

## Head of State Immunity as Sole Executive Lawmaking

Lewis S. Yelin

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Courts Commons](#), and the [President/Executive Department Commons](#)

---

# Head of State Immunity as Sole Executive Lawmaking

Lewis S. Yelin\*

## ABSTRACT

*At the request of the Executive Branch, courts routinely dismiss private suits against sitting heads of foreign states. Congress has never delegated authority to the Executive Branch to identify principles governing head of state immunity. The courts' practice thus appears inconsistent with the conventional view that the Executive Branch lacks authority to affect private rights unless authorized by Congress to do so. This Article argues that the Executive Branch's practice of determining head of state immunity is an example of sole executive lawmaking, deriving from the President's constitutional responsibility as the only authorized representative of the United States in its relations with foreign states. The President accordingly has some inherent, though limited, lawmaking authority under Article II of the Constitution. The Article supports this doctrinal argument by examining the separation-of-powers concerns underlying the courts' historic deference to executive branch determinations of foreign state immunity, prior to the codification of that subject in 1976. It considers objections that the Executive Branch's authority to determine head of state immunity is more plausibly grounded in the Reception Clause than in the President's more general power to conduct the nation's diplomacy, and that head of state immunity determinations are not really lawmaking. The Article concludes by considering the respective roles of Congress and the courts in determining and applying principles of head of state immunity.*

---

\* Attorney, Appellate Staff, Civil Division, U.S. Department of Justice. From January to September 2009, Mr. Yelin served as the Counselor on International Law in the Office of the Legal Adviser at the U.S. Department of State. Mr. Yelin was among the attorneys who represented the United States in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) and *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004), decisions discussed in this Article. The views expressed here do not necessarily represent those of the United States, the Department of Justice, or the Department of State.

This Article benefited from the thoughtful comments of Ruth Wedgwood and the other participants of the Fifth Annual Potomac Foreign Relations Law Roundtable; the participants of the *Vanderbilt Journal of Transnational Law* symposium "Foreign State Immunity at Home and Abroad"; and Nicholas Bagley, John Bellinger, Kristina Daugirdas, William Dodge, Chimène Keitner, Craig Green, Douglas Letter, Henry Monaghan, Peter Rutledge, Jonathan Schwartz, Beth Stephens, and Ingrid Wuerth.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	913
II.	THE TENSION BETWEEN HEAD OF STATE IMMUNITY AND EXCLUSIVE CONGRESSIONAL LAWMAKING .....	922
	A. <i>Judicial Deference to Executive Suggestions of Head of State Immunity: The Courts’ Explanation</i> .....	922
	B. <i>The Uneasy Coexistence of Suggestions of Immunity and the “Steel Seizure” Presidency</i> .....	927
III.	THE EXECUTIVE AS LAWMAKER: IMMUNITY AND DIPLOMACY .....	929
	A. <i>The Emergence of Head of State Immunity and Deference to Executive Suggestions</i> .....	931
	1. The Law of Nations.....	934
	2. Subject to Revision.....	937
	3. By “the Sovereign” .....	938
	B. <i>From the Law of Nations to the Separation of Powers</i> .....	941
	1. The First World War and the Rise of State Commercial Activity .....	942
	2. Uncertainty and Deference .....	947
	C. <i>Executive Suggestions and Executive Diplomacy</i> .....	951
	1. The Executive as Sole Diplomat .....	952
	2. Diplomacy and Immunity.....	955
	D. <i>Some Objections Considered</i> .....	962
	1. Diplomacy or Reception? .....	962
	2. Lawmaking or Something Else? .....	969
IV.	THE BOUNDARIES OF SOLE EXECUTIVE LAWMAKING ...	975
	A. <i>The Scope and Limits of Head of State Immunity: The Executive Branch and Congress</i> .....	976
	B. <i>The Scope and Limits of Head of State Immunity: The Executive Branch and the Courts</i> .....	983
V.	CONCLUSION.....	989
	APPENDIX A: SUITS INVOLVING HEAD OF STATE IMMUNITY .....	991
	APPENDIX B: THE TAFT LETTER.....	997

## I. INTRODUCTION

Under a common view of the constitutional separation of powers, the Executive Branch is fully subservient to the Legislature when it comes to making law. The Constitution vests all legislative powers in Congress and none in the President.<sup>1</sup> The Supreme Court has long construed Article I's Vesting Clause as permitting "no delegation of those powers."<sup>2</sup> But whatever force a formalistic conception of legislative powers may have had in the early Republic, it quickly eroded.<sup>3</sup> For most of our constitutional history, the prohibition against delegation of legislative authority has been highly permissive.<sup>4</sup> The Supreme Court has upheld broad delegations of lawmaking power to administrative agencies, provided that Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."<sup>5</sup> Nevertheless, the Supreme Court's non-delegation jurisprudence reflects the idea that the Constitution assigns to Congress alone the authority to make the law.<sup>6</sup> Accordingly, it is generally accepted that "all executive officials," including the President, "must exhibit some statutory warrant at least when their conduct invades the private rights of American citizens."<sup>7</sup>

1. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

2. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001).

