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The Forgotten History of Foreign Official Immunity

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ARTICLES

THE FORGOTTEN HISTORY OF FOREIGN OFFICIAL IMMUNITY

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The immunity of foreign officials from legal proceedings in U.S. courts has drawn significant attention from scholars, advocates, and judges in the wake of the Supreme Court's decision in Samantar v. Yousuf, *which held that foreign official immunity is governed by the common law rather than the Foreign Sovereign Immunities Act (FSIA). The common law of foreign official immunity, which the* Samantar *Court did not define, operates at the intersection of international and domestic law, and it implicates the constitutional separation of powers between the executive and judicial branches. Conflicting visions of the substance and process of common law immunity have already emerged following the* Samantar *opinion and will continue to compete until the Supreme Court revisits this issue in a future case. At stake is not only the ability of suits to proceed against foreign officials, but also the relationship between the executive branch and the judiciary in matters affecting foreign affairs.*

The original research into eighteenth-century practices presented in this Article yields two important observations. First, claims that defendants acted in their official capacities did not automatically bar adjudication on the merits: Foreign officials who were neither diplomatic officials nor heads of state were on the same "footing" as "every other foreigner" with respect to their "suability." Second, the Executive believed that it did not have constitutional authority to instruct courts to dismiss private suits on immunity grounds. Although twenty-first century advocates might make policy arguments for blanket immunity or absolute executive

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discretion, such choices are not consistent with—let alone compelled by—the eighteenth-century practices and understandings recovered here.

INTRODUCTION

Recent decades have seen an increase in civil claims and criminal charges brought against individuals for conduct performed under the actual or apparent authority of foreign governments. In the United States, civil proceedings have become more common following the Second Circuit's decision in *Filártiga v. Peña-Irala*, which found that a Paraguayan general could be held civilly liable for torture occurring in Paraguay,[1] and the enactment of the Torture Victim Protection Act (TVPA), which provides a civil cause of action for torture or summary execution committed under color of foreign law.[2]

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA) to govern jurisdiction over foreign states and their agencies and instrumentalities.[3] The U.S. government has consistently

[1] 630 F.2d 876 (2d Cir. 1980) (followed with qualifications by *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–32 (2004)).

[2] Torture Victim Protection Act of 1991, 28 U.S.C. § 135 (2006). Other statutes conferring jurisdiction over conduct performed under color of foreign law include: Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (current version at 18 U.S.C. § 1091(e) (Supp. IV 2006)); Federal Courts Administration Act of 1992, 18 U.S.C. § 2333 (2006) (establishing jurisdiction for district courts to hear suits brought by American citizens victimized by international terrorism); Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340–2340B (2006); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (Supp. III 2006); Anti-Terrorism Act of 1987, 22 U.S.C. § 5203 (2006) (granting district courts equitable power to prevent aid from reaching a designated terrorist organization); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(7)(A) (2006), *amended by* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1241, § 221 (current version at 28 U.S.C. § 1605A (Supp. III 2006)) (creating an exception to the foreign sovereign immunity doctrine for state sponsors of terrorism).

[3] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602–1611 (2006)).

maintained that foreign official immunity—as opposed to the immunity of the state itself—is a matter of common law that falls outside the parameters of the FSIA. In 1991, the United States took this position in *Chuidian v. Philippine National Bank*, a suit brought against a Philippine government official for freezing payments pursuant to Philippine government policy.[4] The Ninth Circuit disagreed, applying the FSIA.[5]

The United States again opposed the application of the FSIA to foreign officials in 2006, when it filed a statement of interest in *Matar v. Dichter*, a civil suit against the former Director of Israel's General Security Service for injuries caused by a military operation in Gaza.[6] In that statement, the United States cited a 1794 opinion by Attorney General William Bradford and a 1797 opinion by Attorney General Charles Lee as "recognizing immunity for the official acts of foreign officials."[7] The plaintiffs disputed this characterization of the Attorney General opinions.[8] Later, as the problem of interpreting the FSIA worked its way to the Supreme Court, Professors Curtis Bradley and Jack Goldsmith published an article in which they cited Attorneys General Bradford and Lee's opinions for the proposition that "suits against foreign officials for their official acts were considered suits against the foreign state and thus were subject to the state's immunity."[9] Bradley and Goldsmith also suggested that the Executive's refusal to intervene in early cases brought against foreign officials was likely due to federalism limits, rather than separation-of-powers concerns.[10] When the Supreme Court held in *Samantar v. Yousuf* that the common law—not the FSIA—governs the immunity of foreign

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[4] *See* Statement of Interest of the United States at 5, Chuidian v. Philippine Nat'l Bank, 734 F. Supp. 415 (C.D. Cal. 1990) (No. 86-2255) [hereinafter *Statement of Interest*] (arguing that individual immunity is governed by the common law, not the FSIA).

[5] Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990), *abrogated by* Samantar v. Yousuf, 130 S. Ct. 2278 (2010). The United States argued in *Chuidian* that "the general rule is that an official should be shielded from personal liability for the performance of official functions." *Statement of Interest*, *supra* note 4, at 5. However, the United States specifically reserved comment on "the possibility of extreme situations where overriding policy reasons may suggest liability is appropriate." *Id.* at 5–6.

[6] *See* Statement of Interest of the United States of America at 10–18, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270) (arguing that individual immunity is governed by the common law, not the FSIA).

[7] *Id.* at 6.

[8] Plaintiffs' Response to the Statement of Interest of the United States of America at 13–14, *Matar*, 500 F. Supp. 2d (indicating that the court refused to discharge the defendant in the first case, and that the Attorney General opined that the controversy in the second case was "entitled to a trial").

[9] Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 137, 141–42 (2010).

[10] *Id.* at 142 n.21.

officials for their conduct while in office, these Attorney General opinions from the 1790s assumed even greater salience as evidence of historical understandings about the authority of U.S. courts to adjudicate civil claims against individuals for conduct performed under color of foreign law.[11]

Legal scholars have devoted substantial attention to the potential immunity of foreign officials from domestic prosecution.[12] They have also explored the immunity of foreign states, which the FSIA currently governs.[13] Yet scholars largely have failed to address how, if at all, immunity doctrines constrain the exercise of domestic *civil*

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[11] Samantar v. Yousuf, 130 S. Ct. 2278 (2010). For the record, I represented amici Professors of Public International Law and Comparative Law in support of Respondents in *Samantar*. Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar*, 130 S. Ct. 2278 (No. 08-1555). I do not currently represent any parties on remand in *Samantar* or other cases involving foreign official immunity, and all the views expressed in this Article are my own.

[12] *See, e.g.*, ELIZABETH H. FRANEY, IMMUNITY, INDIVIDUALS AND INTERNATIONAL LAW: WHICH INDIVIDUALS ARE IMMUNE FROM THE JURISDICTION OF NATIONAL COURTS UNDER INTERNATIONAL LAW (2011) (canvassing recent jurisprudence on official immunity from a U.K. perspective); LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003) (providing a detailed account of national practice with regard to prosecutions on the basis of universal jurisdiction); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815 (2010) (exploring the rationale for, and limits on, functional immunity from prosecution for international crimes in the domestic courts of other countries); Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1 (2011) (exploring the possibilities and limitations of universal jurisdiction prosecutions in light of the role and incentives of the political branches).

[13] *See, e.g.*, ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS (2005) (examining the acceptance of the restrictive and absolute theories of state immunity in state practice and arguing against the uncritical acceptance of the restrictive theory); HAZEL FOX, THE LAW OF STATE IMMUNITY (2d ed. 2008) (providing an in-depth account of state treatment of the immunities of foreign states, with an emphasis on U.S. and U.K. approaches). Diplomatic immunity, in contrast to the immunity of officials who are not diplomats, has received somewhat greater attention, as has the separate but related category of consular immunity. *See, e.g.*, E.R. ADAIR, THE EXTRATERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES (1929) (documenting state practice from this period); 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). Diplomatic and consular immunity are now governed by treaty. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

jurisdiction over individuals—even though civil suits comprise a significant share of the domestic adjudicatory landscape.[14]

In the absence of authoritative guidance, scholars have given lower courts scant suggestions about how to handle claims to common law immunity following *Samantar*.[15] In addition to submissions by the parties and the U.S. government on remand in *Samantar* itself,[16] there has been a surge of scholarship on previously overlooked aspects of foreign official immunity.[17] However, existing scholarship has only

[14] There are a few partial exceptions. *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2008) (arguing against blanket immunity from both civil and criminal proceedings); Akande & Shah, *supra* note 12, at 852 (suggesting that the existence of extraterritorial jurisdiction over certain international crimes implies a lack of both civil and criminal immunity for such conduct); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142 (2006) (examining trends in the exercise of extraterritorial jurisdiction over internationally unlawful conduct in civil proceedings, while bracketing the related question of immunities); Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of* Ultra Vires *Conduct*, 29 DENV. J. INT'L L. & POL'Y 261 (2001) (examining the relationship between state immunity and official immunity).

[15] For an argument that the Court must have been referring to federal common law, see Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and the Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1537–38 (2011) (viewing *Samantar* as leaving "no doubt" that the common law governing immunity is federal law, not state law). *See also* David P. Stewart, Samantar *and the Future of Foreign Official Immunity*, 15 LEWIS & CLARK L. REV. 633, 649 (2011) (indicating that "there may be little debate that this area is presumptively one of federal common law").

[16] The pleadings are available on the website of the Center for Justice and Accountability, co-counsel for Bashe Abdi Yousuf. *Pleadings:* Yousuf v. Samantar, CTR. FOR JUSTICE & ACCOUNTABILITY, http://www.cja.org/article.php?list=type&type=142 (last updated Nov. 22, 2011). At the time of writing, the United States had submitted statements of interest regarding foreign official immunity in two additional post-*Samantar* cases. Statement of Interest of the United States of America, Ahmed v. Magan, No. 2:10-cv-342 (S.D. Ohio Nov. 7, 2011); Statement of Interest and Suggestion of Immunity of and by the United States of America, Giraldo v. Drummond Co., No. 1:10mc00764 (D.D.C. Mar. 31, 2011).

[17] A few short articles were published shortly before the Supreme Court heard arguments in *Samantar*. *See* Bradley & Goldsmith, *supra* note 9 (emphasizing that different rules govern the immunity of foreign officials under international law and the immunity of U.S. officials under U.S. domestic law); Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9 (2009) (arguing that the FSIA bars human rights suits against current and former foreign officials); Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1 (2010) [hereinafter Keitner, *Response*], http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf (arguing against interpreting the FSIA to include natural persons who acted under color of foreign law). More authors analyzed the issue post-*Samantar*. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213 (assessing the role of customary international law in immunity determinations following *Samantar*); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61 (2010) [hereinafter Keitner, *Common Law*] (arguing that conduct-based immunity does

scratched the surface of the available historical record.[18] The obvious danger is that unsupported assertions about historical practice, if unchallenged, can creep into judicial opinions and assume an unwarranted aura of authority.

A systematic search of Attorney General opinions, diplomatic correspondence, and available court records from the 1790s brings to light six civil suits in which defendants asserted "conduct-based" immunity; that is, immunity attached to the official nature of a defendant's conduct, as opposed to the "status-based" immunity accorded to a defendant by virtue of her official position at the time of the legal proceedings.[19] Under the law of nations, which was understood as binding on U.S. courts as part of the general common law, diplomatic officials benefited from absolute, status-based immunity and could not be sued or prosecuted while in office.[20] Other current or former foreign officials, by contrast, were on the same "footing" with "every

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not automatically shield all current and former foreign officials from suit); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669 (2011) (arguing that actions that violate clearly defined, widely accepted international norms fall outside the scope of official authority and are therefore not entitled to common law immunity following *Samantar*); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915 (2011) (arguing that federal common law–making, not binding executive branch determinations, should govern immunity claims following *Samantar*); *see also* Symposium, *Official and Municipal Liability for Constitutional and International Torts Today: Does the Roberts Court Have an Agenda?*, 80 FORDHAM L. REV. 441 (2011); Symposium, *Foreign State Immunity at Home and Abroad*, 44 VAND. J. TRANSNAT'L L. 819 (2011); Symposium, *Foreign Official Immunity After* Samantar v. Yousuf, 15 LEWIS & CLARK L. REV. 555 (2011). None of these articles examines the materials explored here.

[18] The historical literature on domestic official immunity has been somewhat more extensive. For a recent contribution that also cites earlier works, see 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 (2010). The same is true of the literature on other aspects of the eighteenth-century legal questions involving foreign relations and constitutional powers. Examples include WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006); David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS UNIV. L.J. 145 (2008); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009) and works cited therein at 1685 nn.5–6.

[19] *See* Keitner, *Common Law*, *supra* note 17, at 63–65 (distinguishing between "conduct-based" and "status-based" immunity). Recently, this distinction between absolute status-based immunity and limited conduct-based immunity led Dominique Strauss-Kahn, the former Managing Director of the International Monetary Fund, to seek the "absolute" immunity granted to a diplomat, rather than the more limited immunity that attaches only to official acts. Memorandum of Law in Support of Defendant Dominique Strauss-Kahn's Motion to Dismiss at 1–2, Diallo v. Strauss-Kahn, No. 307065/2011 (N.Y. Sup. Ct. Sept. 26, 2011) (on file with the *New York University Law Review*).

[20] *See, e.g.*, Who Privileged from Arrest, 1 Op. Att'y Gen. 26 (1792) (considering the lawfulness of the arrest of a domestic servant of the Dutch ambassador under the law of nations and a federal statute).

other foreigner" who came within United States territory.[21] A claim that a defendant acted in his official capacity—a claim to conduct-based immunity—did not operate as an automatic barrier to adjudication on the merits. Moreover, the Executive believed that it did not have constitutional authority to instruct a court to dismiss a private suit on conduct-based immunity grounds.

Whether or not one attributes controlling weight to original understandings of conduct-based immunity,[22] it is important to ensure that historical claims are as accurate as possible. By bringing to light historical materials from both published and unpublished archival sources, this Article shows that advocates of blanket jurisdictional immunity and absolute Executive discretion cannot justify these choices simply by asserting that "it has always been so."

The Article proceeds as follows. Part I describes six civil suits brought in U.S. courts in the 1790s against individuals who claimed that their actions had been authorized by foreign states.[23] It examines extensive diplomatic correspondence, court records, and government memoranda to paint the most comprehensive picture possible of how these cases unfolded and were resolved. Part II describes how subsequent cases carried forward the original understanding of conduct-based immunity as a defense on the merits rather than as a bar to jurisdiction. Part II thereby lays a more solid historical foundation for future research on the act of state doctrine and its relationship to jurisdictional immunities.[24] Although twenty-first century advocates might make policy arguments for blanket immunity or absolute

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[21] Suits Against Foreigners, Case of Cochran[e], 1 Op. Att'y Gen. 49, 50 (1794). However, foreigners who were consular officials were subject only to the jurisdiction of federal, not state, courts. *See* Judicial Act of 1789, ch. 20, §§ 9, 13, 1 Stat. 73, 77, 80 (1789) (providing exclusive federal jurisdiction over actions against consuls).

[22] For a forceful argument against relying on original understandings in this context, see Stephens, *supra* note 17, at 2702–04 (arguing that the modern common law of foreign official immunity must take account of developments in international human rights law and U.S. domestic law that hold officials accountable even when they acted under color of foreign law).

[23] I do not explore two criminal cases brought against foreign consuls, in part because the underlying conduct occurred on U.S. soil. *See* United States v. Ravara, 27 F. Cas. 714 (C.C.D. Pa. 1794) (No. 16,122a) (holding that Ravara, a consul from Genoa, was not privileged from indictment for sending threatening letters for extortion); Letter from Edmund Randolph, Sec'y of State, to Christopher Gore, Att'y of the U.S. for the Mass. Dist. (May 21, 1794), *in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, 19th Cong., 1st Sess., at 277 (1826) (on file with the *New York University Law Review*) (referring to the prosecution of Juteau, Chancellor of the Consulate at Boston, on charge of arming the privateer *Roland*).

[24] As the Supreme Court indicated in *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), the act of state doctrine can provide foreign states with a substantive defense on the merits, based on the principle that "the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders,

executive discretion, such choices are not consistent with—let alone compelled by—the eighteenth-century practices and understandings recovered here.

I
THE "SUABILITY" OF FOREIGN OFFICIALS IN THE 1790S

References to early understandings of foreign official immunity in the United States generally begin and end with the citation of two Attorney General opinions: the first by Attorney General William Bradford regarding a suit against Victor Collot, the former Governor of Guadeloupe,[25] and the second by Attorney General Charles Lee regarding a suit against Henry Sinclair, a British privateer.[26] Because these opinions are terse, scholars and courts have offered conflicting interpretations.[27] This Part explores previously neglected diplomatic correspondence and court documents related to the Collot and Sinclair cases that illuminate the meaning of these Attorney General opinions.[28] It also examines similar materials for other cases involving claims to immunity during this period.

Toward the end of the eighteenth century, the Washington and Adams administrations experienced internal debates about the establishment and role of federal institutions under the new Constitution. At the same time, these administrations faced external crises, including an undeclared naval war with France prompted and exacerbated by the United States's rapprochement with France's enemy, Great Britain.[29] Questions persisted about the role of the federal

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even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts."

[25] Suits Against Foreigners, Case of Collot, 1 Op. Att'y Gen. 45 (1794).

[26] Actions Against Foreigners, Case of Sinclair, 1 Op. Att'y Gen. 81 (1797).

