Case No. 71-179 (S.D.N.Y. Jan. 20, 1920) (on file with author).

[310] *Id.*

[311] Affidavit of Charles Hann, Jr., Luzzato v. Pesaro, Case No. 71-179 (S.D.N.Y. Jan. 20, 1920) (on file with author).

[312] *Id.*

[313] Order Granting Motion, Luzzato v. Pesaro, Case No. 71-179 (S.D.N.Y. Jan. 20, 1920). The U.S. Supreme Court subsequently vacated the Second Circuit's decision in *The Carlo Poma* because the court of appeals lacked jurisdiction over the appeal, which instead should have been taken directly to the Court. The Carlo Poma, 255 U.S. 219, 219–20 (1921) (on file with author) (dismissing based on the ground "that its ownership and possession by a foreign power place it beyond jurisdiction in admiralty").

States."[314] This procedural misstep, they argued, invalidated the district court's decision to release the ship.[315]

The Luzzatos made a clever argument in favor of disregarding the representations made by the Italian Ambassador. They claimed that, had the State Department filed a suggestion of immunity, they could have argued against it "without any undue discourtesy to the dignity of a foreign sovereign."[316] In the instant case, however, they protested that that they were unfairly disadvantaged by their inability to challenge the veracity of an affidavit from the Italian Ambassador without insulting Italy.[317] They thus objected to the admissibility of the affidavit and urged the court to allow them to develop the factual record before ruling on the prayer for immunity.[318] In today's terms, their petition amounted to a request for jurisdictional discovery, to which they attached the bill of lading for their shipment and an additional affidavit from Mr. Hann. When Judge Knox denied this petition, they appealed directly to the Supreme Court.[319]

The U.S. Supreme Court, in an opinion written by Justice Willis Van Devanter, observed that, apart from the Ambassador's affidavit indicating Italian ownership and possession of the ship, "there was nothing pointing to an absence of jurisdiction."[320] The Court apparently gave the Ambassador's suggestion much less weight than had Judge Knox. Justice Van Devanter noted that, although the affidavit was accompanied by "a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy," the Secretary's certification "gave no sanction to the suggestion."[321] The Court therefore deemed that the Ambassador's representation was "nothing more" than a suggestion in the literal sense of the word and held that in order "to be entertained the suggestion should come through official channels

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[314] *See* Traverse to Suggestion, Luzzato v. Pesaro, Case No. 71-179 (S.D.N.Y. Jan. 21, 1920) (on file with author).
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *See generally* The Pesaro, 255 U.S. 216 (1921).
[320] *Id.* at 216.
[321] *Id.* at 218–19.

of the United States."[322] It remanded the case to the district court for further proceedings because "[w]ith the suggestion eliminated, as it should have been, there obviously was not basis for holding that the ship was not subject to the court's process."[323] The Luzzatos' position was vindicated, at least temporarily.

Not long after the Court remanded *Luzzato v. The Pesaro* to the district court, another claimant—the Berizzi Brothers Company—filed a libel against the same ship.[324] The jurisdictional dispute in both cases came before Circuit Judge Julian Mack, who was sitting as a judge of the district court.[325] Judge Mack noted that "the question whether the ship of a foreign government used and operated by it as a merchant vessel is, when within the waters of the United States, immune from arrest in admiralty"[326] was a new one that had only recently been addressed—but not resolved—by the Supreme Court in two cases: *In re Hussein Lufti Bey* and *In re Muir*.[327] In addition to canvassing relevant U.S. and foreign cases, Judge Mack asked the Department of State for its views.[328] In response, the Department indicated:

> It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action

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[322] *Id.* at 217.

[323] *Id.* at 219.

[324] *See generally* The Pesaro, 277 F. 473 (S.D.N.Y. 1921) (overruling objections to jurisdiction).

[325] *Id.* at 473.

[326] *Id.* at 474.

[327] *See In re* Hussein Lufti Bey, 256 U.S. 616, 619 (1921) (indicating that "the question is an open one and of uncertain solution"); *In re* Muir, 254 U.S. 522, 531 (1921) (indicating that the question "is one of obvious delicacy and importance" and that "[n]o decision by this court up to this time can be said to answer it").

[328] *The Pesaro*, 277 F. at 479.

> which might constitute an interference by the authorities of this government in such litigation.[329]

This response did not amount to an explicit, case-specific suggestion of non-immunity. Nevertheless, Judge Mack gave weight—although not dispositive weight—to the State Department's decision to refrain from suggesting immunity for the *Pesaro*.[330]

Judge Mack indicated that "[t]he general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision."[331] However, he also noted an "observable . . . tendency to restrict its application or to guard against its extension."[332] In his view, a court asked to resolve a new problem should strive to reach conclusions that, "if possible, conform to the practical ends of the law in a moving, working world."[333] His adaptive approach to the question of jurisdictional immunity, which has gone largely unnoticed, warrants quoting at greater length:

> [I]n dealing with an unsettled problem in the application of sovereign immunity, the court must not only consider history and logic; it must also look behind and beyond both and inquire whether the public interests justify or require an extension of sovereign

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[329] *Id.* at 479–80 n.3 (quoting a letter from the Secretary of State, transmitted through the Solicitor for the State Department, dated August 2, 1921).

[330] *Id.* at 479.

[331] *Id.* at 474.

[332] *Id.* at 475. This "observable tendency" has been described as a shift from an absolute theory of immunity to a restrictive theory of immunity. As recounted by then-Professor Jack B. Tate in a 1954 speech to the Bar Association of the City of New York: "After the end of World War I, the courts of many countries abandoned the classical theory and adopted the restricted theory, no doubt due to the entry into trade by so many states during and since that war." Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 AM. J. LEGAL HIST. 465, 470 (2015). The United States officially announced its adoption of the restrictive theory in a letter signed by Tate in his capacity as Acting Legal Adviser for the State Department in May 1952. *Id.* As Tate recounted in his later speech, the letter was subject to "meticulous intra- and inter-departmental clearances" before being published. *Id.* at 471. He also pointed out that the letter explicitly notes that while "a shift in policy by the executive cannot control the courts," the Department believed that courts would be "less likely to allow a plea of sovereign immunity where the executive has declined to do so." *Id.*

[333] *The Pesaro*, 277 F. at 475.

> exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.[334]

This opinion anticipates the adoption of the restrictive theory of foreign sovereign immunity, which denies jurisdictional immunity to foreign states for their commercial activities. Judge Mack reasoned that because, under admiralty law, a ship is "treated as an entity separate and distinct" from the ship's owner, "the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed."[335] In light of this reasoning, combined with the State Department's letter and the parties' agreement that Italian courts would "refuse to grant immunity" in cases involving public merchant vessels, Judge Mack found that the *Pesaro* was "not exempt from suit in the United States, by reason of its governmental ownership and operation."[336]

Judge Mack's 1921 decision, though well-reasoned, was not the final word on the matter. In 1924, the Supreme Court decided *The Gul Djemal*, in which an arrested ship's captain claimed that the ship was immune from arrest because it was owned and possessed by the Turkish government.[337] The district court denied the claim to jurisdictional immunity on the grounds that the vessel was "engaged in commercial trade, under charter for hire to a private trader" and that "because diplomatic relations between the United States and Turkey were then severed . . . no appropriate suggestion was filed from the State Department of the United States."[338] The Supreme Court affirmed this decision on the narrow grounds that the ship's captain was not authorized to represent the Turkish government in claiming immunity for the ship.[339]

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334 *Id.*
335 *Id.* at 481.
336 *Id.* at 479, 483.
337 The Gul Djemal, 264 U.S. 90, 91 (1924).
338 *Id.* at 94.
339 *Id.* at 95.

Judge Mack's assessment of the *Pesaro*'s character had been based solely on representations made by Giovanni Bertolini, the ship's master.[340] In light of the holding in *The Gul Djemal* suggesting that this evidence was inadequate, the parties agreed to vacate the decision.[341] They reargued the case before District Judge Augustus N. Hand based on an expanded record that contained a claim and answer filed by the Italian Ambassador, Don Gelasio Caetani.[342]

Judge Hand, unlike Judge Mack, found that a straightforward application of prevailing law required dismissing the case.[343] He took issue with Judge Mack's reasoning, which he characterized as representing the view of a small minority.[344] Instead, he adopted the approach taken by Circuit Judge Charles Merrill Hough sitting as a district court judge in *The Maipo*,[345] a case involving a Chilean ship.[346]

In *The Maipo*, Judge Hough stated in his oral opinion that a public ship of war was exempt from seizure "[n]ot because it was a war vessel, but because it was a part of the exercise or manifestation of sovereign power."[347] In Hough's opinion, any other foreign sovereign vessel or property is exempt "[f]or the same reason, just as the sovereign himself is exempt."[348] This was so, despite Hough's own view that "when a sovereign republic, empire, or whatnot, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person."[349] However, Hough disavowed any ability "as one of the

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340 *The Pesaro*, 277 F. at 475.

341 *See* The Pesaro, 13 F.2d 468, 468 (S.D.N.Y. 1926) (noting that Judge Mack's order overruling jurisdictional objections was "vacated by consent of the parties").

342 *See id.* ("The Italian ambassador has filed a claim and answer, in which governmental rights are reserved by order of court.").

343 *See id.* at 469 ("Because of what has already been written by the judges of this circuit on the subject of immunity of the property of a sovereign, further discussion in a court of first instance seems futile.").

344 *See id.* (observing that Judge Mack's earlier opinion "differ[s] from the great weight of authority in favor of the immunity of a sovereign in a case like this").

345 The Maipo, 259 F. 367 (S.D.N.Y. 1919).

346 *See The Pesaro*, 13 F.2d at 468 (noting that Judge Hough's opinion in *The Maipo* "represent[s] the current view").

347 *The Maipo*, 259 F. at 367.

348 *Id.* at 368.

349 *Id.*

humbler officers of the government of the United States to define for the Republic of Chile what that republic should consider to be a governmental function."[350] He therefore treated Chile's representation as conclusive regarding the character of the ship and its corresponding entitlement to jurisdictional immunity.[351]

Judge Hough did not rule out the possibility that the Executive Branch could reach a different conclusion regarding the treatment owed Chilean property.[352] However, in his view, such a determination by U.S. authorities should be conveyed "through diplomatic channels, and not through the judiciary."[353] To proceed otherwise would allow the judiciary to contribute "to what might become, under conceivable circumstances, a *casus belli*," or cause for war.[354] He thus deemed any question about the ship's public character to be "not justiciable, but diplomatic," even though he acknowledged that the consequences of finding a ship immune from seizure based on the representations of a foreign government would be "very hard" for private persons seeking a damages remedy in U.S. court.[355]

In view of Judge Hough's opinion in *The Maipo* and other district court opinions, Judge Hand opined that "further discussion in a court of first instance seems futile, and the matter should await the authoritative pronouncement of the Supreme Court."[356] The record does not indicate that Judge Hand sought additional input from the State Department, which had earlier informed Judge Mack of its view that "government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war."[357]

The definitive judicial pronouncement on private litigants' claims to the *Pesaro* finally came several months later in the Supreme Court's first decision to address the immunity of a foreign government-owned merchant ship engaged in commerce.[358] Justice

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350 *Id.*

351 *See id.* (acknowledging the jurisdictional immunity of the Maipo arises "because the [ship] is the property of and a portion of the sovereignty of the Republic of Chile").

352 *Id.*

353 *Id.*

354 *Id.* (italics added).