[27] *Compare* Bradley & Goldsmith, *supra* note 9, at 142–43 (citing the Collot and Sinclair opinions in support of the proposition that a foreign country's agents are immune from suit in U.S. courts), *with* Keitner, *Response*, *supra* note 17, at 11 (citing the Collot and Sinclair opinions in support of the proposition that a foreign country's agents are not immune from suit in U.S. courts unless they are diplomatic officials).

[28] Remarkably, a single, brief footnote appears to be the sole twentieth-century account of the suit against Henry Sinclair. 3 BERNARD MAYO, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1936, at 152 n.22 (1941), *available at* http://www.archive.org/details/annualrepotrofth027201mbp (recounting the lawsuit against Sinclair). Accounts of Victor Collot's time in the United States focus on his reconnaissance missions in the Ohio and Mississippi River valleys and unsuccessful attempts to have him deported under the Alien Act. *E.g.*, George W. Kyte, *A Spy on the Western Waters: The Military Intelligence Mission of General Collot in 1796*, 34 MISS. VALLEY HIST. REV. 427, 429–31 (1947); James Morton Smith, *The Enforcement of the Alien Friends Act of 1798*, 41 MISS. VALLEY HIST. REV. 85, 92–96 (1954).

[29] *See, e.g.*, JOHN C. MILLER, THE FEDERALIST ERA 1789–1801, at 210–27 (1960) (providing an account of domestic politics and international relations during this period).

government and its constituent branches in the domestic political order, and about the role of the United States in the international order of European states.[30] At the same time, common law procedures, largely inherited from England, were evolving and being adapted by jurists in state and federal courts.

During this dynamic period, Attorneys General William Bradford and Charles Lee steadfastly affirmed in three opinions[31] that foreign defendants who claimed their acts had been authorized by foreign governments were, "with respect to [their] suability, on a footing with every other foreigner (not a [diplomatic official]) who comes within the jurisdiction of our courts."[32] Attorney General Lee also indicated in a fourth opinion that there was no "doubt respecting the suability" of a consul-general who was not a diplomat.[33] These early opinions recognized an important difference between the status-based immunity enjoyed by diplomatic officials under the law of nations (i.e., international law) and the conduct-based immunity sought by other current and former officials who were subject to proceedings in U.S. courts.

The term "suability" used in these four Attorney General opinions was unusual; it does not appear in legal dictionaries from this period.[34] It seems to have been most closely associated with the question of whether suits could be brought against the states of the federal union, rather than officials of foreign states. When Chief Justice John Jay used this term in the 1793 case *Chisholm v. Georgia*, he remarked that "[*s*]*uability* and *suable* are words not in common use, but they concisely and correctly convey the idea annexed to them."[35] The concept of "suability" in *Chisholm* referred to the ability of a court to assert jurisdiction over a particular defendant—in that case, the State

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30 On the connection between the internal and external dimensions of American constitutionalism, 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, 932 (2010). Golove and Hulsebosch argue that modern understandings of American constitution-making forget that the "animating purpose" of the American Constitution was to facilitate the acceptance of the United States as a full and equal member of the community of "civilized states." *Id.*

31 Actions Against Foreigners, Case of Sinclair, 1 Op. Att'y Gen. 81 (1797); Suits Against Foreigners, Case of Cochran[e], 1 Op. Att'y Gen. 49 (1794); Suits Against Foreigners, Case of Collot, 1 Op. Att'y Gen. 45 (1794).

32 *Case of Cochran[e]*, 1 Op. Att'y Gen. at 50.

33 Consular Privileges, Case of Létombe, 1 Op. Att'y Gen. 77, 78 (1797).

34 *E.g.*, 2 RICHARD BURN, A NEW LAW DICTIONARY 354–55 (1792); T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1765); GILES JACOB, A NEW LAW DICTIONARY (10th ed. 1782).

35 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793). *Chisholm* was argued by Attorney General Edmund Randolph before he became Secretary of State. *Id.* at 419.

of Georgia.[36] The following year, Attorney General Bradford borrowed this term to refer to whether or not a foreign defendant could be subjected to the jurisdiction of a U.S. court, and Attorney General Lee did the same three years later.[37]

In addition to the four cases that gave rise to these Attorney General opinions regarding the "suability" of foreign officials, there are at least two other late eighteenth-century cases in which civil proceedings were initiated in U.S. courts against current or former foreign officials, giving rise to diplomatic requests for the executive branch to intervene and stop them.[38] Taken together, these six cases illustrate that a defendant's "suability" was unaffected by the allegedly official nature of his act. In addition, the Executive repeatedly refused to intervene to stop litigation against individual defendants, even if those defendants had acted under color of foreign law. The plaintiffs did not necessarily prevail on the merits. However, courts compelled the defendants—who were arrested pursuant to writs of *capias ad respondendum*—to appear and respond to the allegations against them on penalty of forfeiting their bail.[39]

A. Waters v. Collot

The first noteworthy case involved George Henri Victor Collot, a former Governor of the French colony of Guadeloupe. When the British captured Guadeloupe, Collot surrendered on the condition that the British transport him to the United States, which he thought

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[36] The word "suable" also appears to have been used at times as an adjective to qualify certain instruments as capable of giving rise to a legal claim. *See, e.g.*, Steel v. Duncan, 2 Yeates 113, 114 (Pa. 1796) (indicating that "until such settlement was made by the plaintiff, the money was only suable for, in the name and for the use of the United States"); Orphan's Bond, 2 N.C. (1 Hayw.) 144, 148 (N.C. Super. Ct. 1795) (indicating that "such bonds are not suable by executors generally").

[37] *Supra* note 32 and accompanying text.

[38] *See infra* Part I.D (describing a suit brought by Dunant against Perroud in the Pennsylvania Supreme Court on September 17, 1796); 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 719 (Maeva Marcus ed., 1998) [hereinafter DOCUMENTARY HISTORY] (referring to *Yard v. Ship Cassius*, a case initiated on August 5, 1795 in the federal district court of Pennsylvania). These are the only six civil suits that are mentioned in Attorney General opinions and related diplomatic correspondence from this period. While it is possible that there were other civil suits, only these six appear to have prompted requests for the Executive to intervene.

[39] When a plaintiff filed a complaint, a court would issue a writ of *capias ad respondendum* authorizing the sheriff to arrest the defendant, particularly if the defendant posed a flight risk. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 281–83 (4th ed. 1771).

would be a safe transit point en route back to France.[40] He was mistaken.

Prior to fleeing Guadeloupe, Collot allegedly had abused his authority as Governor to confiscate the American brig *Kitty*, owned by one of the wealthiest men in America, Philadelphia businessman Stephen Girard.[41] The French privateer the *Intrepid* had attempted unsuccessfully to claim the *Kitty* as a prize of war. Although a competent Court of Admiralty found that the *Kitty* lawfully belonged to Girard, the *Kitty*'s captain, William Waters, reported to Girard that Collot and his intendent-general Voisin, "upon principles of pure republicanism, by their own act," condemned the *Kitty* and its cargo, leaving Waters without redress.[42]

Girard complained to Citizen Le Blanc, Secretary to the French Legation in the United States, and alleged that Collot and Voisin had indulged in an "infamous and piratical character . . . both towards my brig *Kitty* and her cargo, and towards the Captain and crew of the said vessel" by allowing them to be robbed "down to their last shirt."[43] When Captain Waters made it back to Philadelphia, he filed suit against Collot and Voisin in the Pennsylvania Supreme Court for consequential damages, resulting in bail of 800 pounds.[44]

In response to Captain Waters's action, and in accordance with applicable procedures, the Pennsylvania Supreme Court issued a writ of *capias* authorizing the sheriff of Philadelphia County to arrest

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[40] Letter from Executive Council to the French Minister of Foreign Affairs (June 3, 1794), *in* 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1903, CORRESPONDENCE OF THE FRENCH MINISTERS TO THE UNITED STATES, 1791–1797, at 362 (Frederick J. Turner ed., 1903) [hereinafter CORRESPONDENCE], *available at* http://www.archive.org/stream/correspondenceof00turnrich#page/362.

[41] *See* Affidavit of William Waters at 2, Waters v. Collot, 2 Yeates 26 (Pa. 1795) (on file with the *New York University Law Review*) (referring to the capture of the *Kitty* by the privateer schooner *Intrepid* commanded by Joseph Andre); *see also* GREG H. WILLIAMS, THE FRENCH ASSAULT ON AMERICAN SHIPPING, 1793–1813: A HISTORY AND COMPREHENSIVE RECORD OF MERCHANT MARINE LOSSES 212 (2009) (recording losses by the *Kitty*).

[42] 2 Yeates at 27; *see also* Affidavit of William Waters, *supra* note 41 (providing an account of Collot's actions in condemning the *Kitty*); Letter from William Waters to Stephen Girard (Feb. 9, 1794), *quoted in* 1 JOHN BACH MCMASTER, THE LIFE AND TIMES OF STEPHEN GIRARD: MARINER AND MERCHANT 230–31 (1918), *available at* http://www.archive.org/stream/cu31924092517014/cu31924092517014_djvu.txt (same).

[43] MCMASTER, *supra* note 42, at 263; *see also* Letter from Stephen Girard to Edmund Randolph, Sec'y of State (June 6, 1794) (on file with the *New York University Law Review*) (complaining about the treatment of Captain Waters and his crew).

[44] Waters v. Collot, 2 Yeates 26, 26 (Pa. 1795); *see also* Letter from P.A. Adet, Minister Plenipotentiary of the French republic, to French Minister of Foreign Relations (Mar. 17, 1796), *in* 2 CORRESPONDENCE, *supra* note 40, at 840 (describing the lawsuit).

Collot and Voisin so that they could not evade the legal proceedings.[45] The day after General Collot arrived in Philadelphia en route to France, he was arrested "in the middle of the street" and compelled to respond to the suit.[46] Collot complained about the suit to French Minister Joseph Fauchet who, in turn, wrote to U.S. Secretary of State Edmund Randolph.[47]

Randolph referred Fauchet's letter to the U.S. Attorney General, William Bradford.[48] In the meantime, Randolph, who had previously served as Attorney General, wrote to Minister Fauchet:

> Were it a question, upon which I was to decide, I should conceive that the action cannot be maintained against [Collot]. It seems to be allowable by law, that process may issue from our courts against any person not of the Diplomatic corps, or under their protection; and the discussion, whether he be liable or not for damages, will be made, when the cause shall be brought on for trial[.][49]

While Randolph seemed personally sympathetic to Fauchet's objection that the action should not be "maintained," he indicated that the suit against Collot seemed "allowable by law" because Collot was not a diplomatic official, meaning that a court would have to determine Collot's liability, or lack thereof, at trial.[50]

Attorney General Bradford issued his opinion one week later.[51] He acknowledged Fauchet's request that the proceedings against Collot "be stopped" on the ground that "the cause of action arose from the seizure and condemnation of a vessel, made at Guadeloupe, under the authority of the governor, by virtue of the powers vested in him as such."[52] However, Bradford, who had previously served as a

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[45] Writ issued by Thomas McKean, Chief Justice of the Pa. Supreme Court, in a plea of trespass on the case, signed by prothonotary Edward Burd (Apr. 19, 1794), *available at* Pa. State Archives, RG-33, Records of the Sup. Ct. of Pa., E. Dist., Capias Papers, Sept. Term 1794, Part 5, #81 (on file with the *New York University Law Review*).

[46] V. Collot, *Mon Arrestation dans les Etats-Unis de L'Amerique pour fait de mon Administration*, *in* PRÉCIS DES EVÉNEMENTS QUI SE SONT PASSÉS À LA GUADELOUPE PENDANT L'ADMINISTRATION DE GEORGE HENRY VICTOR COLLOT, DEPUIS LE 20 MARS, 1793 JUSQU'AU 22 AVRIL, 1794, PRÉSENTÉ À LA CONVENTION NATIONALE 35, 35 (1795) [hereinafter PRÉCIS DES EVÉNEMENTS] (author's translation).

[47] *See* Letter from P.A. Adet to Minister of Foreign Relations (Mar. 17, 1796), *supra* note 44 (referring to Fauchet's letter of June 4, 1794). I have not located a copy of the June 4 letter.

[48] Letter from Edmund Randolph to U.S. Attorney General [William Bradford] (June 9, 1794), *in* 6 DOMESTIC LETTERS OF THE DEPARTMENT OF STATE 350 (1943) [hereinafter DOMESTIC LETTERS], *available at* http://www.footnote.com/title_72/domestic_letters_of_the_department_of/.

[49] Letter from Edmund Randolph to Joseph Fauchet, Minister Plenipotentiary of the French Republic (June 8, 1794), *in* 6 DOMESTIC LETTERS, *supra* note 48, at 349.

[50] *Id.*

[51] Suits Against Foreigners, Case of Collot, 1 Op. Att'y Gen. 45 (1794).

[52] *Id.* at 46.

judge on the Pennsylvania Supreme Court, indicated that this did not release Collot from the obligation to give bail:

> From this state of facts, it does not appear to me that the defendant has any legal claim to be privileged from arrest; nor have the judges, on that ground, any power to stay the proceedings against him, without the consent of the plaintiff. With respect to his suability, he is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts. If the circumstances stated form of themselves a sufficient ground of defence, they must, nevertheless, be regularly *pleaded*; and the court will not hear them upon motion, for the purpose of quashing the writ or setting aside the arrest.[53]

This part of Bradford's response was clear. To the extent that the question was Collot's "suability," the answer was that Collot could not claim immunity from legal process once he had come "within the jurisdiction" of a U.S. court by entering the United States. As Randolph had anticipated, Bradford indicated that the judges could not "quash[ ] the writ" or "set[ ] aside the arrest";[54] Collot would have to plead his defense.

Attorney General Bradford then went on to address Fauchet's concern that, by obliging him to give bail, the United States was preventing Collot from returning to France. He advised Fauchet that, as a procedural matter, Collot could probably "be relieved from" the obligation to give bail "by citing the plaintiff . . . to show his cause of action."[55] Bradford explained:

> I am inclined to think, if the seizure of the vessel [the *Kitty*] 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; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation.[56]

In this part of his opinion, Bradford appears to have been offering Collot some free legal advice. In contemporary terms, Bradford opined that, while Collot could not claim immunity from legal process, he could invoke the official nature of his action as an affirmative defense.

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53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

As a practical matter, Bradford expressed confidence that, if the Pennsylvania Supreme Court discharged Collot from the obligation to give bail, the plaintiff "would probably prosecute his suit no further."[57] However, he insisted that the allocation of adjudicatory authority between the United States and France in determining Collot's liability was an issue for the Pennsylvania court—not the executive branch—to resolve. He further insisted that "Mr. Collot must defend himself by such means as his counsel shall advise."[58]

Collot was irate about this result, and at what he perceived as French Minister Fauchet's inadequate protests on his behalf.[59] He found the whole affair "as indecent as it was ridiculous," and argued that he did not owe any explanation of his conduct to a U.S. tribunal.[60] On September 13, 1794, consistent with Bradford's advice, Collot's attorney William Lewis, a former judge, moved for Waters to show cause why Collot should not be discharged on common bail—a promise to appear before the court at a later date.[61]

The litigation proceeded with what French Minister Pierre-Auguste Adet, who officially replaced Fauchet in June 1795, disparagingly referred to as "les lenteurs ordinaries des Tribunaux Américains": the typical slowness of American courts.[62] Jasper Yeates, an associate justice of the Pennsylvania Supreme Court, reported an opinion issued by that court in December 1795—more than a year after Collot filed his motion to show cause.[63] Alexander Dallas reported a similar opinion.[64] Yeates's version of the opinion includes counsel's arguments, which were presented by preeminent

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57 *Id.*

58 *Id.*

59 PRÉCIS DES EVÉNEMENTS, *supra* note 46, at 36–37.

60 *Id.* at 36.

61 Motion of W. Lewis, Waters v. Collot, 2 Yeates 26 (Pa. 1795), *available at* Pa. State Archives, RG-33, Records of the Pa. Sup. Ct., E. Dist., Appearance and Continuance Docket, Jan.–Dec. 1795, at 294 (on file with the *New York University Law Review*). Collot avoided jail by giving a bail bond in the sum of 800 pounds, arranged for by the French government. Letter from P.A. Adet to Minister of Foreign Relations (Mar. 17, 1796), *supra* note 44, at 840–41; *see also* RG-33, Records of the Pa. Sup. Ct., E. Dist., Continuance Docket (for Phila. Cnty.), Dec. 1795–Dec. 1796, at 113 (on file with the *New York University Law Review*) (recording the bail).

62 Letter from P.A. Adet to Minister of Foreign Relations (Mar. 17, 1796), *supra* note 44, at 841.

63 *Waters*, 2 Yeates 26.

64 Waters v. Collot, 2 U.S. (2 Dall.) 247 (Pa. 1796). It is unclear whether Dallas's version is a separate but substantively similar opinion or simply the delayed re-reporting of the earlier opinion. Unfortunately, although docket entries from the case have been preserved, written pleadings do not appear to have survived. *See* Letter from Jonathan R. Stayer, Supervisor of Reference Servs., Pa. State Archives, to author (Sept. 7, 2010) (on file with the *New York University Law Review*) (detailing unsuccessful searches).

jurists of the day: Peter Stephen DuPonceau and Alexander Dallas for Captain Waters, and William Lewis and Jared Ingersoll for General Collot. The Executive was not separately represented. It appears that the Pennsylvania justices learned of Attorney General Bradford's opinion when Collot's attorneys read it to them in court.[65]

Captain Waters's main argument was that Collot had acted *ultra vires* in condemning the ship and cargo, and that "[w]hat he did, was in abuse of the authority delegated to him by the late [French] king's commission."[66] He argued that Collot had acted "for the benefit of a few privateers men" rather than "on the ground of state necessity."[67] Waters distinguished Collot's unlawful act in condemning the *Kitty* from acts that Collot might have been authorized to perform in his "political capacity." Waters insisted: "A governor or public officer may be sued for contracts or outrages done by them as individuals in an other [sic] country. Their exemption from suits is merely on account of the exercise of their public functions, and for what they do in their political capacity."[68] Waters's reference to "exemption from suits," as reported by Yeates, appears to refer to the lack of personal liability for officially authorized acts. Under this theory, an act exceeding the defendant's lawful authority should be treated as an act done by a private individual—not as the valid exercise of a public function.[69]

In support of his argument that Collot could be held personally liable for his actions and should not be discharged on common bail, Waters relied on a 1774 English case and distinguished two other English cases.[70] These cases form part of the common law foundation of official immunity.

The central English precedent was *Mostyn v. Fabrigas*, a case brought by Anthony Fabrigas, a native Minorcan, against John

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[65] *See Waters*, 2 Yeates at 28 (indicating that "the defendant also read therefrom the opinion of Mr. Bradford, late attorney general of the United States, as given to the secretary of State"). Bradford had died in office on August 23, 1795. *See* U.S. Dep't of Justice, *United States Attorneys General: William Bradford*, http://www.justice.gov/ag/aghistpage.php?id=1 (last visited Apr. 14, 2012).

[66] *Waters*, 2 Yeates at 28.

[67] *Id.*

[68] *Id.*

[69] This theory has echoes in later jurisprudence under 42 U.S.C. § 1983 (2006). *See, e.g.*, Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987) (examining U.S. treatment of claims to immunity by executive, legislative, and judicial officers sued for their allegedly wrongful acts).

[70] *Waters*, 2 Yeates at 28 (citing Unwin v. Wolseley, (1787) 99 Eng. Rep. 1314 (K.B.); 1 Term Rep. 674; Macbeath v. Haldimand, (1786) 99 Eng. Rep. 1036 (K.B.); 1 Term Rep. 172; Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowper 161).

Mostyn, the Governor of Minorca (a British possession).[71] Fabrigas alleged that Governor Mostyn had assaulted and falsely imprisoned him in Minorca. Mostyn presented an affirmative defense that he had acted in the exercise of his authority as governor. The case went to trial, and the jury found for Fabrigas. Governor Mostyn then moved unsuccessfully for a new trial. Lord Chief Justice De Grey ruled that Mostyn was personally liable for the injury to Fabrigas because he had acted outside the scope of his lawful authority.[72] Mostyn appealed.

On appeal, Lord Mansfield, in a per curiam opinion, confirmed that "prima facie the [English] court has jurisdiction,"[73] and that the trial court had properly required that Mostyn "set forth his commission [as governor] as special matter of justification," which Mostyn had failed to do.[74] Waters cited this precedent in an attempt to persuade the Pennsylvania Supreme Court that Collot was personally liable for condemning the *Kitty* because, like Mostyn, he had acted outside the scope of his lawful authority as governor.

Waters then distinguished two English cases that had found defendant officials not personally liable. *Macbeath v. Haldimand* involved a claim brought by George Macbeath for the satisfaction of several bills of exchange drawn upon General Haldimand, the Governor of Quebec.[75] Macbeath had furnished certain articles at the request of the Lieutenant-Governor for use at a fort on Lake Huron, in the British colony of Canada. When Macbeath sought compensation from Haldimand, Haldimand refused payment on some of the bills. The question was whether Macbeath could hold Haldimand personally liable for payment, even though the bills were drawn on Haldimand "as Governor and Commander in Chief."[76]

The Court of King's Bench, in another opinion by Lord Mansfield, held that Haldimand could not be held personally liable for the debt because "it was notorious that [he] did not *personally* contract."[77] Recourse, if any, lay solely with the English Treasury. Waters might have argued that this case was inapplicable because Haldimand, unlike Collot, had been acting solely as the commercial agent of Quebec.[78]

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[71] *Mostyn*, 98 Eng. Rep. at 1021–22; 1 Cowper at 162.

[72] *Id.* at 1026; 1 Cowper at 169 ("[B]ut the governor knew he could no more imprison him for a twelvemonth . . . than that he could inflict the torture.").

[73] *Id.* at 1027; 1 Cowper at 172.

[74] *Id.*

[75] *Macbeath*, 99 Eng. Rep. at 1036–38; 1 Term Rep. at 172–75.

[76] *Id.* at 1038; 1 Term Rep. at 175.

[77] *Id.* at 1040; 1 Term Rep. at 180.

[78] *See* Waters v. Collot, 2 Yeates 26, 28 (Pa. 1795) (indicating that plaintiff attempted to distinguish *Macbeath v. Haldimand*).

Waters also distinguished *Unwin v. Wolseley*, in which the Court of King's Bench relied on its decision in *Macbeath* to find that "governors or commanders in chief [do not] make themselves personally liable by contracts which they enter into on the part of Government."[79] Waters argued that both of these cases were distinguishable because Collot had not been exercising a lawful public function as governor when he condemned the *Kitty* and its cargo and therefore could be held personally liable for the resulting loss.[80]

Collot, of course, disputed these submissions and argued for discharge on common bail. He insisted that, once his authority over the *Kitty* and its cargo had been established, it was inappropriate for the Pennsylvania court to "take on themselves to judge of the regularity of his proceedings."[81] He appeared to accept that the court could properly inquire into "[w]hether a particular matter was within his commission as governor,"[82] but he denied the court's authority to determine "whether he ha[d] abused" that commission.[83]

Jared Ingersoll, who "asserted himself as counsel for the minister of France,"[84] supported Collot's arguments for discharge on common bail. Ingersoll "insisted[ ] that the defendant, as late govenor [sic] of an island, part of the dominions of an independent state, was not bound to give bail for his official acts, before a foreign tribunal."[85] He invoked Lord Mansfield's statement in *Mostyn* that, if Governor Mostyn had in fact "acted right according to the authority with which he [was] invested," then "the court might have considered it as a sufficient answer"[86] to Fabrigas's complaint. Ingersoll further argued that France—not Pennsylvania—was the proper forum for adjudicating claims regarding the *Kitty*, based on the admiralty law principle that the lawfulness of the condemnation of a ship as a prize can only be challenged in the captor's courts.[87]

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[79] Unwin v. Wolseley, (1787) 86 Eng. Rep. 1314 (K.B.) 1317; 1 Term Rep. 674, 678; *see id.* at 1317; 1 Term Rep. at 678–79 (holding that "the defendant only meant to contract as the servant of government, and not to bind himself personally").

[80] *See Waters*, 2 Yeates at 28 (indicating that the plaintiff interpreted *Macbeath v. Haldimand* and *Unwin v. Wolseley* as providing for a very narrow "exemption from suits"); *id.* at 30 (arguing that Collot and Voisin did not have judicial authority).

[81] *Id.* at 28.

[82] *Id.* at 29.

[83] *Id.*

[84] *Id.* The French minister at that time was Pierre-Auguste Adet.

[85] *Id.*

[86] Mostyn v. Fabrigas, (1774) 104 Eng. Rep. 1021 (K.B.) 1028; 1 Cowper 161; *see Waters*, 2 Yeates at 29 (citing Lord Mansfield as "lay[ing] down the rule" in *Mostyn*, 104 Eng. Rep. at 1028; 1 Cowper at 173).

[87] *See Waters*, 2 Yeates at 29 ("If the plaintiff has been injured, his remedy must be by an application to the executive of France, or by a pursuit of the appeal there . . . ."). For support, Ingersoll invoked *Yard v. Davis*. 6 DOCUMENTARY HISTORY, *supra* note 38, at 719

Ingersoll also invoked the principle of reciprocity and raised the specter of proceedings against U.S. officials in foreign courts:

> The present governor of this state [Pennsylvania] has sent soldiers on board of French privateers, under a requisition from the executive of the United States, to preserve the rights of neutrality. Will it be asserted, that after his administration is expired, he could be prosecuted therefor in the courts of France?[88]

In response to this argument, Captain Waters's attorneys presented what they deemed a "more analogous" scenario and indicated that, if the governor of Pennsylvania "should forcibly obstruct the judgment of this court on a foreign attachment," the governor would certainly "be responsible at the suit of the injured party, in another country, where there was the semblance of distributive justice."[89] Each side thus attempted to support its position by choosing an analogy that reflected its characterization of Collot's conduct in condemning the *Kitty*: a lawfully authorized attempt to preserve and implement recognized rights, on the one hand, or a wanton and unlawful disregard for the judgment of a properly constituted tribunal, on the other.

In the end, the question for the Pennsylvania Supreme Court was whether Captain Waters had shown "[s]ufficient reasonable ground" to bring the case before a jury, so that the jury could determine "how far the defendant can justify his conduct, as an official character."[90] The court, without opining on the merits of the suit, determined that Waters had satisfied this burden.[91] When Alexander Dallas reported this case in 1796, he summarized the winning argument that he and DuPonceau had made on behalf of Waters: "Whether the present aggression was a private, or an official, act, is the gist of the controversy; and, on that point, the plaintiff is entitled to a trial; which, however, he is not likely ever to obtain with effect, if the defendant, a traveller, is discharged on common bail."[92] Like Yeates, Dallas reported that the Pennsylvania Supreme Court found that Waters had met his burden to show cause why Collot should not be discharged on

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(referring to *Yard v. Davis*). For a discussion of *Yard v. Davis*, see *infra* Part I.C. In response to Ingersoll's argument that France was the appropriate forum, Dallas and DuPonceau countered on behalf of Waters that Collot should be considered an emigrant to the United States. *Waters*, 2 Yeates at 29. With respect to the scope of Collot's authority, they argued that the King of France did not, and could not, endow Collot with judicial authority to condemn ships or with jurisdiction over prize cases. *Id.* at 30. Finally, they argued that discharging Collot would leave Waters without a remedy and undermine the purpose of endowing U.S. courts with jurisdiction over cases involving U.S. ships. *Id.* at 30.

88 *Waters*, 2 Yeates at 29.

89 *Id.* at 30.

90 *Id.* at 31.

91 *Id.*

92 Waters v. Collot, 2 U.S. (2 Dall.) 247, 248 (1796).

common bail. Dallas also reported the court's admonition that: "[I]t must not be understood, that, by this decision, we give any countenance to an opinion, that [Collot] is ultimately liable."[93] In order to avoid liability, Collot would be required to appear and defend himself in court.

As a result of the Pennsylvania Supreme Court's decision, Collot was required to remain in the United States to avoid forfeiting his bail. Fauchet's successor Adet described the court's 1796 opinion as "*ridicule et contradictoire*"—ridiculous and contradictory—because it obliged Collot to pay the claimed damages (in the form of forfeited bail) unless he could prove that he had been lawfully authorized as governor to confiscate the *Kitty* and its cargo.[94] The Executive's refusal to intervene to stop the case infuriated Adet,[95] and he doubted the Attorney General's good faith.[96] Perhaps for this reason, Adet felt no compunction about profiting from Collot's unexpected sojourn in the United States by sending him on notorious reconnaissance missions in the Ohio and Mississippi River valleys.[97]

In the spring of 1797, Adet left the United States. French consul-general Joseph Létombe wrote to Secretary of State Timothy Pickering, Randolph's successor, about Collot's continued inability to leave the United States.[98] Létombe also provided Pickering with an official certification from the French Directory that Collot had acted within the scope of his lawful authority as Governor when he confiscated the *Kitty*, which Adet previously had refused to do.[99] In the end, the certification—and the case—never made it to a jury. On May 29,

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[93] *Id.*

[94] Letter from P.A. Adet to Minister of Foreign Relations (Mar. 17, 1796), *supra* note 44, at 841.

[95] *See id.* at 842 (questioning the Executive's lack of power to intervene). Adet also was upset about the Executive's refusal to intervene in the *Cassius* case. *See id.* (expressing displeasure at the Executive's similar inaction with respect to the *Cassius*). For more information on the *Cassius* case, see *infra* Part I.C.

[96] *See* Letter from P.A. Adet to Minister of Foreign Relations (Mar. 17, 1796), *supra* note 44, at 842 (arguing that the Attorney General, by not petitioning the court, failed to show good will).

[97] *See id.* at 842–43 (planning to take advantage of Collot's prolonged visit by sending him on a special mission). Secretary of State Timothy Pickering called Collot an "intriguer and bitter enemy to this country." Smith, *supra* note 28, at 93. For more information on Collot's reconnaissance activities, see Durand Echeverria, *General Collot's Plan for a Reconnaissance of the Ohio and Mississippi Valleys*, 9 WM. & MARY Q. 512, 512 (1952).

[98] *See* Letter from Letombe, French Consul-General, to Delacroix, French Minister of Foreign Relations (May 29, 1797), *in* 2 CORRESPONDENCE, *supra* note 40, at 1022–23 (referring to Collot's "detention . . . on bail" in the United States).

[99] There is a reference to a declaration by the Directory and to a certificate from Mr. Ingersoll, in Letter from Létombe, French Consul-General, to Talleyrand, French Minister of Foreign Relations (Nov. 12, 1797), *in* 2 CORRESPONDENCE, *supra* note 40, at 1079. I have not located a copy of the certificate.

1797, three years after Collot was arrested in Philadelphia, Pickering finally informed Létombe that "the friend of the plaintiff in the suit has assured me that he will immediately withdraw it, and the General will be discharged from his bail."[100] Pickering's letter does not identify the "friend" by name, but it could well have been the *Kitty*'s owner, Stephen Girard, who was facing increased pressure to abandon the suit.[101] It is also possible that the French government's official certification of Collot's authority lessened Captain Waters's confidence that he could prevail at trial. Peter Stephen DuPonceau, representing Waters, signed a discontinuance on June 29, 1797.[102]

Secretary of State Pickering opined that the protracted nature of the proceedings was in part Collot's own fault, since "the General refused . . . to say anything more than that he was, at the time [of the seizure], the *Governor of Guadeloupe*: as though a Governor could commit no unlawful act for which he would be personally responsible."[103] Pickering's statement acknowledges the compatibility of an official position with personal liability, but it does not elaborate on the relationship between the two. Because Waters withdrew the suit, the sufficiency of the French Directory's certification as "proof" of Collot's authority was never tested in court.

The correspondence and court proceedings in *Waters v. Collot* illustrate the prevailing understanding that foreigners who were not diplomatic officials did not enjoy absolute immunity from legal process. Instead, they could present an affirmative defense at trial that they were not personally liable for the plaintiff's injuries because they had acted within the scope of authority conferred by a foreign government. French Minister Adet criticized this approach in his correspondence and noted the tension implicit in the idea that the exercise of governmental authority could shield a foreign official from personal

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[100] Letter from Timothy Pickering to Mr. Letombe, Consul General of the French Republic (May 29, 1797), *in* 10 DOMESTIC LETTERS, *supra* note 48, at 51–52.

[101] For example, Ingersoll wrote to Girard, warning of French retaliation and urging, "Pray think whether it is worth your while to prosecute the suit." E-mail from Iren Snavely, Nat'l Endowment for the Humanities Archivist, Am. Philosophical Soc'y, to author (Feb. 3, 2011, 08:12) (on file with the *New York University Law Review*) (referring to Ingersoll's letter to Girard and containing the quoted language).

[102] 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 the *New York University Law Review*).

[103] Letter from Timothy Pickering to Mr. Letombe (May 29, 1797), *supra* note 100, at 52; *see also* Letter from Letombe, French Consul General, to Delacroix, French Minister of Foreign Relations (July 25, 1797), *in* 2 CORRESPONDENCE, *supra* note 40, at 1054 (conveying Collot's good news); Letter from Timothy Pickering to Mr. Letombe, Consul General of the French Republic (July 26, 1797), *in* 10 DOMESTIC LETTERS, *supra* note 48, at 90–91 (confirming discontinuance of Waters's suit against Collot).

liability, but that the foreign official bore the burden of proving the scope of his authority in a U.S. court.[104]

Waters v. Collot also illustrates the prevailing understanding of the appropriate role of the executive branch. Despite the protracted proceedings and persistent French objections, the executive branch repeatedly disclaimed any authority to instruct the court to dismiss the case. That said, the Executive was not entirely passive; it communicated information to the French authorities, managed their expectations, and may have played an informal role in encouraging Stephen Girard and Captain Waters to abandon the claim.

B. Rose v. Cochrane

Less than six weeks after conveying his opinion on the *Waters v. Collot* case to French Minister Fauchet, Attorney General Bradford was asked to opine on the "suability" of another foreigner who was not a diplomatic official. The defendant was Alexander Cochrane, previously captain of the British navy ship the *Carolina* and presently captain of the *Thetis*.[105] Captain Cochrane allegedly had taken enslaved people seeking freedom aboard the *Carolina* during the evacuation of Charleston in 1782.[106] When the *Thetis* came into port in New York under Captain Cochrane's command in 1794, Cochrane was arrested pursuant to a writ of *capias* in a suit for damages brought in state court by Alexander Rose, who asserted ownership of one of the enslaved men who had fled aboard the *Carolina*.[107] Once again, Attorney General Bradford advised that, "with respect to his

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[104] *See supra* notes 94–95 and accompanying text (describing irate letters from Adet).

[105] Letter from George Hammond to Edmund Randolph (July 25, 1794), British National Archives, F.O. 5/5 at 229 (manuscript copy on file with the *New York University Law Review*), *reprinted in* U.S. National Archives, Notes from the British Legation, NS 1323, M.50 Roll 1.