355 *Id.*

356 The Pesaro, 13 F.2d 468, 469 (S.D.N.Y. 1926).

357 The Pesaro, 277 F. 473, 479–80 n.3 (S.D.N.Y. 1921).

358 *See generally* Berrizi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926). Like Judge Hand, the U.S. Supreme Court does not appear to have sought the views of the Attorney General or

Van Devanter, who had written the Court's opinion five years earlier in *Luzzato v. The Pesaro*, also penned the Court's opinion in *Berizzi Bros. Co. v. The Pesaro*.[359] Although the case presented a novel question, the Court looked to the principles articulated by Chief Justice Marshall in *The Schooner Exchange* for guidance. In Justice Van Devanter's view, it was unsurprising that Chief Justice Marshall had not considered whether government-owned-and-operated merchant ships were entitled to immunity because "there was little thought of governments engaging in such operations" in 1812.[360] He indicated that "[t]he principal case announcing the other view" was Judge Mack's original opinion, which was superseded by Judge Hand's decision after the case was reargued.[361] The U.S. Supreme Court affirmed Judge Hand's decision, finding the ship immune from process because the grant of admiralty jurisdiction to district courts was "not intended to include a libel in rem against a public ship, such as the *Pesaro*, of a friendly foreign government."[362]

With the exception of Judge Mack, who explicitly solicited the views of the State Department, the various judges confronted with claims to immunity for the *Pesaro* declined to subject the *Pesaro* to U.S. jurisdiction. They treated the jurisdictional determination as a straightforward legal question and cited *The Schooner Exchange* as requiring the exemption of foreign public ships from U.S. jurisdiction, without regard for the views of the Executive Branch. Before long, however, that approach would undergo substantial change.

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the Department of State on this matter. *Id.* Its judgment makes no reference to the submission previously provided by the Executive Branch in response to Judge Mack's request. *Id*.

[359] *Id.* at 569.

[360] *Id.* at 573.

[361] *Id.* at 576.

[362] *Id.* Once again, the judiciary found itself in the position of creating a "safety valve" for cases that would not have been heard in U.S. courts but for the grant of admiralty jurisdiction to the district courts in *Glass v. The Betsey*, 3 U.S. (3 Dall.) 6 (1794). *See supra* note 168 and accompanying text. The difference between the *Pesaro* litigation and the dispute over the *Exchange* is that the State Department expressed no objection to the former, leaving the judiciary to self-limit even in the absence of specific foreign relations concerns.

2. The Shift Towards Judicial Deference.

In the late 1930s, a dispute arose over the Spanish merchant vessel *Navemar*, and the State Department declined Spain's request to intervene on its behalf.[363] In its opinion, the Supreme Court indicated that "it is open to a friendly government to assert . . . the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States."[364] This statement appeared to give foreign governments a choice between requesting assistance from the State Department and appearing in the proceedings.

In *The Navemar*, the Court cited the 1796 *qui tam* proceeding involving the *Cassius* and Chief Justice Marshall's 1812 opinion in *The Schooner Exchange* for the proposition that "[i]f the claim [to immunity] is allowed by the executive branch of our government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."[365] Since the Attorney General had not filed a suggestion, however, this observation was not relevant to resolving the dispute at hand.[366] It remains unclear why the Court made this observation, except perhaps to explain why the Spanish government was entitled to appear and demand possession of the disputed vessel.

In 1943, five years after *The Navemar*, the Supreme Court decided *Ex parte Republic of Peru* and affirmed the principle of deference to Executive Branch suggestions.[367] In that case, Peru requested that the Supreme Court prohibit the District Court for the Eastern District of Louisiana from exercising *in rem* jurisdiction over the Peruvian steamship *Ucayali*.[368] Additionally, Peru asked the State Department to recognize its claim of immunity.[369] At the State Department's request, the Attorney General instructed the U.S. Attorney to convey the Peruvian Ambassador's formal claim of

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[363] *See* The Navemar, 303 U.S. 68, 71 (1938) ("Meanwhile the Department of State had refused to act upon the Spanish Government's claim of possession and ownership . . . [and] had decline to honor the request of the Ambassador that representations be made in the pending suit . . . on behalf of the Spanish Government . . . .").

[364] *Id.* at 74.

[365] *Id.* at 68.

[366] The Court also cited Judge Betts's 1852 decision in *The Pizzaro*. *See supra* note 299 and accompanying text.

[367] *See Ex parte* Republic of Peru, 318 U.S. 578 (1943).

[368] *Id.*

[369] *Id.*

immunity to the district court.[370] The U.S. Attorney included a statement that the State Department "accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity."[371] This statement indicated that the Department had determined the reliability of a certain version of the facts, and recognized the legal consequences that, in the Department's view, flowed from those facts.[372]

In response to Peru's petition and the accompanying U.S. suggestion, the Supreme Court held that the Executive Branch can settle a dispute between a private claimant and a foreign government through diplomacy instead of litigation:

> When the Secretary [of State] elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.[373]

The Court emphasized that "in the absence of recognition of the immunity by the Department of State" the district court would have had authority to determine for itself whether or not the ship was entitled to immunity.[374] But in the Court's view, the district court should have relinquished this authority "in conformity to [the] overriding principle of substantive law" that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations."[375] This principle of non-embarrassment echoes French Minister Sérurier's rationale

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370 *Id.* at 581.
371 *Id.*
372 *Id.*
373 *Id.* at 587.
374 *Id.* at 587–88.
375 *Id.* at 588.

for urging Secretary of State Monroe to order the release of the *Exchange*.[376] It does not explain, however, why something that was once firmly believed to exceed the Executive's authority was now deemed an "overriding principle of substantive law."

In support of its conclusion that exercising jurisdiction in this case would embarrass the political branches and was therefore impermissible, the Court found that "[t]he certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."[377] The Court's rationale for deferring to the Executive Branch's endorsement of diplomacy over litigation in *Peru* thus turned on the separation of powers and the allocation of responsibility for the conduct of foreign relations to the political branches.

The Court reaffirmed this rationale for judicial deference two years later in dicta in *Republic of Mexico v. Hoffman*, in which the United States did not take a position on the question of immunity.[378] In that case, the owner of the *Lottie Carson*, an American fishing vessel, filed a libel against the *Baja California*, a Mexican ship, for allegedly causing a collision with the *Lottie Carson* in Mexican waters.[379] In response, Mexico claimed that the *Baja California* was immune from judicial seizure.[380] The U.S. Attorney filed a communication sent by the Secretary of State to the Attorney General declining to take a position with respect to the asserted immunity of the vessel and citing two previous cases holding that a vessel is entitled to immunity if it is in the possession and public service of a foreign government.[381] The U.S. Supreme Court affirmed the lower court's holding that the Mexican government's mere title to the vessel was insufficient to support the claim of jurisdictional immunity.[382] In so doing, the Court again drew a straight line from *The Schooner Exchange* to contemporary cases involving merchant vessels:

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[376] *See supra* note 179 and accompanying text.
[377] *Republic of Peru*, 318 U.S. at 589.
[378] *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (explaining that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs").
[379] *Id*. at 31.
[380] *Id*. at 38.
[381] *Id*. at 31–32.
[382] *Id.*

> [I]n *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General . . . . This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings.[383]

The Court continued: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[384] This was so, the Court reasoned, even though it had not followed the position of the Executive Branch two decades earlier in *Berizzi Bros. Co. v. Steamship Pesaro*.[385] In that case, as described above, the Court held that a merchant ship owned and operated by Italy was immune from *in rem* proceedings because merchant ships "held and used by a government for a public purpose . . . are public ships in the same sense that war ships are,"[386] even though the Department of State took the opposite view.[387] The *Berizzi Bros.* Court treated immunity as a question of law, whereas the *Peru* and *Hoffman* Courts approached it as a hybrid matter of law and diplomacy.

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[383] *Id.* at 34.
[384] *Id.* at 35.
[385] *Id.* at 35 n.1.
[386] Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926).
[387] *Id.*

B. THE ROLE OF "REASONS OF STATE"

Chief Justice Marshall, sitting as a circuit court judge in the dispute over the *Independencia*'s cargo, articulated the idea that the exercise of jurisdiction might be subject to diplomatic considerations when he said that it "must be regulated by a discretion, which courts do not possess, and may be controlled by reasons of state, which do not govern tribunals acting on principles of positive law."[388] However, in his assessment, "reasons of state" do not govern courts "acting on principles of positive law."[389] The *Peru* Court blurred this distinction when it referred to the "overriding principle of substantive law" that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations."[390] The *Peru* Court conceptualized the boundary between law and diplomacy as permeable and viewed the authority to make binding immunity determinations as an incident of the Executive Branch's foreign relations power.

This is, indeed, how the Executive Branch currently interprets the scope of its authority, which stands in stark contrast to the disclaimers it issued in the cases explored in Part II. Under this approach, "suggestions" of immunity are a misnomer. As U.S. Department of Justice attorney Lewis Yelin, writing in his personal capacity, has indicated, "[a]lthough denominated a 'suggestion' of immunity, the government's filing informs the courts that the Executive Branch's immunity determination is binding."[391] Yelin acknowledges that "if the Executive Branch has authority to direct the dismissal of a suit that power must derive from the Constitution."[392] In his view, and as articulated by the U.S. government in recent suggestions of immunity, such authority stems from the Executive Branch's responsibility for the conduct of foreign affairs.[393]

That the deferential posture articulated by the U.S. Supreme Court in *Peru* and *Hoffman* should apply in cases involving foreign

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[388] Chacon v. Eighty-Nine Bales of Cochineal, 5 F. Cas. 390, 397 (C.C.D. Va. 1821).
[389] *Id.*
[390] *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).
[391] Yelin, *supra* note 12, at 915 n.15.
[392] *Id.* at 916.
[393] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Affirmance, *supra* note 11, at 10.

officials is not a foregone conclusion. As Ingrid Wuerth points out, *Peru* and *Hoffman* "were decided during World War II, and the President often enjoys deference during wartime."[394] It is also plausible that, as Yelin suggests, courts during this period "began to doubt the stability of the governing immunity rule in international practice, and in the absence of any legislative guidance, courts increasingly looked to the Executive Branch for the applicable principles."[395] He continues: "As the governing international principles became less clear and as the Executive asserted views contrary to the prevailing judicial norm [of absolute immunity], the courts began to hew more closely to executive branch articulations of foreign sovereign immunity principles, until the practice of absolute deference arose."[396]

At the State Department's urging, the 1976 FSIA returned the paramount authority to resolve certain disputes involving foreign sovereign immunity to the judicial branch.[397] The picture remains murkier, however, when it comes to the respective roles of the judicial and executive branches in determining the immunities of foreign officials, which the FSIA does not prescribe.

The Executive Branch interprets *Samantar* as an endorsement of the practice of judicial deference articulated in *Peru* and *Hoffman*.[398] Others, including Wuerth, argue that "the better interpretation [of *Samantar*] is the more literal one: Congress did not seek to do anything with respect to individual immunity cases,

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394 Wuerth, *supra* note 5, at 926.

395 Yelin, *supra* note 12, at 961.

396 *Id.* at 983.

397 *See, e.g.*, Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 304–05 (1986) (noting a "principal objective" of the FSIA was to grant authority to courts to determine sovereign immunity); Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 65 (1978) ("The intent of the Immunities Act was to place in the courts the determination whether a foreign sovereign was entitled to immunity."); Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 2 (1976) (explaining power is granted to the courts "to decide claims of foreign state immunity from their process" and that the statute "withdraws the State Department's authority both to prescribe and to apply rival standards of immunity").

398 *See, e.g.*, Suggestion of Immunity by the United States at 9, Doğan v. Barak, No. 2:15-CV-08130-ODW-GJS (C.D. Cal. June 10, 2016) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945))).

either to authorize or eliminate the practice."[399] From the *Samantar* decision to the time of writing, no court appears to have granted immunity to an individual defendant where the Executive Branch suggested non-immunity, or denied immunity to an individual defendant where the Executive Branch suggested immunity. That said, lower courts have not been uniform in the degree of deference they have accorded these suggestions, or the basis upon which they have accorded deference.

To the extent that the pre-FSIA practice referenced by the *Samantar* Court informs the content of the "common-law regime" of official immunity, it is important to recognize that this practice was not uniform in either its reasoning or its results. For example, in the pivotal *Hoffman* case, Justices Frankfurter and Black concurred in the Court's opinion but would have found that U.S. courts "should not disclaim jurisdiction" over vessels owned by foreign governments except when the Executive Branch or Congress "explicitly asserts that the proper conduct of [foreign] relations calls for judicial abstention."[400] By contrast, Judge Mack in *The Pesaro* would have taken into account the failure of the State Department to intervene but would not have said "that immunity should be refused in a clear case simply because the executive branch has failed to act."[401] After all, the Executive Branch is not automatically notified when a case is filed against a foreign defendant, and various reasons prevent suggestions from being filed in every case, ranging from capacity constraints to delays in diplomatic communications.