[106] *Id.* Thousands of enslaved people fled in this manner. *See generally* SIMON SCHAMA, ROUGH CROSSINGS: BRITAIN, THE SLAVES AND THE AMERICAN REVOLUTION (2006) (chronicling the exodus of American slaves seeking emancipation to British-controlled territory during the Revolutionary War).

[107] Letter from George Hammond to Edmund Randolph (July 25, 1794), *supra* note 105. Hammond's letter refers to the plaintiff as "a Citizen of the state of South Carolina named Rose." *Id.* Although I have not been able to locate the pleadings in this case, an Alexander Rose was the plaintiff in thirteen cases brought in New York state courts between 1793 and 1798. *See* Results from New York County Clerk Judgment Index Retrieval System from Bruce Abrams, Div. of Old Records, N.Y. Cnty. Clerk's Off. to author (on file with the *New York University Law Review*) (listing computerized search results for cases brought by plaintiff Alexander Rose). Alexander Rose of Charleston, South Carolina (1731–1801) was "a prominent merchant and planter," as recounted in BEN LACY ROSE, ALEXANDER ROSE OF PERSON COUNTY NORTH CAROLINA AND HIS DESCENDANTS 211 (1979). It is thus very likely, although not certain, that Alexander Rose was the plaintiff in this case.

suability, [Cochrane was] on a footing with every other foreigner . . . who comes within the jurisdiction of our courts."[108]

The British Minister to the United States, George Hammond, complained about the suit to Secretary of State Randolph. Hammond wrote:

> Captain Cochrane, though fully convinced of the frivolity and injustice of this action, and of the nature of the motives by which its institution was dictated, was under the necessity previously to his departure for sea, and in order to prevent the seizure of his person, of procuring a gentleman of this City [New York] to become his bail.[109]

Hammond further alleged that he had "reason to believe, from the information I have received, that [the suit] is a part of a preconcerted plan formed by some individuals of this Country, for the purpose of insulting and harassing the officers in his Majesty's service, who may occasionally arrive in ports of the United States."[110] He urged Randolph to secure "the interposition of the general government" in order to frustrate this broader plan, "which if carried into execution, may eventually lead to the most serious consequences."[111]

Randolph referred Hammond's letter to Bradford and sought his opinion on the *Rose v. Cochrane* suit. Bradford replied in terms virtually identical to those in his previous opinion about *Waters v. Collot*:

> The Attorney General is 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, or the government any authority to interfere, so as to stay the proceedings against him, without the consent of the plaintiff. He is, with respect to his suability, on a footing with every other foreigner (not a public minister) who comes within the jurisdiction of our courts, and he must answer or demur to the allegations against him.[112]

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[108] Suits Against Foreigners, Case of Cochran[e], 1 Op. Att'y Gen. 49, 50 (1794).

[109] Letter from George Hammond to Edmund Randolph (July 25, 1794), *supra* note 105. On the circumstances surrounding Captain Cochrane's arrival in New York, see Letter from George Clinton to George Hammond (July 30, 1794), British National Archives F.O. 5/5 at 236 (on file with the *New York University Law Review*); Letter from George Hammond to Edmund Randolph (July 30, 1794), British National Archives (manuscript copy on file with the *New York University Law Review*), *reprinted in* U.S. National Archives, Notes from the British Legation, NS 1323, M.50 Roll 1.

[110] Letter from George Hammond to Edmund Randolph (July 25, 1794), *supra* note 105.

[111] *Id.*

[112] *Case of Cochran[e]*, 1 Op. Att'y Gen. 49, 50 (1794). Randolph transmitted this opinion to Hammond on August 11. Letter from Edmund Randolph to George Hammond (Aug. 11, 1794), *in* 7 DOMESTIC LETTERS, *supra* note 48, at 153.

Hammond specifically alleged that the suit violated Article VI of the Treaty of Paris,[113] which had ended the Revolutionary War. According to Bradford, even if Cochrane had a defense based on the treaty, he "must nevertheless appear and plead it in the usual course of judicial proceedings."[114] Bradford emphasized that any complaints about the irregularity of Cochrane's arrest should be addressed to the courts, not the Executive. He also remained firm that Cochrane's objection to the suit should be resolved through judicial, not diplomatic, channels.[115]

Secretary Randolph transmitted Bradford's letter to Minister Hammond on July 28, 1794.[116] Hammond was not appeased.[117] He insisted that Article VI of the Treaty of Paris provided that "there shall be *no future prosecutions commenced*" against any persons for their role in the war, and that this provision constituted a "stipulation of amnesty" for Captain Cochrane for his conduct during the evacuation of Charleston.[118] He reiterated that suits brought in violation of the treaty could not "fail to be productive of the most dangerous consequences" for Anglo-American relations.[119]

Attorney General Bradford responded by issuing a second opinion that focused specifically on Hammond's treaty argument. Bradford indicated that he had examined Article VI and concluded that it did not apply. He explained that the term prosecution "imports a suit against another in a *criminal* cause."[120] He distinguished a prosecution initiated by the government, which he conceded would be barred by Article VI, from a civil suit such as the one against Cochrane, which was initiated by a private party.[121] Because a civil suit "may turn out to be free from exception,"[122] Bradford denied that the government had any power or reason to "prevent a citizen from commencing" such a suit.[123] He continued:

> If the minister of his Britannic Majesty will have the goodness to point out in what manner the executive authority of England could

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113 Letter from George Hammond to Edmund Randolph (July 25, 1794), *supra* note 105.

114 *Case of Cochran[e]*, 1 Op. Att'y Gen. 49, 50 (1794).

115 *Id.*

116 Letter from Edmund Randolph to George Hammond (July 28, 1794), British National Archives, F.O. 5/5 at 231 (on file with the *New York University Law Review*).

117 Letter from George Hammond to Edmund Randolph (July 30, 1794), *supra* note 109.

118 *Id.*

119 *Id.*

120 *Case of Cochran[e]*, 1 Op. Att'y Gen. 49, 51 (1794).

121 *Id.*

122 *Id.*

123 *Id.*

> repress the commencing of such suits in that country, I shall cheerfully revise my opinion; the laws in both countries being, on this point, nearly the same.[124]

Bradford's reliance on the analogy to English law underscores that he was articulating a principle of executive non-interference in judicial matters, not a principle of federal non-interference in state matters, as some have surmised.[125] While Hammond was corresponding with Randolph, he also sought advice from Lord Grenville, the British Secretary of State for Foreign Affairs. Grenville forwarded Hammond's letter and enclosed materials to British crown advocate Sir William Scott.[126] Scott agreed with Hammond's view that the peace treaty provision barring prosecutions of individuals involved in the war should be interpreted in a "liberal & favourable spirit" to include civil suits.[127] However, he acknowledged that the expression "[p]rosecutions" was "sufficiently loose and equivocal to be, at least, capable of receiving [a stricter] [i]nterpretation."[128] He also affirmed Bradford's understanding that neither the British nor the U.S. Executive had the authority to interfere in a civil suit:

> But it is not to be denied that a private Subject of either country has a Right to take the opinion of his National Courts of Justice upon this Question of Interpretation, and that the Executive government in either has not a Right to interfere to prevent him from so doing.[129]

In Scott's view, the question of treaty interpretation was ultimately a matter for the courts, and Bradford's strict construction of the provision barring "prosecutions" was not so far-fetched as to constitute a treaty violation by the United States. Consequently, it was up to the defendant to enter a "defensive Plea"—not for the Executive to direct the suit's termination.[130]

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124 *Id.* at 51–52.

125 *See* Bradley & Goldsmith, *supra* note 9, at 142 n.21 (suggesting that Bradford "[p]robably" disclaimed authority to interfere in the state court proceedings because "immunity for foreign officials had the status in the United States of general common law rather than federal law").

126 *See* Letter from Sir William Scott to Lord Grenville (Dec. 13, 1794), *in* 1 LAW OFFICERS' OPINIONS TO THE FOREIGN OFFICE 1793–1860, at 256, 256 (Clive Parry ed., 1970) (responding to Lord Grenville's request for his opinion about whether civil suits against British captains violated the peace treaty).

127 *Id.* at 257.

128 *Id.* at 257–58.

129 *Id.*

130 *Id.* at 259. Scott characterized some of the suits described by Hammond as "improper attempts of Individuals to convert a Question of Prize into a Question of civil debt," which could not "be deemed Violations of the Law of Nations" unless the courts in which the civil claims were brought did not dismiss the proceedings "as soon as ever the real nature of them was fairly disclosed." *Id.* In accordance with the law of prize, Scott

It is unclear what became of the claim in *Rose v. Cochrane* because no court records appear to have survived.[131] Other correspondence regarding Captain Cochrane during this period refers to the highly charged accusation that Cochrane had impressed American citizens on board the *Thetis*, forcing them to work in the service of the British navy.[132] Rose's lawsuit did not prevent Cochrane from resuming his pursuit of enemy ships in order to capture and claim them as prizes.[133]

The correspondence regarding *Rose v. Cochrane* illustrates that, during the late eighteenth century, legal authorities in Britain and the United States agreed that the executive branch lacked authority to interfere with the ability of individuals to bring civil claims against foreigners who were not diplomatic officials. This is not to say that private litigation was insulated from foreign relations concerns. As Minister Hammond's letters indicate, the prospect that British captains who landed in the United States could be subject to arrest in civil suits strained diplomatic relations, leading Hammond to argue unsuccessfully that such suits were precluded by treaty.

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opined that a U.S. court should dismiss a civil suit upon a defensive plea if the suit involved the capture of a ship that had already been adjudicated as a prize by a properly constituted admiralty court. *Id.*

131 Archives searched include Records of the New York Supreme Court of Judicature, see E-mail from Bruce Abrams, Division of Old Records, N.Y. Cnty. Clerk's Off., to author (Nov. 24, 2010, 07:58) (on file with the *New York University Law Review*), describing failure to locate records in *Rose v. Cochrane*; microfilm records of the U.S. District Court and U.S. Circuit Court for the Southern District of New York (as it was then called); E-mail from Elizabeth Pope, Archivist, Nat'l Archives & Records Admin., to author (July 29, 2011, 08:33) (on file with the *New York University Law Review*); and digests of reported state and federal cases at the New York State Library. The New York State Archives do not have any common law trial court records prior to 1799. E-mail from N.Y. State Archives, Reference Servs., to author (Nov. 8, 2010, 05:45) (on file with the *New York University Law Review*).

132 *See, e.g.*, Letter from George Hammond to Edmund Randolph (Sept. 3, 1794), Notes from the British Legation, NS 1323, M.50 Roll 2 (on file with the *New York University Law Review*) (responding to allegations of impressment).

133 *See id.* (indicating that Cochrane proceeded to Halifax). Cochrane appears to have been sued again in New York in 1797, this time by David Gelston, a merchant who claimed that Cochrane had unlawfully seized a ship and its cargo shortly after the *Thetis* left New York in 1794. *See* Plea, Gelston v. Cockran [sic], RG 21, Records of the Dist. Ct. of the United States, S.D.N.Y., Records of the Cir. Ct. (Mar. 31, 1797) (on file with the *New York University Law Review*) (providing Cochrane's account of his capture of a suspected enemy ship on November 16, 1794, and the ship's condemnation as a prize by a British Court of Admiralty in Halifax, Nova Scotia on December 22, 1794). He was also named in the later *Forbes v. Cochrane* case in England, in which the Court of King's Bench found that an enslaved person, once on a British ship outside the territorial waters of the United States, gained freedom. Forbes v. Cochrane, (1824) 107 Eng. Rep. 450 (K.B.) 456; 2 Barnewall & Cresswell Rep. 448, 463.

Although leaving matters in the courts' hands was not always a comfortable arrangement from a diplomatic perspective, it was what the constitutional structure dictated, as understood by key participants at the time. As in *Waters v. Collot*, the burden remained on the defendant to enter a defensive plea.[134] Although the Executive's inability to direct the termination of a suit risked permitting vexatious litigation to go forward, it also preserved U.S. courts as potential fora for claimants seeking redress for injuries caused by foreign defendants who later entered the United States.

C. Yard v. Davis

Samuel Davis was a commissioned officer in the French navy, even though he held U.S. citizenship.[135] On August 4, 1795, the French corvette the *Cassius* entered the port of Philadelphia as a public ship of war under Captain Davis's command.[136] The next day, Philadelphia merchant James Yard filed a "libel" to initiate a civil case in admiralty in the District Court of Pennsylvania seeking to attach the *Cassius* and arrest Captain Davis.[137] Yard alleged that Davis, who "pretended an authority from the French republic," had captured the schooner the *William Linsday*, which Yard owned, and that Davis was responsible for the financial loss that resulted when the *William Lindsay* and its cargo were wrongfully detained at Port de Paix.[138] The *Cassius* was duly attached, and Davis arrested.[139] Davis asserted immunity from the district court's jurisdiction on the grounds that he had acted as an agent of France.

French Minister Pierre-Auguste Adet instructed French consul-general Létombe to give bail for Captain Davis, so that Davis could avoid jail.[140] From a diplomatic perspective, the proceedings against

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134 *See supra note* 53 and accompanying text (quoting Suits Against Foreigners, Case of Collot, 1 Op. Att'y Gen. 45, 46 (1794)).

135 6 DOCUMENTARY HISTORY, *supra* note 38, at 721.

136 Statement of W. Rawle [to Timothy Pickering] (Dec. 21, 1796), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 637 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) [hereinafter AMERICAN STATE PAPERS], *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=001/llsp001.db&recNum=4. This litigation is recounted in the DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, because the French government sought a writ of prohibition in the Supreme Court. 6 DOCUMENTARY HISTORY, *supra* note 38, at 719–27.

137 Statement of W. Rawle (Dec. 21, 1796), *supra* note 136, at 637.

138 *Id.*

139 *Id.*

140 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), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 629, 629; *see also* Letter from [Joseph Létombe,] French Consul at Phila., to P.A. Adet, Minister Plenipotentiary of the French republic (24th Messidor, 3rd year of the

the ship were apparently of greater concern than those against the captain. However, the legal arguments relating to Captain Davis are of greater interest to this study, because Davis objected to the court's jurisdiction based on the allegedly official nature of his conduct.

In addition to arranging bail for Davis, Minister Adet wrote to Secretary of State Randolph to protest the ship's attachment and Davis's arrest.[141] Adet articulated a clear vision of the lack of personal liability for official 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.[142]

Adet also outlined a vision of diplomatic protection by the injured party's government as the best—and only—recourse for individuals allegedly harmed by the public acts of another state's officials:

> It is [the official's] Government alone that is to judge whether the orders it has given 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 deems just and equitable. Therefore the party complaining should lay their complaints before it, either directly, or through the medium of its own Government. Were it otherwise, one Government would become amenable to another; which would reverse the first principles of the rights of nations.[143]

Adet argued that injuries caused to one country's citizens by another country's officials are matters for diplomatic, not judicial, resolution—the opposite of Attorney General Bradford and crown advocate Scott's disavowal of the executive branch's ability to interfere in a privately initiated suit.[144]

Adet complained to Randolph that this was not the first time American courts had "arrogate[d] to themselves the cognizance of the conduct of French agents," and he pointed to *Waters v. Collot* as an example.[145] He argued that detaining Captain Davis violated the United States's obligations under its 1778 Treaty of Amity and

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French Republic [July 11, 1795]) *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 631, 631 (indicating the bail arrangement).

141 Letter from P.A. Adet to Mr. Randolph (Aug. 9, 1795), *supra* note 140.

142 *Id.* at 629.

143 *Id.*

144 *See supra* notes 123–24 & 130 and accompanying text (disclaiming the ability of the Executive to intervene).

145 Letter from P.A. Adet to Mr. Randolph (Aug. 9, 1795), *supra* note 140, at 630.

Commerce with France, which provided that each country would punish any violations by its own "men of war," and that each would give safe harbor to the other's public and private ships.[146]

Secretary Randolph consulted the U.S. Attorney for the District of Pennsylvania, William Rawle. Rawle advised Randolph that the district court's order attaching the *Cassius* was impermissible, because it amounted to an indirect attempt to make France itself amenable to a U.S. tribunal.[147] Rawle also thought that Davis should not be "liable to prosecution" under a 1794 criminal statute designed to punish offenses against the United States, but not because the proceedings against Davis would implead France. Rather, he opined that Davis's capture of the *William Lindsey* did not come within the statute's express language because Davis had not accepted his commission from France "within" the United States.[148]

Peter Stephen DuPonceau assisted France with legal representation in the *Cassius* affair, which quickly became a major irritant in relations between France and the United States.[149] Secretary Randolph reported to Minister Adet that attorney DuPonceau was filing a motion with the district court for the discharge of the *Cassius*, and that DuPonceau also planned to move the U.S. Supreme Court for a prohibition to enjoin the district court from proceeding in the case.[150] Randolph promised Adet that he would keep informed of the situation, but he emphasized that "as long as the question is in the hands of our courts, the Executive cannot withdraw it from them."[151]

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146 *Id.* at 629–30.

147 *See* Statement of W. Rawle (Dec. 21, 1796), *supra* note 136, at 637 (opining on the lawfulness of attaching the *Cassius*).

148 *Id.* (referring to Act of June 5, 1794, ch. L, 1 Stat. 381, which made it a crime for a U.S. citizen to "accept and exercise" a foreign commission "within the territory or jurisdiction" of the United States).