Although foreign governments are permitted to make submissions directly to U.S. courts, the practice has been for immunity requests to be submitted via diplomatic channels.[402] The Supreme Court indicated in 1921 that "the correct practice" was for a foreign government "to make the asserted public status and immunity of the vessel the subject of diplomatic representations," and that if the Executive Branch "recognized" the claim of immunity, this determination should be "set forth and supported" in a suggestion by the Attorney General.[403] The Court explained

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399 Wuerth, *supra* note 5, at 939–40.

400 *Hoffman*, 324 U.S. at 41–42.

401 The Pesaro, 277 F. 473, 480 (S.D.N.Y. 1921).

402 *See Sovereign Immunity Revisited*, 113 ASIL PROC. (forthcoming 2019) (on file with author) (outlining the remarks of John B. Bellinger III, former U.S. State Department legal adviser).

403 *In re* Muir, 254 U.S. 522, 532–33 (1921).

that the practice of requesting a suggestion of immunity from the State Department "makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision."[404] These suggested procedures reflect a desire to reconcile the potentially competing demands of law and diplomacy within a constitutional system based on the separation of powers.

Whether contemporary immunity determinations by U.S. courts should be considered as governed primarily by "reasons of state" or by "principles of positive law" remains a matter of contention. For example, in suggesting immunity from suit for Laos's sitting president and its prime minister, the United States indicated:

> The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has the sole authority to determine the immunity from suit of incumbent heads of state and heads of government. The interest of the United States in this matter arises from a determination by the Executive Branch, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, that President Choummaly and Prime Minister Thongsing are immune from this suit while in office.[405]

Given this explanation, Executive Branch suggestions of immunity might best be characterized as hybrid legal—"in light of the relevant principles of customary international law"—and political—"in the implementation of its foreign policy and in the conduct of its international relations"—determinations.[406]

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[404] *Id.* at 533.

[405] Suggestion of Immunity and Statement of Interest of the United States of America, Hmong I v. Lao People's Democratic Republic, No. 2:15-CV-02349, at *4 (E.D. Cal. Feb. 12, 2016), https://www.state.gov/wp-content/uploads/2019/05/23-Hmong-I-v.-Lao-Peoples-Democratic-Republic-U.S.-statement-of-interest.pdf.

[406] *Id.*

Lewis Yelin takes the position that suggestions of immunity can properly be characterized as binding on courts notwithstanding this apparent hybrid or blended character.[407] In his view, suggestions of status-based immunity for foreign heads of state, such as the one quoted above, amount to "lawmaking," because they implement "a prescriptive rule that can be applied in future cases by the courts" rather than "purely ad hoc, foreign policy-based decision making."[408] In support of this position, he notes that "although the State Department has acknowledged foreign relations concerns among its reasons for recognizing and allowing the immunity of a head of state, it has generally explained that its determinations of head of state immunity are based on its adoption and application of the governing customary international law principles."[409] That said, as Yelin recounts, "the Executive Branch believes that courts have no discretion to look behind the suggestion of immunity to determine for themselves the applicable principles of customary international law."[410] The hybrid nature of Executive Branch suggestions, which take into account legal principles but are also informed by foreign policy considerations, complicates claims about the institutional competence of the judicial and political branches, respectively, in making binding immunity determinations. Absent clarifying legislation, the leap to absolute deference in *Peru* and *Hoffman* seems difficult to defend, especially when a suggestion turns on the nature of the defendant's conduct, rather than on his or her official status.[411]

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[407] *See* Yelin, *supra* note 12, at 969.

[408] *Id.* at 971 n.338.

[409] *Id.*

[410] *Id.* at 973.

[411] The *Samantar* Court did not distinguish between status-based and conduct-based immunity. It did, however, indicate that "it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state, as the state is the real party in interest." Samantar v. Yousuf, 560 U.S. 305, 325 (2010). It remains unclear whether such a suit would be subject to dismissal on common-law immunity grounds, or whether it would be treated as a suit brought under the FSIA. *Cf.* Lewis v. Mutond, 918 F.3d 142, 147 (D.C. Cir. 2019) (indicating that "Defendants have not proffered anything to show that Plaintiff seeks to draw on the DRC's treasury or force the state to take specific action, as would be the case if the judgment were enforceable against the state"); *see also* Rishikof v. Mortada, 70 F. Supp. 3d 8, 15 (D.C. Cir. 2014) (holding that "[t]he salient fact is that Plaintiff seeks to hold the Swiss Confederation jointly and severally liable for Mortada's actions" in fatally injuring a pedestrian in a D.C. crosswalk while driving for official business, and that in so doing, "Plaintiff—by definition—is seeking to enforce a rule of law against the Swiss Confederation"); *Ex rel.* C.G. v. Gutierrez, No. 5:16-CV-00158-BR, 2017 WL 1435720, at *3 (E.D.N.C. Apr. 21, 2017) (in a vehicular injury case, noting that "[a]lthough defendant was acting in her official duty as consul at the time of the incident, exercising jurisdiction in

C. APPLYING "PRINCIPLES OF POSITIVE LAW"

If the rationale for immunity determinations is not reducible to "reasons of state," then courts must also identify "principles of positive law" to guide their decisions. The starting point for an analysis of personal jurisdiction, as identified by Chief Justice Marshall in *The Schooner Exchange*, remains the plenary territorial jurisdiction generally exercised by U.S. courts. For example, in 1993, Croat and Muslim victims of atrocities committed by Bosnian Serb forces in Bosnia-Herzegovina learned that Radovan Karadžić, the President of the self-proclaimed Republika Srpska, was visiting the United States.[412] Unable to pursue redress for their injuries in Bosnia, they filed civil claims against Karadžić in a U.S. court, relying on his physical presence in the United States to justify the assertion of personal jurisdiction.[413] The U.S. Court of Appeals for the Second Circuit held that "if appellants personally served Karadžić with the summons and complaint while he was in New York," then the court had personal jurisdiction over him.[414]

Assuming effective service of process and a viable cause of action, the question becomes whether a defendant can assert a successful claim to immunity from the exercise of U.S. jurisdiction. At the international level, state practice regarding immunities for individuals accused of conduct such as war crimes, genocide, and crimes against humanity has been characterized as "in a state of flux."[415] As a matter of domestic procedure, claims to immunity from

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this case does not have the effect of enforcing a rule of law against Mexico as Mexico is not a named party in this lawsuit and plaintiffs seek to hold defendant alone personally responsible for her alleged negligence"); Moriah v. Bank of China Ltd., 107 F. Supp. 3d 272, 279 (S.D.N.Y. 2015) (finding common-law immunity on the grounds that, among other factors, "if this Court exercises jurisdiction and issues a subpoena, compelling Ciechanover's testimony would 'have the effect of enforcing a rule of law against the state'" (quoting Heaney v. Gov't of Spain, 445 F.2d 501, 504 (2d Cir. 1971))).