149 In *Yard v. Davis*, the same lawyers who litigated *Waters v. Collot* found their positions reversed. DuPonceau, who had argued that Collot was suable in a U.S. court, now insisted that Davis's arrest was just as offensive to French sovereignty as the attachment of the *Cassius* itself. Lewis, who had represented Collot, argued that the district court had jurisdiction over both Davis and the *Cassius*. *See supra* text accompanying note 65 (identifying attorneys in *Waters v. Collot*). DuPonceau made a career of representing French interests, which makes his representation of Waters in the suit against Collot somewhat puzzling. However, at the time of that suit, DuPonceau had recently founded the French Benevolent Society of Philadelphia together with the *Kitty*'s owner Stephen Girard, a fellow French expatriate. This relationship could explain the unusual representation in *Collot*.

150 Letter from Edmund Randolph, Dep't of State, to Mr. Adet, Minister Plenipotentiary of the French Republic (Aug. 1[4], 1795), *in* 8 DOMESTIC LETTERS, *supra* note 48, at 373–74; *see also* 6 DOCUMENTARY HISTORY, *supra* note 38, at 731 (indicating that the letter was actually written on August 14).

151 Letter from Edmund Randolph to Mr. Adet (Aug. 1[4], 1795), *supra* note 150, at 373–74.

Randolph also wrote a follow-up letter to Adet indicating that he had asked U.S. Attorney Rawle to "bring forward an application to the Judge" to determine promptly whether the *Cassius* itself "[was] liable or not to his jurisdiction."[152]

Rawle and DuPonceau met to discuss the best way to proceed in the midst of this diplomatic wrangling.[153] They recognized that, even if the district court found in France's favor, it would not discharge the *Cassius* if the plaintiffs filed an appeal, which could take eight or nine months to resolve. Minister Adet would not agree to pay a bond to secure the *Cassius*'s release, and Secretary Randolph would not volunteer to pay a bond in France's stead.[154] Both countries were steadfast in their positions. So, too, were the parties, as settlement talks with Plaintiff Yard apparently failed.[155] Meanwhile, eighteen crew members from the *Cassius* deserted, and unknown persons committed thefts on board the docked ship.[156]

Rawle pondered how to inform the district court of his view that it lacked jurisdiction over the *Cassius*, even if it had personal jurisdiction over Captain Davis. Calling his submission a "[s]uggestion,"[157] Rawle made an appearance in order to state his position that the *Cassius* "so being the property of, and belonging to, the French Republic, cannot, by law, be rendered liable to civil process in the courts of the United States, at the suit of individuals."[158] During the hearing, Rawle indicated that he was only charged with defending the ship itself, and not Captain Davis.[159] Later, in a letter to Minister

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152 Letter from Edmund Randolph, Dep't of State, to Mr. Adet, Minister Plenipotentiary of the French Republic (Aug. 15, 1795), *in* 8 DOMESTIC LETTERS, *supra* note 48, at 375.

153 Letter from Peter Stephen DuPonceau to Pierre-Auguste Adet (Aug. 16, 1795), Peter Stephen DuPonceau Letterbook B (1792–1797) at 129, Historical Soc'y of Pa. (manuscript copy on file with the *New York University Law Review*), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 38, at 731, 731.

154 *Id.* at 731–32.

155 Statement of W. Rawle (Dec. 21, 1796), *supra* note 136, at 637.

156 Letter from P.A. Adet, Minister Plenipotentiary of the French republic, to Mr. Randolph, Sec'y of State of the U.S. (Aug. 18, 1795), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 631.

157 Suggestion of the Attorney of the United States for the Pennsylvania District, and the Plea of Samuel B. Davis to the Jurisdiction of the District Court for the Said District, *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 639 [hereinafter Suggestion and Plea]. Samuel Davis's submission to the Supreme Court, upon which the motion for a prohibition was founded, was also termed a "suggestion." *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 122–25 (1795) (reproducing the suggestion filed by attorney Benjamin R. Morgan on Davis's behalf in the district court).

158 Suggestion and Plea, *supra* note 157.

159 Letter from Peter Stephen DuPonceau to Pierre-Auguste Adet (Aug. 19, 1795), Peter Stephen DuPonceau Letterbook B (1792–1797) at 132, Historical Soc'y of Pa. (manuscript copy on file with the *New York University Law Review*), *reprinted in* 6

Adet, attorney DuPonceau objected to Rawle's distinction between the ship and the captain because, in his opinion, the attachment and the arrest violated the same principle.[160]

Adet felt strongly that the Executive should seek an injunction from the Supreme Court against the district court proceedings,[161] but time was of the essence because there were only a few days remaining in the Court's term before a six-month recess.[162] Adet would have to settle for Davis's lawyers taking this step on their own. On August 21, 1795, Davis simultaneously filed a plea to the district court asking to be discharged from arrest and for a writ of prohibition from the Supreme Court to enjoin the district court proceedings.[163]

By this time, Alexander Dallas had joined DuPonceau and Jared Ingersoll as counsel for Captain Davis. Dallas argued to the Supreme Court 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: it would be making public property responsible for private wrongs."[164] Dallas also argued that the French court at Port de Paix (the court of the captor) had exclusive jurisdiction over the prize case between the *Cassius* and the *William Lindsey*, and consequently over Yard's claim for damages.[165] He continued:

> [The libel in the district court is] for damages, in consequence of the capture as prize, which can only be given by the court having cognizance of that question. Any other interpretation of the law would be attended with intolerable inconveniences. Every owner, freighter, master, seaman, of a vessel taken as prize, might sue the Captor in every Court of every Country. No precedent of such a proceeding exists; and the universal silence on this subject, amounts to a denial of its legality.[166]

Dallas relied on the principle that, under "the law of nations, the right of judging is vested in the courts of the captor,"[167] meaning that all

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DOCUMENTARY HISTORY, *supra* note 38, at 733, 733. The printed reproduction of Rawle's suggestion also includes Davis's own submission to the court, in which he denied the court's jurisdiction and referred to a certificate from Adet indicating that he was commissioned as an officer of the French navy. Suggestion and Plea, *supra* note 157.

160 Letter from Peter Stephen DuPonceau to Pierre-August Adet (Aug. 19, 1795), *supra* note 159.

161 *Id.*

162 *Id.*

163 Statement of W. Rawle (Dec. 21, 1796), *supra* note 136.

164 United States v. Peters, 3 U.S. (3 Dall.) 121, 127 (1795).

165 *Id.* at 126–27.

166 *Id.* at 128.

167 *Id.* at 126.

claims relating to the *Cassius*'s capture of the *William Lindsey* could only be adjudicated by French courts.

William Lewis and his co-counsel Tilghman opposed Captain Davis's motion to enjoin the district court proceedings.[168] Perhaps because Alexander Dallas represented Davis, his report of the case gave short shrift to Lewis and Tilghman's arguments in favor of the district court's jurisdiction.[169] On August 24, 1795, Chief Justice John Rutledge announced that "though a difference of sentiment exists, a majority of the Court are [sic] clearly of the opinion, that the motion [for a prohibition] ought to be granted."[170]

The Supreme Court's order indicated that, in the context of this prize case, "vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority."[171] Adet had provided Captain Davis with a certificate indicating that Davis was duly commissioned by France "to cruize [sic] against her enemies, and make prize of their ships."[172] The Supreme Court held that, because the *William Lindsey* was not captured in U.S. waters, the district court could not adjudicate prize claims against either the *Cassius* or Davis.[173]

Although the district court was barred from proceeding, Plaintiff Yard was undeterred. No sooner had the Supreme Court issued its prohibition than one of Yard's associates, John Ketland, filed a *qui tam* action in the Philadelphia circuit court, again seeking to attach the *Cassius*. Ketland claimed that the *Cassius*, previously named *Les Jumeaux*, had been armed in the Philadelphia port in violation of the neutrality law of June 5, 1794, and that the circuit court had jurisdiction on that basis.[174] Adet suspected that Ketland filed this *qui tam*

168 *See* 6 DOCUMENTARY HISTORY, *supra* note 38, at 722 n.17 (indicating that Lewis's co-counsel could have been either William or Edward Tilghman).

169 *Peters*, 3 U.S. (3 Dall.) at 129.

170 *Id.*

171 *Id.* at 130.

172 *Id.* The Pennsylvania circuit court later deemed such official certificates inadequate proof of the "property of the Cassius" itself. Letter from Timothy Pickering, Sec'y of State, to Mr. Adet, Minister Plenipotentiary of the French republic (June 3, 1796), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 636.

173 *Peters*, 3 U.S. (3 Dall.) at 136.

174 Ketland v. The Cassius, 14 F. Cas. 431 (C.C.D. Pa. 1796). For more on the *Cassius* affair from the perspective of enforcing neutrality laws, see 7 CORRESPONDENCE CONCERNING CLAIMS AGAINST GREAT BRITAIN 18–23 (1871). The *Cassius*, previously named *Les Jumeaux*, had in fact been fitted out illegally in Philadelphia, leading to the trial of Etienne Guinet—the first prosecution under the 1794 Neutrality Act. The Neutrality Act was designed to keep the United States from becoming entangled in the ongoing conflict between England and France by enabling U.S. courts to prosecute individuals for

action solely to create delay, because the circuit court only sat two times a year.[175]

The *qui tam* action inched forward without any further claims against Captain Davis, because it was solely a claim against the ship. Meanwhile, the newly-appointed Secretary of State, Timothy Pickering, wondered whether the United States had any obligation to prosecute Davis. It was becoming increasingly apparent that Davis had been involved in, or at least aware of, the unlawful arming of *Les Jumeaux* in Philadelphia and that he had deliberately waited until the ship was outside of U.S. waters before taking command as its captain. Pickering asked U.S. Attorney Rawle: "As the captain (Davis) was, and probably remains, a citizen of the United States, is it not the duty of the government to commence a prosecution against him?"[176] He later pressed Rawle further:

> Shall any of our piratical citizens be allowed to run out of our harbors, a league from the land, and there receive commissions from the agents of one of the belligerent powers, and then return to our ports and exercise them with impunity? [B]ecause he did not *accept* as well as *exercise* his commission within our jurisdiction, is Captain Davis innocent?[177]

Pickering found himself caught between Minister Adet, who remained furious about the ongoing *qui tam* proceedings against the *Cassius*, and the British *chargé d'affaires*, Phineas Bond (British Minister George Hammond's interim replacement), who insisted that the United States punish Davis for his complicity in the arming of the *Cassius* in the Philadelphia port.

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actions that undermined the United States's neutrality. *See* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 93–94 (1849); *see also* CHARLES WARREN, *History and Scope of Section 9 of the Federal Penal Code*, *in* HISTORY OF LAWS PROHIBITING CORRESPONDENCE WITH A FOREIGN GOVERNMENT AND ACCEPTANCE OF A COMMISSION, S. DOC. NO. 696, at 15 (2d Sess. 1917) (providing an account of the drafting and enactment of this legislation).

175 Letter from P.A. Adet, Minister Plenipotentiary of the French republic, to Mr. Pickering, Sec'y of Dep't of War (Sept. 22, 1795), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 632, 633.

176 Letter from Timothy Pickering to William Rawle, Dist. Att'y, Pa. (Sept. 1, 1795), *in* 8 DOMESTIC LETTERS, *supra* note 48, at 384, 384–85.

177 Letter from Timothy Pickering to William Rawle, Dist. Att'y, Pa. (Sept. 7, 1795), *in* 8 DOMESTIC LETTERS, *supra* note 48, at 397, 397–98. This is precisely the distinction that led Rawle to advise Randolph that the district court did not have jurisdiction over Davis in the first place. *See supra* note 148 and accompanying text (opining on the lack of statutory jurisdiction over Davis). Pickering repeated his skepticism of this distinction in a subsequent letter to Rawle. *See* Letter from Timothy Pickering to William Rawle (Oct. 1, 1795) (on file with the *New York University Law Review*) (challenging Rawle's interpretation of the statute).

In response to Adet's continued protests about the second suit against the *Cassius*, Pickering wrote that "Mr. Randolph has already informed you 'that, as long as the question is in the hands of our courts, the Executive cannot withdraw it from them.'"[178] Two months later, Pickering repeated:

> 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 [C]onstitution: and you will see immediately that the measure would be as unsafe as unconstitutional.[179]

Pickering also informed Adet that he was now certain that the *Cassius* had been armed in the port of Philadelphia and had deliberately evaded arrest by the U.S. authorities while en route to the West Indies.[180] He shared his suspicion that Davis "went out in her ostensibly as a passenger, and . . . consequently was on board of her when the laws of the United States were forcibly resisted,"[181] thereby giving a U.S. court jurisdiction over Davis's actions, even under Adet's criteria. Based on these new facts, Pickering intimated that France might not have an exclusive claim to adjudicate the lawfulness of Davis's capture of the *William Lindsey*.

Adet was not placated. In a report to the French Foreign Relations Committee, he complained that Yard had impermissibly brought the original suit against Davis in the district court for "un Acte par lui commis, non comme particulier, mais comme Commandant" (an act committed by him, not as an individual, but as the Captain) of the *Cassius*.[182] He accused British *chargé d'affaires* Bond of being the driving force behind the second suit against the ship, which had been filed by Bond's "friend and agent" Ketland.[183] Bond, for his part, had an interest in keeping the *Cassius* detained for as long as possible, both to incapacitate it and to send a strong message about the consequences of arming French ships in U.S. ports.[184]

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178 Letter from Timothy Pickering to Mr. Adet, Minister Plenipotentiary of the French republic (Aug. 25, 1795), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 631.

179 Letter from Timothy Pickering to Mr. Adet, Minister Plenipotentiary of the French republic (Oct. 1, 1795), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 634.

180 Letter from Timothy Pickering to Mr. Adet (Aug. 25, 1795), *supra* note 178, at 631 (citing Report of David Robinett (Dec. 31, 1794), *in* 1 AMERICAN STATE PAPERS, *supra* note 136, at 632).

181 *Id.*

182 Letter from P.A. Adet, Minister Plenipotentiary of the French Republic, to Comm'n on Foreign Relations (Sept. 30, 1795), *in* CORRESPONDENCE, *supra* note 40, at 780 (author's translation).

183 *Id.*

184 As David Sloss documents, the British used litigation as "lawfare" during this period by forcing French privateers to defend admiralty actions in U.S. courts, thereby

He urged Pickering to prosecute Davis, but Pickering responded that there did not appear to be sufficient evidence to bring criminal charges.[185] While this back-and-forth continued, Davis kept a low profile, surfacing only to sign a pleading in the circuit court—an affidavit drafted by attorney DuPonceau that affirmed Davis's status as "a Lieutenant in the navy of the French Republic" and documented damage to the *Cassius* caused by its prolonged detention in the Philadelphia port.[186] Davis then disappeared; when Yard filed yet another suit against him in the district court, Davis could not be found.[187]

Like the other cases explored in this Article, *Yard v. Davis* illustrates the diplomatic dance occasioned by litigation involving a foreign sovereign's property or the conduct of its officials. The *Cassius* affair confirms the U.S. Executive's consistent disavowal of the power to stop private civil proceedings against a nondiplomatic official. But it also shows a step toward more direct involvement, in the form of William Rawle's "[s]uggestion" that applicable law precluded a French public ship from "be[ing] rendered liable to civil process in the courts of the United States."[188] This early "suggestion" of immunity for the ship was not accompanied by a similar suggestion of immunity for its captain, despite France's request.

As the *Cassius* literally rotted in port, prevailing understandings about foreign official immunity continued to crystallize: first, that U.S. courts could compel nondiplomatic officials to respond to civil suits even if they claimed that their actions had been authorized by a foreign government; and second, that the Executive lacked power to order the dismissal of a civil suit against a nondiplomatic official, even though the Executive would maintain an active interest in litigation that gave rise to diplomatic protests.

D. Dunant v. Perroud

The potential for litigation to trigger diplomatic protests means that, as a practical matter, diplomatic correspondence can provide

"detain[ing] the privateers' property for extended periods of time and ma[king] it difficult for privateers to initiate additional attacks on enemy merchant vessels." Sloss, *supra* note 18, at 174.

185 Letter from Timothy Pickering to Mr. Bond, Chargé des aff. of his Brit. majesty (Sept. 3, 1795), *in* 8 DOMESTIC LETTERS, *supra* note 48, at 387.

186 Affidavit of Samuel B. Davis (Sept. 4, 1795) (on file with the *New York University Law Review*).

187 6 DOCUMENTARY HISTORY, *supra* note 38, at 725 & n.32 (citing Writ of Attachment and Arrest, Sept. 29, 1795, Yard v. Schooner William Lindsay).

188 Suggestion and Plea, *supra* note 157.

valuable clues about lawsuits for which official court records do not appear to have survived. This is true for *Dunant v. Perroud.*

History has not been kind to Henry Perroud. Perroud was appointed "*ordonnateur*" of the French colony of St. Domingo by the Governor, General Étienne Laveaux, "for the purpose of organizing a more perfect system of finance."[189] One surviving account dismisses him as "the insignificant Perroud," while noting that he escaped the turmoil in St. Domingo in 1796 by fleeing to the United States.[190] If Perroud had known about the civil suits brought against Collot, Cochrane, and Davis, perhaps he would have sought refuge elsewhere.

Upon Perroud's arrival in the United States, Philadelphia merchant Edward Dunant initiated a suit against him for acts performed in St. Domingo while Perroud was *Ordonnateur.* On September 17, 1796, the Chief Justice of the Pennsylvania Supreme Court issued a writ of *capias* authorizing Perroud's arrest.[191] Sheriff John Baker indicated that a bail bond was executed for $60,000 on November 10, 1796,[192] and that Chief Justice Thomas McKean subsequently discharged Perroud on common bail (a promise to appear).[193] This likely means that Perroud filed a successful motion to show cause why he should not be discharged on common bail, just as Attorney General Bradford had advised Collot to do in similar circumstances. The case was discontinued on June 29, 1798.[194]

The litigation was conducted by a familiar cast of characters. Attorney William Lewis represented the plaintiff, Dunant.[195] The French Republic engaged Peter Stephen DuPonceau to represent Perroud.[196] Secretary of State Pickering referred to the suit in passing in a May 29, 1797 letter to French consul-general Philippe Létombe,

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189 C.W. MOSSELL, TOUSSAINT L'OUVERTURE, THE HERO OF SAINT DOMINGO 106 (1896). The title "*ordonnateur*" means that Perroud was a high-level bureaucrat.