412 *See* Kadic v. Karadžić, 70 F.3d 232, 236–37 (2d Cir. 1995) (explaining that the plaintiff "Croat and Muslim citizens" of Bosnia-Herzegovina—who alleged that they were victims "of various atrocities" led by Karadžić—learned that Karadžić entered the United States in 1933).

413 *See id.* at 246 ("Appellants aver that Karadžić was personally served with process while he was physically present in the Southern District of New York.").

414 *Id.* at 248.

415 Jones v. United Kingdom, 2014 Eur. Ct. H. R. 176, ¶ 213 ("State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases."); *see also* Chimène I. Keitner, *Immunities of Foreign Officials from*

civil suit in U.S. courts will generally take the form of a motion to dismiss the complaint under Rule 12 of the Federal Rules of Civil Procedure.[416] Defendants often move to dismiss on a variety of grounds, and courts are not always clear about whether they are considering a motion to dismiss under Rule 12(b)(1) (lack of subject-matter jurisdiction),[417] 12(b)(2) (lack of jurisdiction),[418] or 12(b)(6) (failure to state a claim).[419] Historically, as indicated above, conduct-based immunity was treated as an affirmative defense on the merits because it was based on the argument that the named defendant did not bear personal responsibility for the challenged acts.[420] In contemporary terms, this sounds more like an argument for dismissal based on failure to state a claim—or even for summary judgment—since it takes the view that the claimant would only be entitled to relief from the foreign state and not the named official.[421]

One might also treat suggestions of status-based immunity as determinations that a U.S. court lacks personal jurisdiction over the defendant because she is entitled to be treated *as if* she were not actually present on U.S. territory under the fiction of "extraterritoriality." Suggestions of conduct-based immunity operate somewhat differently. They involve an assertion that adjudicating the claim would require the court impermissibly to determine the lawfulness of an authorized official act of a current or former agent of a foreign government, absent a waiver of

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Civil Jurisdiction ("The [European Court of Human Rights] found that it was not 'manifestly erroneous' for the House of Lords to find that an individual official benefits from the state's immunity in the civil context, while acknowledging that 'State practice on the question in in a state of flux.'" (quoting *Jones*, 2014 Eur. Ct. H. R. 176, ¶ 213)), *in* CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW (Tom Ruys & Nicolas Angelet eds., Cambridge Univ. Press 2019).

416 *See generally* Samantar v. Yousuf, 560 U.S. 305 (2010) (reviewing a district court's granting of a foreign official's motion to dismiss because it concluded that the official had immunity and the court lacked subject-matter jurisdiction).

417 FED. R. CIV. P. 12(b)(1).

418 FED. R. CIV. P. 12(b)(2).

419 FED. R. CIV. P. 12(b)(6).

420 *See supra* notes 63–69 and accompanying text.

421 *Cf.* Doe 1 v. Buratai, 318 F. Supp. 3d 218, 226 (D.D.C. 2018) (indicating that "foreign-official immunity is a question of subject-matter jurisdiction"). Some status-based immunity determinations have been upheld by courts without a motion to dismiss having been filed. *See generally* Manoharan v. Rajapaska, 711 F.3d 178 (D.C. Cir. 2013) (affirming the district court's denial of plaintiff's motion to validate service in a civil action against the sitting president of Sri Lanka); Hmong I v. Lao People's Democratic Republic, No. 2:15-CV-2349 TLN AC, 2016 WL 2901562 (E.D. Cal. May 17, 2016) (denying plaintiff's motion for default judgment in a civil action against the president and the prime minister of Laos).

immunity.[422] Whether or not to take a foreign state's representation that its agent acted within the scope of lawful authority at face value could plausibly involve both legal and political considerations. In the domestic context, U.S. government certifications that a government official acted within the scope of her authority for Westfall Act purposes is technically entitled to substantial, but not absolute, deference.[423] As a practical matter, however, such certifications create obstacles to judicial remedies for international law violations.[424] The same would no doubt be true if foreign governments—which are generally entitled to immunity under the FSIA—could unilaterally substitute themselves for their officials as defendants in U.S. courts.

These questions lead us back to the Supreme Court's reasoning in the pivotal *Peru* and *Hoffman* cases.[425] Although the district courts in those cases had "authority to determine" for themselves whether the ships in question were entitled to immunity,[426] the Supreme Court indicated in *Peru* that they should "relinquish" this authority "in conformity to [the] overriding principle of substantive law" that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."[427] Consequently, a suggestion of immunity would be "accepted by the courts as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations."[428] As the Court subsequently articulated in *Hoffman*, the practice of judicial deference to Executive Branch suggestions of immunity is "founded upon the policy recognized both by the Department of State and the courts that the national interests will

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[422] *See supra* notes 63–69 and accompanying text.

[423] *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 433–37 (1995) ("[W]e find the exercise of federal-court authority involved here less ominous than the consequences of declaring certifications of the kind at issue uncontestable.").

[424] *See, e.g.*, William Casto, *Notes on Official Immunity in ATS Litigation*, 80 FORDHAM L. REV. 573, 592 (2011) (indicating that the Westfall Act "effectively immunizes federal officers who may be sued for violating international law").

[425] *See supra* Section III.A.

[426] *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

[427] *Id.*; *see also* note 375 and accompanying text.

[428] *Republic of Peru*, 318 U.S. at 590.

be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings."[429]

These passages from *Peru* and *Hoffman* appear to push immunity determinations towards the "diplomacy" side of the balance sheet and away from the "law" side—contrary to previously established practice. They evoke precisely the discretion that the State Department sought to relinquish in supporting enactment of the FSIA, but that it claims to retain with regard to determinations of foreign official immunity.[430] That said, the State Department has never claimed to be untethered from "principles of positive law" in making immunity determinations, whether these involve foreign ships or foreign officials. The better reasoned suggestions of immunity are, the more likely courts will defer to them.

Taking the suggestion of immunity in the Laos case as an example,[431] it remains unclear what the Executive Branch would do if applying "the relevant principles of customary international law" produced a result at odds with its assessment of "the United States' foreign policy and foreign relations interests."[432] It is not always possible to discern the motivations behind a decision to suggest immunity, to suggest non-immunity, or to remain silent. The Executive Branch has declined to recognize claims to head of state immunity where it has determined that the individual does not qualify as a sitting head of state.[433] If the Executive Branch is silent, a court can determine for itself whether an individual is a sitting head of state or head of government entitled to immunity under "the relevant principles of customary international law," although it is less clear that a court would be well-positioned to ascertain the potential impact of this analysis on "the United States' foreign policy and foreign relations interests." That said, one might expect to see a suggestion of immunity from the Executive Branch if a case were deemed to pose a serious threat to the conduct of foreign

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[429] Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945).

[430] *See supra* note 397 and accompanying text

[431] *See supra* note 405 and accompanying text.

[432] *See supra* note 405 and accompanying text.

[433] *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity.").

policy—assuming that the defendant or the court brings the case to the Executive Branch's attention by requesting a suggestion or seeking its views.[434]

The question of conduct-based immunity for foreign officials remains more fraught than that of status-based immunity—both in terms of its contours under customary international law, and in terms of the judicial reviewability of State Department determinations. The Executive Branch has invoked the holding in *Peru* and the dicta from *Hoffman* as precedent indicating a requirement of absolute deference to suggestions of immunity, regardless of whether the immunity is status-based or conduct-based.[435] The U.S. Court of Appeals for the Fourth Circuit has held that conduct-based immunity determinations by the Executive Branch are not "controlling," but that they do carry "substantial weight" in a court's analysis of a defendant's entitlement to immunity.[436] The Executive Branch, in contrast, has cited *Hoffman* for "the basic principle that Executive Branch immunity determinations establish 'substantive law governing the exercise of the jurisdiction of the courts'"[437] and are therefore binding on courts.

The language in *Hoffman* does not support the view that the State Department creates a "substantive rule of law" when it makes an immunity determination. Rather, the Supreme Court in that case cited *Peru* for the proposition that "it is an accepted rule of

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[434] *See, e.g.*, Statement of Interest and Suggestion of Immunity, Rosenberg v. Lashkar-e-Taiba, No. 1:10-cv-05381-DLI-CP, at *9 n.5 (E.D.N.Y. Dec. 17, 2012), http://opiniojuris.org/wp-content/uploads/Rosenberg-Suggestion-of-Immunity-12-17-12.pdf ("[B]ecause a foreign state's request for immunity on behalf of an official itself has foreign relations implications, courts should ensure that the Executive Branch has been notified of and had an opportunity to consider such a request before ruling on the immunity issue. Indeed, for that reason, a foreign state's request for an official's immunity should first be presented to the Department of State, not to the court.").

[435] *See, e.g.*, Suggestion of Immunity and Statement of Interest of the United States of America, *supra* note 405, at 8.

[436] Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012). By contrast, a Second Circuit panel held in an unpublished opinion that, under applicable circuit precedent, Executive determinations of foreign official immunity are binding on the courts. *See* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) (representing a pre-*Samantar* case applying "our traditional rule of deference to such Executive determinations" of immunity).

[437] *See, e.g.*, Suggestion of Immunity by the United States, Doğan v. Barak, No. 2:15-CV-08130-ODW-GJS, at *9 (C.D. Cal. June 10, 2016) (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)).

substantive law governing the exercise of the jurisdiction of the courts that they accept and follow [an] executive determination that [a friendly foreign] vessel is immune."[438] In other words, courts' *practice of judicial deference* is the rule of "substantive law," not the immunity determination itself. This reading is reinforced by the *Hoffman* Court's statement that it found "no persuasive ground for allowing the immunity in [that] case, an *important reason* being that the State Department has declined to recognize it."[439] This interpretation conforms with the *Peru* court's framing of the immunity question as involving "whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law."[440] That "overriding principle" was that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."[441] As the *Cassius* case demonstrated early on, the seizure of a foreign vessel could indeed create a foreign relations headache.[442] Courts can take foreign relations considerations into account if they are raised by the Executive Branch.

It is indisputable that a tradition of judicial deference to Executive Branch suggestions of immunity emerged by the early 1940s and was endorsed by the Supreme Court at that time.[443] It remains more doubtful, however, that the Supreme Court's description of that tradition in the *Samantar* opinion and its indication that Congress did not intend to "displace" the common law of foreign official immunity when it enacted the FSIA can properly be read as a holding that absolute judicial deference to all determinations of foreign official immunity is constitutionally compelled. The deference question remains unresolved at the U.S. Supreme Court level.

Whether the Executive Branch has the constitutional authority to make status-based immunity determinations that are binding on

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438 *Hoffman*, 324 U.S. at 36.

439 *Id.* at 36 n.1 (emphasis added).

440 *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943)

441 *Id.*

442 *See supra* Section II.C.