190 TOUSSAINT L'OUVERTURE ET L'INDÉPENDANCE D'HAÏTI 88 (Jacques de Cauna ed., 2004).

191 Writ of Capias and Bail Bond, Sept. 17, 1796, Pa. State Archives, RG-33, Records of the Sup. Ct. of Pa., E. Dist., Capias Papers, series #33.24 (Dec. 1796) (on file with the *New York University Law Review*).

192 *Id.*; *see also* Docket Entry 177, December Term 1796, Pa. State Archives, RG-33, Records of the Sup. Ct. of Pa., E. Dist., Appearance Dockets, series #33.12 (Dec. Term 1795–March Term 1797) (on file with the *New York University Law Review*) (recording the bail).

193 *Id.*

194 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 the *New York University Law Review*).

195 *Id.* (filed by Mr. Lewis).

196 DuPonceau issued an invoice "for services rendered to the French Republic." Mémoire des honoraires dûs à P.S. DuPonceau (Jan. 20, 1797), Peter Stephen DuPonceau

during their correspondence about the ongoing proceedings against General Collot. In the letter, Pickering informed Létombe that the Pennsylvania Supreme Court had "discharged Mr. Peroud [sic], the Ordonnateur at Cape Francois" upon a showing that "his act which occasioned the injury complained of had been within his lawful powers."[197] In Pickering's view, it was in part Collot's persistent refusal to make such a showing that had prolonged the proceedings against him.[198] Pickering invoked Perroud as an example to show that lawful authority could be invoked successfully to secure a defendant's discharge on common bail.

No additional court records appear to have survived in *Dunant v. Perroud*.[199] Still, some clues exist. It is possible that the claim against Perroud involved the *Martha*, a sloop owned by Edward Dunant.[200] On March 23, 1795, the *Martha* entered the harbor at Port à Paix in St. Domingo.[201] The Governor, General Laveaux, attempted to commandeer the *Martha*'s cargo of flour, insisting that the 630 barrels should be delivered to the administration for the use of the French Republic.[202] When the ship's master, Joshua McWilliams, refused the price offered by Laveaux, he was denied permission to leave the port and was told "that Gen. Lavaud [sic] had ordered his sails and rudder to be taken away if he did not comply."[203] McWilliams ultimately capitulated and agreed to sell the flour, which would otherwise have spoiled, to Perroud, the agent for the French administration.[204] If the *Martha* incident was in fact the basis for Dunant's 1796 suit against Perroud in Philadelphia, it makes sense that Perroud would not have been personally liable. Because Perroud acted solely as the

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Letterbook (1792–1797) at 250, Historical Soc'y of Pa. (on file with the *New York University Law Review*).

197 Letter from Timothy Pickering to Mr. Letombe (May 29, 1797), *supra* note 100, at 51–52.

198 *See supra* note 103 and accompanying text (blaming the delay on Collot's refusal to say anything other than that he had been Governor at the time of the alleged acts).

199 I discovered the above-referenced court records only after repeated searches of the Pennsylvania Supreme Court archives for cases involving "Peroud" or "Perroud" as a party.

200 An account of an incident involving the *Martha* appears in records from a case brought in 1892 in the U.S. Court of Claims by John C. Williams, administrator of Edward Dunant. Williams v. United States, 27 Ct. Cl. 218 (1892); *see also* WILLIAMS, *supra* note 41, at 398–99 (detailing losses to the *Martha*).

201 *Williams*, 27 Ct. Cl. at 218.

202 *Id.* at 218–19.

203 *Id.* at 219.

204 *Id.*

commercial agent of France, the government alone would have borne financial responsibility for the resulting loss.[205]

Despite the dearth of information about the *Perroud* case, it adds to the cluster of civil suits against foreign officials in the 1790s in which legally relevant actors articulated and acted upon prevailing understandings of cognizable claims and defenses. These actors also further explored the boundaries of executive and judicial authority. The cases manifest at least three identifiable patterns. First, merely claiming an official (but nondiplomatic) title was insufficient to secure a defendant's discharge—some further proof or evidence that the challenged conduct was within the defendant's "lawful powers" was required.[206] Second, following basic principles of agency law, an individual who had been acting merely as the commercial agent of a foreign country was not personally liable, although this did not prevent such an individual from being arrested and compelled to enter a defensive plea. Third, a tension remained between the courts' insistence that the defendant show his action to be within the scope of official authority to secure dismissal of a suit, and foreign countries' claims that their own courts should determine whether their own officials had exceeded such authority.

E. Parnell & Stewart v. Sinclair

Like the suit against Perroud, many of the clues about the suit against Henry Sinclair come from diplomatic correspondence, buttressed by an Attorney General opinion and contemporary news reports. Sinclair was a privateer rather than a government official, but he was acting under a commission from the British government. He claimed that this official commission shielded him from the jurisdiction of U.S. courts. Courts and scholars have referenced Sinclair's case but neglected to explore it in any detail. The underlying facts have all but been forgotten.

As the United States struggled to maintain its neutrality, American ships became entangled in the conflict between England and France. A letter of marque from King George III commissioned

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[205] The suit could also have been related to Laveaux's requisitioning other items from ships owned by Dunant, such as the *George* on May 18, 1795, the *Hope* on June 3, 1795, or the *Liberty* on June 9, 1795. *See* WILLIAMS, *supra* note 41, at 159 (losses incurred by the brig *George*); *id.* at 186 (articles requisitioned from the *Hope* at Cape François on June 3, 1795); *id.* at 217 (removal of articles from the *Liberty* and the *George* on June 9, 1795).

[206] *See supra* note 197 and accompanying text (discussing Perroud's discharge upon a showing that "his act which occasioned the injury complained of had been within his lawful powers").

Henry Sinclair to "cruise" against enemy ships.[207] Sinclair, captain of the *Swinger*, captured the *Atlantic*, an American ship, while it was en route from a French port in the West Indies back to its home port of Baltimore, on the suspicion that it was carrying enemy (Spanish) property.[208] John Parnell and David Stewart, the *Atlantic*'s owners, brought a civil suit for damages against Captain Sinclair.[209]

On December 1, 1797, the *Alexandria Advertiser* reported that "Henry Sinclair, captain of the British letter of marque *Swinger*, now in this port, was arrested, and imprisoned in the county gaol, on suits for damages amounting to 20,000 dollars, brought against him by Stewart and Son, of Baltimore[ ]."[210] After the *Advertiser* reported Sinclair's arrest, a subscriber sent a letter to the editor providing a version of the events according to Henry Stockett, Captain of the *Atlantic*.[211] The letter indicated that, after the *Swinger* had captured it, two different ships successively re-captured the *Atlantic*, and it endured a series of further misfortunes at sea.[212]

Parnell and Stewart sued Captain Sinclair in Alexandria for damages relating to his alleged theft of articles from the *Atlantic* and the *Atlantic*'s subsequent misadventures.[213] The letter to the editor of the *Advertiser* recounted that Parnell and Stewart, having found Sinclair "in this port, have sued him for damages, and he is now in confinement, having as yet been unable to find bail."[214]

Captain Sinclair was thoroughly distraught by his arrest. He wrote a lengthy and detailed plea to Robert Liston, the British Minister to the United States.[215] Sinclair's unpublished memorial offers a window into the human story behind privateering, civil suits, and the expectations of individuals about the legal regimes that govern their conduct. Because Sinclair was acting under a British commission, he had an expectation of protection by the British authorities.

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207 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 the *New York University Law Review*).

208 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 the *New York University Law Review*).

209 *Id.*

210 *Alexandria Advertiser*, Dec. 1, 1797, at 3. The *Swinger* apparently had arrived at Alexandria on November 19. *Federal Gazette & Baltimore Daily Advertiser*, Nov. 22, 1797, at 3.

211 *Alexandria Advertiser*, Dec. 2, 1797, at 3.

212 *Id.*

213 *Alexandria Advertiser*, Dec. 1, 1797, at 3; *Alexandria Advertiser*, Dec. 2, 1797, at 3.

214 *Alexandria Advertiser*, Dec. 2, 1797, at 3.

215 Memorial of Henry Sinclair, *supra* note 208.

However, he was not a diplomatic official. Thus, his presence within the United States subjected him to the jurisdiction of U.S. courts, with the attendant delays and potential harm to his privateering business, even if he were ultimately found to have acted lawfully.

In his memorial, Sinclair reported that he had been "confined in Gaole" for some time but had finally been able to give bail to guarantee his appearance in court "at March term next."[216] He explained that the *Swinger* had encountered the *Atlantic* on March 17, and that he "had every reason to believe that part of the Cargo was Spanish Property," and thus subject to confiscation as a prize.[217] He conceded that, after the *Atlantic* had been recaptured by the two other ships, a court at St. Kitts "cleared" the ship and cargo rather than condemning it. But he maintained the validity of his initial capture, and he blamed a French privateer for destroying the "[l]etters and [p]apers" that would have substantiated his original suspicion that the *Atlantic* was carrying Spanish cargo.[218] Sinclair sheepishly acknowledged that he had taken some goods from the *Atlantic* when he boarded it, but he insisted that this was due to "Your Memorialist being in want of [b]read," and that he had assured Captain Stockett at the time "that he would receive payment from the Owner of the *Swinger* in Barbadoes, if no Condemnation took place."[219]

Most urgently, Sinclair feared for his livelihood. He complained to Liston that his arrest and trial would prevent him from commanding the *Swinger* and pursuing "his customary occupation," thereby reducing him "to entire ruin, unless he is relieved by the Interposition of His Britannick Majesty's Minister Plenipotentiary."[220] In Sinclair's view, such interposition was warranted because he had acted while bound by "the Oath administered to him by his Country."[221] It therefore followed that:

> If he has done wrong in sending the Ship *Atlantic* for adjudication, and if his alterning [sic] her Route has been the cause of her subsequent misfortunes, Your Memorialist humbly conceives that he is not amenable to the Laws of the United States, but to those of his own Country, from whence he received his Commission and where,

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216 *Id.* Bail was given by James Patton, the British Vice-Consul at Alexandria. Letter from Robert Liston to Lord [Grenville] (Feb. 6, 1798), *available at* British National Archives, F.O. 5/22 at 94–95 (on file with the *New York University Law Review*).

217 Memorial of Henry Sinclair, *supra* note 208.

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

> previous to its being delivered to him, ample Security was deposited for its faithful Discharge.[222]

On December 15, 1797, Liston transmitted Sinclair's memorial to Secretary of State Pickering.[223] Liston argued that "if [Sinclair] was guilty of any irregularity in the Seizure [of the *Atlantic*], he might have been punished by the British Court of Admiralty to which the trial was submitted, since he had previously given the requisite Security for his good behavior."[224] Liston therefore insisted that Sinclair "was not amenable in this instance to the Courts of Law of the United States."[225] He also argued that, because Sinclair was not "amenable" to U.S. courts, "his late imprisonment was consequently illegal," and he ought to be released from the obligation to give bail.[226] Pickering forwarded Liston's letter and Sinclair's memorial to Attorney General Charles Lee and asked Lee to opine whether Sinclair was entitled to "an exemption from all responsibility in the case to the laws of any other country than his own."[227]

Like his predecessor Bradford, Lee argued that Sinclair "ought to prevail" at trial before the court of law at Alexandria, because "it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States."[228] However, also like Bradford, Lee disclaimed any power of the Executive to intervene, based upon the same principle "that has been settled in the case of General Collot, and I believe in some other cases."[229] This principle dictated 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."[230]

The problem for Sinclair was that he could not wait for a March hearing to defend himself in court. As a privateer, his livelihood depended on his ability to return promptly to sea. Mindful of this time pressure, Liston went on the offensive. He interpreted the letters from Pickering and Lee as "agree[ing] in the opinion that the detention of

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222 *Id.*

223 Letter from R. Liston to Colonel Pickering (Dec. 15, 1797), *supra* note 207.

224 *Id.*

225 *Id.*

226 *Id.*

227 Letter from Timothy Pickering to Charles [Lee], Att'y Gen. (Dec. 23, 1797), *in* 10 DOMESTIC LETTERS, *supra* note 48, at 276.

228 Actions Against Foreigners, Case of Sinclair, 1 Op. Att'y Gen. 81, 81 (1797).

229 *Id.* These "other cases" likely included those of Alexander Cochrane and Henry Perroud.

230 *Id.*

Mr. Sinclair was illegal."[231] He therefore instructed the British Vice-Consul at Alexandria, James Patton, to bring an action of damages for false imprisonment against the plaintiffs, David Stewart and John Parnell.[232]

The suit for false imprisonment never got off the ground. Although Liston later expressed "little doubt that Mr. Sinclair would have recovered a compensation for the imprisonment he had suffered," he reported to British Foreign Secretary William Grenville that Sinclair elected to "compromis[e] matters with the adverse party" because he had "in fact carried off certain articles from the American Ship, before she was brought into port for trial."[233] Sinclair's awareness of his own misconduct led him to settle the lawsuit rather than pursue a claim for false imprisonment. The threat of damages for false imprisonment also may have led Parnell and Stewart to accept a settlement rather than go to trial.

There is also an intriguing, although unconfirmed, hint of executive involvement behind the scenes. Liston reported to Grenville that Pickering "wrote . . . to the Magistrates before whom the trial was to have come on" about the illegality of Sinclair's arrest,[234] although no such letter appears in official State Department records or among Pickering's papers. Given Lee's public insistence on the Executive's powerlessness to intervene in judicial proceedings, it would have been curious for Pickering to have written such a letter, although it is conceivable that he attempted to exercise some behind-the-scenes influence over events. Liston also may have mistakenly conveyed an overly optimistic understanding of Pickering's reassurances. No court records appear to have survived, leaving the remaining details to speculation.[235]

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231 Letter from Robert Liston to Lord [Grenville] (Feb. 6, 1798), *supra* note 216.

232 *Id.*

233 *Id.*

234 *Id.*

235 *See* E-mail from George K. Combs, Branch Manager, Special Collections, Alexandria Library, to author (June 30, 2010, 15:51) (on file with the *New York University Law Review*); E-mail from George K. Combs, Branch Manager, Special Collections, Alexandria Library, to Vincent Moyer (June 18, 2010, 14:25) (on file with the *New York University Law Review*); E-mail from Katrina R. Krempasky, Fairfax Circuit Court Historical Records, to author (Nov. 22, 2010, 06:16) (on file with the *New York University Law Review*); E-mail from Elaine McHale, Librarian, Virginia Room, Fairfax Cnty. Pub. Library, to author (Dec. 7, 2010, 17:20) (on file with the *New York University Law Review*). Additional records searched include Fairfax County Court Records, Minute Book, 1797–1798, and U.S. District Court and Circuit Court cases. E-mail from Minor Weisiger, Archives Reference Servs. Coordinator, Library of Va., to author (July 20, 2011, 11:45) (on file with the *New York University Law Review*); E-mail from Katrina R. Krempasky, Fairfax Circuit Court Historical Records, to author, *supra*.

Because Parnell and Stewart settled their claims against Captain Sinclair before trial, just as Captain Waters ultimately abandoned his claim against Collot, there remains little historical record of the proof required to discharge a defendant on conduct-based immunity grounds. At a minimum, where the plaintiff seemed to be attempting to circumvent the exclusive jurisdiction of a foreign admiralty court by bringing a civil claim relating to the capture of a ship as a prize, the Executive was not supportive, even though it was the judiciary's responsibility to identify and dismiss such suits.

F. Jones v. Létombe

The final eighteenth-century suit examined here was brought against a French official living in the United States. French consul-general Philippe Létombe was no stranger to suits against French officials. He had corresponded with Secretary of State Pickering about the case against Victor Collot and had given bail for Samuel Davis.[236] In November 1797, Létombe found himself in the defendants' shoes. Létombe had previously signed several bills of exchange directing the French minister of the marine in Paris to pay more than $70,000 to James Swan, a financier who had been the official purchasing agent of the French Government in the United States.[237] Swan endorsed the bills over to John Coffin Jones of Massachusetts. When the French minister failed to pay the bills, Jones sued Létombe under the original jurisdiction of the U.S. Supreme Court.[238]

Létombe promptly objected to the suit. In response, Attorney General Lee advised Pickering that Létombe was "not privileged from legal process, either by the general law of nations, or by the consular convention between the United States and France,"[239] because he was not a diplomatic official. According to Lee, whether or not Létombe could be found personally responsible for the debts of the French Republic did not affect his "suability."[240] Moreover, although Lee opined that Létombe had been acting merely "as the commercial agent of the [French] republic," he repeated that "the President of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice."[241] Létombe

236 Letter from [Joseph Létombe] to P.A. Adet (July 11, 1795), *supra* note 140 (indicating the bail arrangement).

237 *See* 8 DOCUMENTARY HISTORY, *supra* note 38, at 75 (describing this transaction).

238 *Id.* Because this case was brought under the original jurisdiction of the Supreme Court, a fuller account of the litigation can be found in 8 DOCUMENTARY HISTORY, *supra* note 38, at 75–79.

239 Consular Privileges, Case of Létombe, 1 Op. Att'y Gen. 77, 77–78 (1797).

240 *Id.* at 78.

241 *Id.*

could not claim immunity from arrest and was forced to give $90,000 bail.[242]

In a report to French Foreign Minister Talleyrand, Létombe indicated that, after giving bail, he consulted several ministers residing in the United States, all of whom indicated that "a consul is not subject to the laws of the 'country in which he resides for any transaction he undertakes in his capacity and under the direct authority of his sovereign.'"[243] He stated that he was still awaiting a response to a letter he had sent Pickering, and that the legal team of DuPonceau, Dallas, and Edward Livingston was representing him. In their view, he explained:

> I cannot . . . reject the [jurisdiction of the] Supreme Court of the United States *ratione personae* but rather *ratione materiae* because if, on the one hand, article II of the consular convention subjects French consuls to the territorial laws *on an equal footing with U.S. nationals*, on the other hand, it seems impossible to them that I could be judged in the United States as being personally responsible for transactions performed in my official capacity and under the direct authority of my Government.[244]

On December 2, 1797, Létombe updated Talleyrand and informed him that, although Attorney General Lee had offered a favorable assessment of his lack of personal liability for France's debts, he would nevertheless be required to subject himself to the jurisdiction of the Supreme Court.[245]

The case against Létombe further illustrates the extent to which the Executive went out of its way to disavow the constitutional authority to interfere with civil proceedings. Secretary Pickering wrote to Létombe:

> Having, as you inform me, resided seventeen years in the United States, you must have become acquainted with their Constitution, which separates the various powers of Government: marks the limits of each, & forbids one to interfere in the department of another; especially you must have known that the executive branch of Government cannot controul [sic] the Judicial branch without a

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242 8 DOCUMENTARY HISTORY, *supra* note 38, at 77.

243 Letter from [Joseph Létombe] to Talleyrand, Minister of Foreign Relations (Nov. 29, 1797), *in* 2 CORRESPONDENCE, *supra* note 40, at 1083 (author's translation).

244 *Id.* (author's translation).

245 Letter from [Joseph Létombe] to Talleyrand, Minister of Foreign Relations (Dec. 2, 1797), *in* 2 CORRESPONDENCE, *supra* note 40, at 1086. In transmitting Lee's opinion to Létombe, Pickering indicated that "an exemption from legal process" is not one of the rights attached to the "character" of consul-general. Letter from Timothy Pickering to Philippe de Létombe (Nov. 30, 1797) (manuscript copy on file with the *New York University Law Review*), *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 38, at 84.

> violation of the constitution: and that the attempt would have been as unavailing as illegal.[246]

Pickering assured Létombe that, although the Executive would not "interpose between you & the regular operation of our laws," Létombe could "justly expect the full protection of [his] rights"[247] by the Court.

Before the Supreme Court, Jared Ingersoll and Edward Tilghman argued on behalf of the plaintiff, Jones.[248] They claimed that "when a Consul acts as a merchant, and draws bills for cash advanced, he is not entitled to any privilege."[249] For support, they cited various treatises and the Pennsylvania Supreme Court's decision in *Waters v. Collot*.[250]

As Attorney General Lee had predicted, the Justices were unconvinced: In a unanimous decision, they found that "there was no cause of action" against Létombe because "the contract was made on account of the [French] government."[251] The Court had personal jurisdiction over Létombe because he was not a diplomatic official, but Létombe could not be held personally liable for France's debts.

Adding this case to those previously examined, the following principles and practices can be discerned. First, the Executive believed that it did not have the constitutional authority to order a court to dismiss a civil suit brought by a private individual against a current or former foreign official on conduct-based immunity grounds, although in at least one instance the U.S. Attorney submitted a "suggestion" that the applicable law deprived a U.S. court of jurisdiction over a foreign public ship (*Collot*, *Cochrane*, *Davis*, *Sinclair*, and *Létombe*). Second, foreigners who were not diplomatic officials were not personally immune from the jurisdiction of U.S. courts, and could therefore be arrested and compelled to give bail to secure their appearance in a civil suit pursuant to a writ of *capias ad respondendum* (*Collot*, *Cochrane*, *Sinclair*, and *Létombe*). Third, individual foreign officials were not liable in U.S. courts for "mere irregularities" in the exercise of their lawful powers (*Collot*, *Perroud*, and *Sinclair*). Fourth, if the defendant could show that she had acted within his or her "lawful powers," she would be discharged on a promise to appear (*Perroud*). The mere assertion that the defendant held an official title at the time of the alleged misconduct was not sufficient for this purpose if the

246 Letter from Timothy Pickering to Philippe de Létombe (Nov. 30, 1797), *supra* note 245, at 84–85.

247 *Id.* at 85.

248 Jones v. Létombe, 3 U.S. (3 Dall.) 384, 385 (1798).

249 *Id.* at 385.

250 *Id.*

251 *Id.*

defendant posed a flight risk (*Collot*).[252] Finally, individuals acting as commercial agents of a foreign sovereign did not bear personal liability for debts incurred on behalf of the government; under applicable principles of agency law, the claim ran exclusively against the principal (*Létombe*).[253]

Several problematic aspects of litigation against nondiplomatic officials were also becoming evident during this period. First, civil suits brought by private individuals against current or former officials for conduct performed under the authority of a foreign sovereign created diplomatic tensions with foreign countries and forced the U.S. Executive to manage relationships by repeatedly explaining its inability to intervene (*Collot*, *Cochrane*, *Davis*, *Sinclair*, and *Létombe*). Second, the long delays associated with litigation proved a source of frustration for foreign defendants and their diplomatic representatives, as did the possibility that a favorable judgment could be subject to lengthy appeals (*Collot*, *Davis*, and *Sinclair*). Third, plaintiffs brought claims in U.S. courts when defendants were physically present in the United States, even when their claims related to injuries sustained outside of U.S. territory (*Collot*, *Davis*, *Sinclair*, and

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252 For an example of a case distinguishing between the issues of an individual defendant's official *position* and the lawful scope of his or her *authority*, see *Dupont v. Pichon*, 4 U.S. (4 Dall.) 321 (Pa. 1805). In that case, Louis Andre Pichon, the French *chargé d'affaires*, was sued by a former employee who sought payment on bills of exchange that Pichon had drawn "merely as public agent of the French republic." *Id.* at 323. Pichon asserted diplomatic immunity, which would entitle him to immediate discharge, rather than relying on his lack of personal responsibility for the debt, which he would have to plead as a defense after giving bail. The three Justices agreed that the position of *chargé d'affaires* would entitle him to diplomatic immunity, but they hesitated whether "the notoriety of his reception by the President" was sufficient or, as the plaintiff's counsel argued, "proof should be produced from the secretary of state of his reception as a minister." *Id.* at 323-24. Although Chief Justice Edward Shippen "seemed inclined to wait for information, from the department of state, as to [Pichon's] actual reception by the president of that character [of minister]," the court ultimately agreed to discharge Pichon from the process in order to spare him from being imprisoned until such proof could be obtained. *Id.* at 324. On the various forms that suggestions of immunity took prior to the 1930s, see A.H. Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83 (1931).

253 Although this point might be considered a subset of the "lawful authority" point, it seems helpful to differentiate commercial from noncommercial cases, particularly in light of subsequent developments in the doctrine of foreign sovereign immunity finding foreign states *liable* but individual foreign agents *not personally liable* for a state's commercial activities. *See* Dugan v. United States, 16 U.S. (3 Wheat.) 172, 178 (1818) (citing *Jones v. Létombe* 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, [1967–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,780, at 90,827 (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." Pfander & Hunt, *supra* note 18, at 1871 n.37.

Perroud). This could create problems including lack of access to evidence and competing claims to jurisdiction by foreign tribunals, especially in prize cases.

This is where matters stood as the eighteenth century came to a close.

II
RECLAIMING THE EIGHTEENTH-CENTURY CASES

Part I recounted the stories of the six civil suits brought against current or former foreign officials in the 1790s that attracted diplomatic attention. Our common law tradition has been shaped not only by what actually transpired in those cases, but by the stories that authoritative decision makers tell about prior judicial decisions—stories inevitably shaped by their own ideas, beliefs, and understandings. This Part sketches the evolution of some of these stories. Because the primary goal of this Article has been to recover the eighteenth-century cases, my focus in this Part is to draw connections between those cases and their uses—and misuses—in later arguments, rather than to describe the later cases in great detail.

This Part illustrates that, by the end of the nineteenth century, jurisprudence involving claims of conduct-based (or "*ratione materiae*") immunity by current or former foreign officials began to merge into a separate but related line of cases involving so-called "acts of state"—that is, public acts a government performs within its own territory, insulated from judicial scrutiny by foreign courts.[254] The continuity between *ratione materiae* immunity and the act of state doctrine is significant because many consider immunity to be a defense against jurisdiction, whereas the act of state doctrine constitutes a substantive defense on the merits.[255] However, treating a claim of conduct-based immunity more like an affirmative defense would require a defendant to prove that she had acted within her "lawful powers" in order to have a case dismissed on immunity grounds. It would also preserve the judiciary's role as the final arbiter of whether such a defense could succeed in specific instances.

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[254] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (describing the "classic" conception of the act of state doctrine (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897))).

[255] *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."); *see also* R[osalyn] Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 275 (1982) (indicating, with respect to the immunity of the foreign state itself, that "[o]ne of the most complicated and difficult areas is the relationship between the concept of State immunity and that of act of State").

Some of the eighteenth-century cases described above may have been "forgotten" because they were unreported, even though the related Attorney General opinions survived. *Waters v. Collot* is an exception. Plaintiff Jones invoked *Waters* to support his claim that French consul-general Joseph Létombe should be personally liable for debts incurred by him on behalf of the French Republic.[256] The claim did not succeed, reflecting the principle that an individual acting merely as a commercial agent will not incur personal financial responsibility[257]—a proposition for which the *Jones v. Létombe* case was itself subsequently cited.[258]

One might expect that the next judicial reference to the 1790s immunity cases would be the 1812 case *Schooner Exchange v. McFaddon*,[259] which is often cited as the original foreign sovereign immunity case,[260] even though *Schooner Exchange* postdates the cases studied here by almost twenty years. *Schooner Exchange* involved an in rem action against a ship in the possession and use of a foreign sovereign, not a claim against an individual. Because individual conduct-based immunity was not at issue, the existing body of case law relating to official immunity does not appear to have figured in the arguments. It was not because the lawyers involved were not aware of those cases. In fact, Alexander Dallas, who was intimately familiar with the precedents explored in Part I, played a significant role in *Schooner Exchange* as the U.S. Attorney for the District of Pennsylvania.

Following his predecessor William Rawle's example in the *Cassius* case, Dallas filed a "suggestion" informing the district court that applicable law did not permit attachment of the foreign ship, even

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256 *Supra* note 250 and accompanying text.

257 *See supra* note 251 and accompanying text (describing the decision in *Jones v. Létombe*). *But cf.* Saorstat & Cont'l S.S. Co. v. Rafael de las Morenas, [1945] I.R. 291, 300 (Ir.) (finding that a colonel in the Spanish army who had contracted to carry horses from Dublin to Lisbon for use by the Spanish army was not entitled to immunity because "[h]e is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally, and any such judgment cannot be enforced against any property save that of the appellant").

258 *See, e.g.*, Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 n.a (1817) (citing *Jones v. Létombe* for the proposition that a public agent generally will not incur personal liability for contracts entered into on behalf of the government); Passmore v. Mott, 2 Binn. 201, 201–02 (Pa. 1809) (citing *Jones v. Létombe* to support the finding that the defendant did not incur personal responsibility when he acted as the secretary of an incorporated company and the plaintiffs did not rely on his individual credit).

259 Schooner Exchange v. M[c]Faddon, 11 U.S. (7 Cranch) 116 (1812).

260 *See, e.g.*, Note, *Interpreting Silence: The Roles of the Courts and the Executive Branch in Head of State Immunity Cases*, 124 HARV. L. REV. 2042, 2044 (2011) ("[T]he 1812 Supreme Court case *Schooner Exchange v. McFaddon* remains the general starting point for discussions of sovereign immunity in American law.").

though it had come into a U.S. port.[261] The district court dismissed the plaintiffs' claim, but the circuit court reversed. On appeal before the Supreme Court, U.S. Attorney Dallas and Attorney General William Pinkney argued that certain property of a foreign sovereign was entitled to absolute immunity akin to the absolute, status-based immunity of a diplomat or foreign head of state. As Pinkney explained: "We claim for this vessel, an immunity from the ordinary jurisdiction, as extensive as that of an ambassador, or of the Sovereign himself;—but no further. . . . The jurisdiction over things and persons, is the same in substance. The arrest of the thing is to obtain jurisdiction over the person."[262] This echoes Rawle's argument that attaching the *Cassius* would implead France—an argument that Rawle did not make about the proceedings against Captain Davis.[263]

Chief Justice John Marshall delivered the Court's opinion that the ship was not subject to attachment. He indicated that the Court was "exploring an unbeaten path, with few, if any, aids from precedents or written law."[264] He situated this case within a "class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[265] None of the examples within the "class of cases" enumerated by Marshall reflects the fact patterns seen in the earlier cases brought against foreigners who were not diplomatic officials. *Schooner Exchange* fits most comfortably within the *Cassius* line of cases on the immunity of public ships and states themselves, which Chief Justice Marshall considered alongside the status-based immunity of heads of state and ambassadors. Seen in this way, the jurisprudential foundation for claims to immunity based on the official character of an individual's conduct begins not with *Schooner Exchange* but instead with *Waters v. Collot* and the other cases examined in Part I, and continues with nineteenth-century cases on the act of state doctrine.

If the 1790s precedents canvassed above were not deemed relevant to suits against foreign ships (and vice versa), they were nonetheless cited in cases against individuals. In 1818, a suit was filed against

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261 *Schooner Exchange*, 11 U.S. (7 Cranch) at 117-19.

262 *Id.* at 132-33.

263 *See supra* notes 157-59 and accompanying text (describing Rawle's arguments in the proceedings against Captain Davis in the *Cassius* case).

264 *Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

265 *Id.* at 187. For more on the historical evolution of the immunity of foreign ships, see Recent Decisions, *International Law—Admiralty—Sovereign Immunity of Foreign Vessels*, 45 COLUM. L. REV. 80 (1945) and Stefan A. Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1 (1940).

Louis Aury, a French privateer, in the U.S. District Court for the District of South Carolina.[266] Aury allegedly raided and sank the Spanish ship *Conception*. When Aury landed in Charleston, the owner of the *Conception*, Hernandez, brought suit.[267]

The district court discharged Aury and dismissed the case on the established grounds that a neutral court, sitting in admiralty, "will carefully avoid taking cognizance of prize matters of foreign nations, occurring upon the high seas."[268] It distinguished *Waters v. Collot* as a contrary example in which, unlike the case at bar, the court properly assumed jurisdiction because the "tort [was] only considered as a marine trespass, and not an incident of a case jure belli."[269] The court's refusal to exercise jurisdiction in *Hernandez v. Aury* turned on its characterization of the action as "incidental to the question of prize"[270]—that is, the lawfulness of Aury's capture of a suspected enemy ship. The trial judge made a special point to indicate that the case's disposition did not in any way depend on "the military grade of the defendant who is before me; or the authority by which he acted at the time the capture was made,"[271] but purely on the grounds of neutrality. The special rules governing prize cases thus prevented the need for further delineation of the scope of individual conduct-based immunity, leaving *Waters v. Collot* as the most authoritative precedent in this area.

During the nineteenth century, the Executive appears not to have changed its posture of non-intervention in suits against individuals who acted on behalf of foreign governments, even though it did submit suggestions in suits against foreign ships. In 1841, the New York Supreme Court of Judicature considered the potential immunity from suit of Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada. McLeod faced criminal and civil charges for his alleged involvement in the 1837 attack on the steamboat *Caroline*, in which U.S. citizen Amos Durfee was killed.[272] Secretary of State Daniel Webster echoed Attorney General

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266 Hernandez v. Aury, 12 F. Cas. 33 (D.S.C. 1818).

267 *Id.* at 33.

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.* at 34.

272 People v. McLeod, 1 Hill 377, 379–81 (N.Y. Sup. Ct. 1841). For additional discussion, see John E. Noyes, *The* Caroline*: International Law Limits on Resort to Force, in* INTERNATIONAL LAW STORIES 263 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007), David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515 (1992), and R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82 (1938).

Bradford's disavowal of the authority to order McLeod's discharge and release, even though McLeod allegedly had been acting under British orders. Webster wrote to British Minister Henry Fox that "Her Majesty's government must be fully aware, that in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process."[273] He continued: "[I]t is quite clear that the Executive Government cannot interfere to arrest a civil suit, between private parties, in any stage of its progress; but that such suit must go on to its regular judicial termination."[274] This was true, Webster wrote, notwithstanding the President's opinion that McLeod's claim of "immunity from personal responsibility by virtue of the law of nations" (which McLeod raised in a habeas proceeding) would succeed in state court if McLeod presented "authentic evidence of the avowal by the British Government, of the attack on and destruction of 'The Caroline,' as acts done under its authority."[275] The New York Supreme Court (the highest court of general jurisdiction sitting in New York at the time) rejected McLeod's claim to immunity from personal responsibility for his alleged acts (without reference to the *Collot* decision).[276] McLeod presented an alibi defense at trial and was ultimately acquitted by the jury.[277]

Half a century later—nearly a full century after the Pennsylvania Supreme Court refused to discharge General Collot on the grounds of conduct-based immunity—the Second Circuit issued its opinion in *Underhill v. Hernandez*, which is often cited as the origin of the act of state doctrine in the United States.[278] On November 5, 1893, the *New York Times* reported that former U.S. Consul George Underhill and his wife had filed a suit against José Manuel Hernandez, a Venezuelan General and Senator, and obtained an order for his arrest in New

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273 Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), *reprinted in* People v. McLeod, 25 Wend. *483, *513 (N.Y. Sup. Ct. 1841).