443 *See also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 11 (2009) (indicating that "starting in the late 1930s, courts began to give essentially absolute deference to Executive Branch views on whether immunity should be granted").

the courts could hypothetically arise if the Executive Branch made a determination of *non-immunity* for a sitting head of state, contrary to established principles of customary international law.[444] The question of the Executive Branch's constitutional authority to make binding conduct-based immunity determinations arises when a defendant urges a court to dismiss a case notwithstanding an Executive Branch suggestion of non-immunity, or when a claimant urges a court to retain jurisdiction notwithstanding a suggestion of immunity.[445] In the former scenario, which recalls the *Berizzi Bros.* case, the degree of deference owed might depend on whether the proffered rationale for non-immunity turns on legal considerations, diplomatic considerations, or both. In the latter scenario, if an Executive Branch suggestion of conduct-based immunity does not run counter to established principles of customary international law and invokes facially plausible foreign relations reasons for declining to exercise jurisdiction over the claim, most judges will likely defer to that determination, even if they indicate they are according it only "substantial," rather than controlling, weight.[446]

The extent to which one feels comfortable with the prospect of a U.S. court declining to defer to an Executive Branch suggestion of

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[444] *See* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, 2002 I.C.J. Rep. 3, ¶ 53–54 (Feb. 2002) (finding that the incumbent Congolese foreign minister was entitled to status-based immunity from criminal prosecution by a Belgian court because, like an incumbent head of state, an incumbent foreign minister is entitled to protection "throughout the duration of his or her office" from "any act of authority of another State which would hinder him or her in the performance of his or her duties").

[445] For example, the *Doğan* court explained:

> The Judiciary does not defer to the Executive because of any perceived requirement that it *must*. Rather, the Judiciary *chose* to adopt a policy of deference simply as a matter of logic and comity. Lawsuits concerning a foreign nation's official acts and instrumentalities inevitably implicate our diplomatic relationship with that nation. Thus, the Supreme Court concluded [in *Republic of Peru* that] "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings."

Doğan v. Barak, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 5947236, at *7 (C.D. Cal. Oct. 13, 2016), *aff'd*, 932 F. 3d 888 (9th Cir. 2019) (citing *Republic of Peru*, 318 U.S. at 589) (affirming the result without determining the required degree of deference).

[446] *See Doğan*, 2016 WL 6024416, at *9 (deferring to an Executive Branch suggestion of immunity, while noting that "[e]ven if the Court conducted an independent inquiry on the immunity question, it would reach the same conclusion").

conduct-based immunity turns to a large extent on which scenario one finds more problematic: a U.S. court declining to provide a forum to adjudicate allegations of egregious human rights abuses that were authorized or endorsed by a foreign state, or both;[447] or a U.S. court providing such a forum over the objections of the foreign state and the Executive Branch.[448] To the extent that conduct-based immunity determinations by the Executive Branch involve considerations of both law and diplomacy, it seems that the Executive Branch's ability to put a heavy thumb on the scale—but not to compel dismissal of a suit based on an intrinsically opaque assessment of relevant considerations—best accommodates potentially conflicting concerns in the absence of applicable legislation.

In addition to privately initiated civil suits, there are a variety of contexts in which imposing legal consequences on foreign officials for their conduct serves, rather than undermines, current U.S. foreign policy goals, from U.S. indictments of foreign state-sponsored hackers[449] to U.S. support for other countries' attempts to prosecute Syrian war criminals.[450] As courts consider the contours of common law immunity for foreign officials who are sued in U.S. courts, they should remain mindful of the potential

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[447] The Department of Justice indicated in a suggestion of conduct-based immunity for a claim brought under the Torture Victim Protection Act that

> [o]n their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and plaintiffs have provided no reason to question that determination . . . . The per se rule of nonimmunity [for violations of peremptory norms of international law] adopted by the Fourth Circuit is not drawn from any determination made or principles articulated by the Executive Branch.

Suggestion of Immunity by the United States, *Doğan*, 2016 WL 5947236, at *9.

[448] For example, certain cases against foreign states and their officials can proceed under legislation opposed at the time of its enactment by the Executive Branch based on concerns about its impact on foreign relations. *See, e.g.*, Veto Message from the President–S.2040, White House Office of the Press Secretary (Sept. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 (vetoing Justice Against Sponsors of Terrorism Act, which Congress enacted after overriding the veto).

[449] *See, e.g.*, Chimène I. Keitner, *Attribution by Indictment*, 113 AJIL UNBOUND 207, 207 (2019) (describing U.S. practice).

[450] *See* Press Statement, Robert J. Palladino, Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan (Mar. 5, 2019), https://www.state.gov/r/pa/prs/ps/2019/03/290011.htm (stating that "the United States supports effective mechanisms for holding those responsible for atrocities in Syria accountable").

doctrinal reverberations of their determinations in these other contexts.[451]

IV. CONCLUSION

U.S. courts have grappled with disputes arising at the intersection of law and diplomacy since the Founding Era. Although the line from eighteenth-century cases against privateers to twentieth-century cases against human rights abusers might not seem self-evident, these cases raise many of the same conceptual and doctrinal issues for U.S. courts. If Henry Sinclair had been a pirate rather than a privateer, he could not have argued that "a commission from the sovereign of a foreign nation" shielded him from the jurisdiction of U.S. courts.[452] Two centuries later, the court of appeals in *Filártiga v. Peña-Irala* famously considered a civil suit brought by two Paraguayan citizens against a former Paraguayan official, who was served with process in New York, for torture and extrajudicial killing that occurred in Paraguay.[453] The court reasoned that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[454] Despite this reasoning, some foreign defendants who are sued in U.S. courts argue, like Sinclair, that their conduct was authorized—and can only be judged—by their own governments. As long as such defendants continue to come within the personal jurisdiction of U.S. courts, they will continue to raise claims to common law immunity.

This Article has offered an account of strategies used by litigants, judges, legislators, and executive branch officials to navigate tensions between rules-based approaches to jurisdictional immunity administered by the judiciary and case-by-case approaches administered by the political branches. Despite the

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451 *Cf.* Chimène I. Keitner, *Prosecute, Sue, or Deport? Transnational Accountability in International Law*, 165 U. PA. L. REV. ONLINE 1, 1–4 (2015), https://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-1.pdf (indicating a range of policies that impose consequences on individuals for unlawful conduct, even if they acted on behalf of foreign states).

452 Charles Lee, Actions Against Foreigners, 1 Op. Att'y Gen. 81 (1797).

453 Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

454 *Id.* at 890.

perceived advantages of determinacy, preserving some room for continued inter-branch dialogue around questions of common law immunity seems both doctrinally and normatively warranted as our understandings of personal responsibility for "official acts," and the consequences that flow from that responsibility, continue to evolve. The best way to preserve this space for dialogue, which is also most consistent with the historical understandings explored here, is for courts to accord significant, but not absolute, deference to Executive Branch suggestions of conduct-based immunity from suit.