274 *Id.*

275 *Id.*

276 People v. McLeod, 1 Hill 377 (N.Y. Sup. Ct. 1841).

277 Bederman, *supra* note 272, at 526. With respect to official acts done on the foreign state's own territory, however, the New York Supreme Court ruled in *Hatch v. Baez* that the former president of the Dominican Republic was not "amenable to the jurisdiction of the courts of this State" for "the acts of another government done within its own territory." 14 N.Y. Sup. Ct. 596, 599 (Gen. Term 1876). This ruling, which relies on *Schooner Exchange v. M[c]Faddon*, 11 U.S. (7 Cranch) 116 (1812), and *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), rather than the 1790s cases explored above, will be examined in future work on the nineteenth-century evolution of the act of state doctrine.

278 *See* Underhill v. Hernandez, 65 F. 577, 580, 583 (2d Cir. 1895) ("[W]e conclude that the acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government."), *aff'd on other grounds*, 168 U.S. 250 (1897).

York.[279] The Underhills alleged that Hernandez had imprisoned them in Ciudad Bolivar, where Underhill operated water works under a concession from the previous government, and that Hernandez had compelled Underhill to sell his plant and property "for a pittance."[280] The Circuit Court for the Eastern District of New York directed a verdict for Hernandez at the conclusion of the trial "upon the ground that because the acts of the defendant were those of a military commander, representing a de facto government in the prosecution of a war, he was not civilly responsible therefor."[281] Underhill appealed the directed verdict.

The Second Circuit affirmed. It found that the evidence presented at trial was "not sufficient to have warranted a finding by the jury that the defendant was actuated by malice, or any personal or private motive."[282] It also articulated the principle that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers."[283] (By then, the United States had recognized the revolutionary forces commanded by General Hernandez as the legitimate government of Venezuela.[284]) In support of its decision to affirm the directed verdict, the Second Circuit cited the Attorney General's letters in the *Collot* and *Sinclair* cases for the proposition that "[t]he law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country, in behalf of their government, by virtue of their official authority"[285]—even though, as detailed above, this did not mean that such individuals could avoid being arrested in the United States and compelled to respond to a suit. The Second Circuit held that, based on the trial record, "the acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government."[286]

The Supreme Court affirmed the Second Circuit's decision.[287] While Chief Justice Fuller wrote for the court that "acts of legitimate

279 *Bail Came Just in Time*, N.Y. TIMES, Nov. 5, 1893, at 9.

280 *Id.*

281 *Underhill*, 65 F. at 579, 583. The reasoning in *Underhill* stands in contrast to the West Virginia Supreme Court of Appeals's earlier decision in *Hedges v. Price*, 2 W. Va. 192 (1867), which held that a former member of the Confederate army could be held civilly liable for trespass and theft for carrying away the plaintiffs' goods under orders from his superiors for the use of the Confederate army.

282 *Underhill*, 65 F. at 579.

283 *Id.*

284 *Id.* at 578.

285 *Id.* at 580.

286 *Id.* at 583.

287 Underhill v. Hernandez, 168 U.S. 250, 254 (1897).

warfare cannot be made the basis of individual liability,"[288] his opinion is more often cited for its statement that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[289] Limits on individual responsibility, judicial competence, and territorial jurisdiction thus became entwined with a broader principle of judicial non-intervention in cases involving "acts of the government of another done within its own territory"—the affirmative defense now known as the act of state doctrine.

Following *Underhill*, the precise relationship between foreign state immunity, foreign official immunity, and the act of state doctrine remained blurred. For example, in 1924, the Second Circuit found in *Oliver American Trading Co. v. Mexico* that Mexico was immune from U.S. jurisdiction in an action for breach of contract.[290] In support of Mexico's immunity, the court cited the Attorney General's letters in the *Collot* and *Sinclair* cases, as well as its own previous decision in *Underhill*.[291] In so doing, the Second Circuit did not differentiate between suits against individuals and suits against states themselves, or between immunity from jurisdiction and a substantive defense on the merits. Instead, it articulated a general proposition that "for illegal acts committed in a foreign state the judicial tribunals of that state will afford proper redress."[292] This overly broad statement was only partially cured by the court's later clarification that its dismissal was based on the limited ground that "the public property of Mexico . . . is entitled to the same immunity as a sovereign, or an ambassador, or a ship of war, and for the same reason,"[293] thereby placing *Oliver American Trading Co.* within the line of cases on status-based (as opposed to conduct-based) immunity.

As the twentieth century progressed, relatively few cases were brought against individuals acting on behalf of foreign governments. Judicial discussions of the scope of conduct-based immunity and the

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288 *Id.* at 253.

289 *Id.* at 252.

290 Oliver Am. Trading Co. v. Mexico, 5 F.2d 659, 660, 666–67 (2d Cir. 1924). In so holding, the court took judicial notice of the fact that, in countries where the government owns and operates the railways, "[t]his is not regarded by them as engaging in trade, but as the performance of a fundamental governmental function." *Id.* at 665.

291 *Id.* at 662.

292 *Id.* In fact, the 1871 Attorney General opinion that the court cites in support of this general proposition found that seeking local redress (what we would now term "exhaustion of local remedies") was *not* required where such an attempt would be futile. *See* New Granadian Passenger-Tax, 13 Op. Att'y Gen. 547, 550–51 (1871) (opining that the principle of exhaustion did not apply because the government of New Granada had taken the position that the acts complained of were lawful).

293 *Oliver Am. Trading Co.*, 5 F.2d at 667.

role of the Executive remained scarce.[294] In the meantime, the act of state doctrine continued to evolve. In 1963, the petitioner in *Banco Nacional de Cuba v. Sabbatino* cited *Waters v. Collot* in its brief to the Supreme Court.[295] *Sabbatino* involved the Cuban government's expropriation of sugar owned by an American company. The brief submitted by the Cuban bank argued that U.S. courts were required to give legal effect to the nationalization decrees and grant summary judgment to the bank because there were "no substantial issues of fact requiring trial."[296] The brief cited the Pennsylvania Supreme Court's decision in *Waters v. Collot*, as well as Attorney General Bradford's related letter, in a footnote, and characterized *Collot* as one of the earliest cases applying the act of state doctrine.[297]

These occasional citations to the 1790s cases did not fully clarify the relationship between jurisdictional immunity and entitlement to summary judgment, or between status-based and conduct-based immunity. These distinctions became increasingly important as more claims were brought against current or former foreign officials in U.S. courts.[298] After making its appearance in the *Sabbatino* brief, the case against Collot does not appear to have resurfaced as a precedent until the United States filed its 2006 Statement of Interest in *Matar v. Dichter*, which cited the opinions by Attorneys General Bradford and Lee.[299] Collot and Sinclair, rescued from oblivion, soon found themselves in the middle of a doctrinal maelstrom, as their eighteenth-century misadventures became fodder for twenty-first-century legal arguments.

CONCLUSIONS

This Article has sought to illuminate the process and substance of common law immunity for nondiplomatic officials as it was understood during the late eighteenth century and beyond. It has emphasized the important, but often overlooked, distinction between the status-based immunity from jurisdiction accorded heads of state,

294 On the paucity of cases against individuals who were not heads of state in the two decades preceding the enactment of the FSIA, see Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, 1977 DIGEST app. at 1020, and Keitner, *Common Law*, *supra* note 17, at 72–73 (describing these four cases).

295 Brief for Petitioner at 14 n.3, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16).

296 *Id.* at 11.

297 *Id.* at 14 n.3. Louis Henkin's subsequent article on *Sabbatino* cites the *Collot* case as one that carried "echoes" of the act of state doctrine. Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 805 (1964).

298 *See supra* notes 1–8 and accompanying text (describing suits against officials).

299 *Supra* notes 6–7 and accompanying text.

diplomatic officials, and ships in the possession and use of a foreign sovereign, and the affirmative defense that a particular action was within the scope of a foreign official's "lawful powers."[300] Clarifying this distinction constitutes an important first step toward formulating the standards that will govern jurisdictional immunity, as well as dismissal for failure to state a claim or entitlement to summary judgment, in cases against current or former foreign officials.

The materials examined lead to the observation that conduct-based (or *ratione materiae*) immunity was treated like an affirmative defense to be pleaded by the defendant, and not a basis for Executive intervention in the eighteenth and nineteenth centuries. The origins of the act of state doctrine and *ratione materiae* immunity may be so closely intertwined precisely because both represent substantive defenses to be pleaded on the merits.

Several enduring principles emerged during this early period. A defendant who acted as a commercial agent would not bear personal liability for debts incurred on behalf of a foreign state because the foreign state itself was the real party in interest.[301] U.S. courts also declined to adjudicate claims that were incidental to the capture of a suspected enemy ship because, as a matter of prize law, these disputes were subject exclusively to the jurisdiction of the captor's courts.

Other acts performed within the scope of a foreign official's lawful powers were also insulated from review by U.S. courts. In these cases, it was not that the court lacked jurisdiction over the individual if she was found within the United States and was not a diplomatic official or head of state. Instead, as in the commercial agent cases, there was no cause of action against the individual personally because she did not bear personal responsibility for the challenged acts. It was not

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300 Timothy Pickering used the term "lawful powers" in his May 29, 1797 letter to Joseph Létombe. Letter from Timothy Pickering to Mr. Letombe, Consul General of the French Republic (May 29, 1797), *supra* note 100. In order to secure discharge on common bail, a defendant foreign official was required to provide certification from the foreign government that the "act which occasioned the injury complained of had been within his lawful powers." *Id.* Pickering's formulation leaves open the question of whether such a certification could be challenged on the grounds that the authorization was itself unlawful, or that the action exceeded the scope of authority that any government could lawfully confer.

301 This principle was reaffirmed in *Greenspan v. Crosbie*, [1976–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,780, at 90,827 (S.D.N.Y. Nov. 23, 1976), in which individual foreign officials were deemed immune from suit for alleged violations of Section 10(b) of the Securities Exchange Act. Similarly, when a plaintiff seeks financial recovery from a foreign state but names an individual defendant, the state is the real party in interest and the case against the individual should be dismissed. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010) ("[I]t may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest.").

settled in the late eighteenth century, and it remains unsettled today, what type of evidence of action within lawful powers was sufficient to secure dismissal on this basis.

As the 1790s cases illustrate, the situation becomes more complicated when an individual allegedly has exceeded the scope of his authority,[302] or when the authority given (for example, to torture) was unlawful under the domestic law of the place where the conduct occurred, under international law, or under the law of a third state. In these scenarios, the forum state might recognize a cause of action against the individual personally notwithstanding his or her actual or apparent authority. The hard question is whether a claim of common law immunity will nevertheless prevent the case from moving forward. If such a claim is grounded in eighteenth-century precedents, my assessment is that an assertion of conduct-based immunity will not serve as a jurisdictional bar to proceedings, and that a court must assess whether applicable substantive law imposes personal responsibility for the alleged conduct.

If applicable law does reach the alleged conduct, a version of the act of state doctrine might still have a role in securing dismissal, especially if the alleged conduct falls within what one might call a "margin of appreciation" within which sovereign states permit each other leeway to act without foreign judicial scrutiny.[303] This is a more limited basis for dismissal, however, than the blanket claim that current or former officials are immune from jurisdiction for all acts performed on behalf of a foreign state.

As for the Executive's role, it is clear that the current practice of submitting suggestions or statements of interest can be useful to courts in cases involving both conduct- and status-based immunity. That said, it is important to recognize that the Executive previously believed that certain forms of intervention in a civil suit against a foreign official would be constitutionally prohibited. The Executive has not taken full account of its own early disavowal of constitutional authority in this area. In its amicus curiae brief in *Samantar*, the United States erroneously asserted that foreign officials have always had immunity "[r]ooted [i]n" the exclusive discretion of the executive

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302 *Cf.* Gill v. Brown, 12 Johns. 385, 386 (N.Y. Sup. Ct. 1815) (finding personal liability for a public officer who acted beyond the scope of his authority when he entered into an agreement with the plaintiff).

303 *See* Kenneth C. Randall & Chimène I. Keitner, Sabbatino, Sosa, *and "Super Norms," in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 559, 565 (Mahnoush H. Arsanjani et al. eds., 2011) (drawing a line of continuity between *Sabbatino* and *Sosa* as delineating the authority of the U.S. judiciary vis-à-vis the political branches and foreign sovereigns).

branch.[304] In fact, the practice of judicial deference to the Executive crystallized only in the 1930s and arose in the context of in rem proceedings against foreign ships, not suits against foreign officials.[305] There does not appear to be any long-standing practice of judicial deference to executive determinations of individual conduct-based immunity.[306] This does not mean that the Executive must embrace its previous disavowals, but it does open a space for critical reflection about the Executive's appropriate role and the allocation of authority between the Executive and the judiciary in cases against nondiplomatic officials.

The eighteenth-century cases involving claims to foreign official immunity can also be read alongside other cases raising foreign-relations concerns. The Supreme Court has suggested "a policy of case-specific deference to the political branches" under which "federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy"[307] before exercising jurisdiction. Although, in most cases, one might expect that giving "serious weight" to the Executive's views will produce the same result as absolute judicial deference, the distinction between serious weight and absolute deference is not insignificant. The materials explored here thus contribute to a growing body of literature challenging the historical basis for judicial deference to the Executive branch in cases that implicate foreign affairs.[308] In practical terms, if the Executive does not have the final word on conduct-based immunity determinations, it

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304 Brief for the United States as Amicus Curiae Supporting Affirmance at 27, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555). Professor David Stewart, previously an Assistant Legal Adviser for the Department of State, has also taken this position. *See* Stewart, *supra* note 15, at 646.

305 *See* Keitner, *Common Law*, *supra* note 17, at 73 & n.44 (noting this change in degree of judicial deference); Wuerth, *supra* note 17, at 925–27 (same).

306 In the 1950s and 1960s, there were only four immunity determinations involving individual officials who were neither diplomats nor heads of state, and in only one of these cases is it clear that the court believed itself to be bound by an Executive determination. Semonian v. Crosbie (D. Mass. 1974) (no decision located); Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, *supra* note 294, at 1062 (citing Cole v. Heitman (S.D.N.Y. 1968)); Waltier v. Thomson, 189 F. Supp. 319 (S.D.N.Y. 1960); *Greenspan*, Fed. Sec. L. Rep. (CCH) ¶ 95, 780; *see* Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, *supra* note 294, at 1020 (chronicling Executive consideration of requests for suggestions of immunity in the period between the Tate letter and the passage of the FSIA); Keitner, *Common Law*, *supra* note 17, at 73 (noting that there is no stable conduct-based immunity standard of total deference to the Executive).

307 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

308 *See, e.g.*, David L. Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505 (2007) (indicating that in its first fifty years, the Supreme Court did not defer to executive branch treaty interpretations); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in*

can potentially deflect some of the diplomatic pressures brought by foreign governments seeking conduct-based immunity for their officials and mitigate concerns that immunity determinations are based solely on political considerations[309]—the same concerns that led Congress to enact the FSIA to govern the immunity of foreign states themselves.[310]

Absent further congressional action, the immunity of foreign officials not covered by applicable treaties or statutes will be determined under the "common law of official immunity," not the FSIA.[311] The common law, understood broadly, comprises a series of choices by authoritative decision makers from which subsequent decision makers have constructed a set of constraints that relevant actors understand as legally binding. By chronicling early choices regarding foreign official immunity, this Article builds a foundation for a more informed conversation about the shape that the "common law of official immunity" can and should take going forward. As U.S. courts and other decision makers struggle to achieve a balance among affording individuals judicial recourse for their injuries, holding wrongdoers accountable without scapegoating bureaucrats, and preserving peaceful relations with foreign countries, they might take some comfort in the fact that their eighteenth-century predecessors struggled with remarkably similar issues.

By highlighting the fluid and shifting nature of understandings in this area, this Article will likely add to the general discomfort with federal common lawmaking that pushes decision makers toward

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Foreign Affairs: An Empirical Study of the Supreme Court's Docket, 114 YALE L.J. 855 (2005) (documenting a high degree of judicial involvement in early foreign affairs).

309 The ability of the Executive to deflect criticism of its apparent inaction may serve a practical purpose. Former State Department Legal Adviser Davis Robinson recounts an exchange between Secretary of State George Shultz and Chinese leader Deng Xiao Ping about the possible attachment of a Chinese aircraft by a U.S. court:

> Apparently Shultz met with him and I was told that Deng Xiao Ping became highly annoyed and said . . . "Why don't you just call that judge down in Alabama and tell him to lay off the People's Republic of China." And apparently Shultz replied, "Oh, we have the separation of powers, you have to understand." And Deng Xiao Ping said, "Well, what is the separation of powers?" Shultz answered, "I'll send you my lawyer to explain it."

MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 44 (2010). The letters sent by Secretaries of State Randolph and Pickering to British and French ministers might be seen as the eighteenth-century equivalent of Schultz's statement, "I'll send you my lawyer to explain it."

310 *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2285 (2010) (No. 08-1555) (noting that Congress enacted the FSIA in 1976 in response to the "inconsistent application of sovereign immunity").

311 *Id.* at 2290 & n.14.

statutory solutions. If this Article has succeeded in challenging historical generalizations about the absolute immunity of foreign officials from suit in U.S. courts, and the established role of the Executive in issuing binding suggestions of conduct-based immunity, then such discomfort is—in my view—a worthwhile price to pay.