3. *See, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.) ("Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

4. *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 5 (1993) ("[T]he nondelegation barrier, never very sturdy, has collapsed. Only the fiction remains." (footnote omitted)). The high point of the nondelegation doctrine occurred in 1935 when the Supreme Court issued its only decisions holding unconstitutional statutes delegating legislative authority to the Executive Branch. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating § 3 of the National Industrial Recovery Act, which empowered the President to implement "codes of fair competition"); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating § 9(c) of the National Industrial Recovery Act, which authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum produced in excess of the amount permitted by state quotas).

5. *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (internal quotation marks omitted).

6. As the Supreme Court explains it, the "intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). In this Article, I use "lawmaking" broadly to denote the creation of rules of prescriptive force, capable of prospective application, whether regulating primary or secondary conduct.

7. Monaghan, *supra* note 4, at 5. In this Article, I use "private rights" to denote individual rights established by common law or statute that can be "enforce[d]"

The Constitution's grant of authority to the President is thought to lead to the same result. Article II of the Constitution identifies very few specific powers of the Presidency.<sup>8</sup> Only two of them expressly relate to lawmaking: the President can suggest legislation to Congress, and he has the power to veto bills presented to him by Congress.<sup>9</sup> Neither of these powers authorizes the President to make law on his own.<sup>10</sup> And while some have argued that the general grants of authority—vesting the “executive Power” in the President<sup>11</sup> and directing the President to “take Care that the Laws be faithfully executed”<sup>12</sup>—are independent sources of sole executive lawmaking power,<sup>13</sup> that view has not been dominant.<sup>14</sup>

on private initiative in the law courts.” *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 496 (1953).

8. U.S. CONST. art. I, § 7, cl. 2 (giving the President the power to veto bills presented by Congress); *id.* art. II, § 2 (making the President Commander in Chief of the armed forces and giving the President the power: to require opinions of heads of Executive Departments, to grant pardons; to make treaties and appoint foreign and domestic affairs officials, all with the advice and consent of the Senate; and to make recess appointments); *id.* art. II, § 3 (giving the President the power: to recommend legislation to Congress; to convene and adjourn Congress in extraordinary circumstances; to receive ambassadors and other public ministers; and to commission officers of the United States).

9. *Id.* art. I, § 7, cl. 2; *id.* art. II, § 3, cl. 1. The Constitution also makes the Vice-President the President of the Senate, with the power to vote only to break ties. *Id.* art. I, § 3, cl. 4.

10. The President can make law by entering into treaties with foreign states. *See id.* art. II, § 2, cl. 2 (granting the President the power to make treaties); *id.* art. VI, § 2 (making treaties “the supreme Law of the Land”). But the President can commit the United States domestically to a treaty only with the concurrence of “two thirds of the Senators present.” *Id.* art. II, § 2, cl. 2. Thus, the Treaty Clause does not give the President independent lawmaking power.

11. *Id.* art. II, § 1, cl. 1.

12. *Id.* art. II, § 3, cl. 4.

13. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 701–04 (1952) (Vinson, C.J., dissenting) (arguing that President Truman’s seizure of steel mills without express statutory warrant was authorized under the Take Care Clause). Hamilton proposed that the Article II Vesting Clause gave the President a substantive grant of power, presumably all the executive powers historically exercised, except those the Constitution specifically assigned to Congress or to both political branches. *See Alexander Hamilton, PACIFICUS NO. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON, JUNE 1793–JANUARY 1794, at 39 (Harold C. Syrett et al. eds., 1969) (“The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.”).

There is significant debate about the Founders’ understanding of executive authority and whether the Article II Vesting Clause is a source of inherent presidential authority. *Compare, e.g.,* MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS (2007) (arguing that the Vesting Clause is the principal source of executive branch authority over foreign affairs), and Saikrishna B. Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (same), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (disputing textual and historical arguments supporting Vesting Clause as source of executive foreign policy authority), and Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009) (arguing that

The notion that the President has no independent lawmaking authority sits uneasily with the courts' practice of dismissing private lawsuits at the direction of the Executive Branch. Over the past forty-five years, private litigants have sued sitting foreign heads of state about thirty times. In almost every case, the government has appeared to "suggest" the defendant's immunity from suit and to inform the court that it must dismiss the suit.<sup>15</sup> With few exceptions, the court deferred to the Executive Branch's assertion of immunity.<sup>16</sup> And in no case did a court require a foreign official to stand suit despite the Executive Branch's assertion of head of state immunity.<sup>17</sup> By directing the dismissal of suits regardless of the merits of the

---

implied presidential powers must be derived solely from the enumerated powers granted by the Constitution to the President).

14. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 532 (2008) ("[The Take Care Clause] allows the President to execute the laws, not make them."); *Steel Seizure*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.") (rejecting the argument that presidential seizure order unauthorized by statute was an exercise of the President's constitutional executive power); *Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."); see also Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 849 (1975) ("[I]t is at least reasonable to hold that [the executive] power is at best interstitial and ancillary to the policy-forming powers of Congress."); Monaghan, *supra* note 4, at 24 (arguing that powers implied from the Article II Vesting Clause "provide[ ] no basis for a claim that the President can disregard the will of Congress or invade the private rights of American citizens without statutory warrant"); Reinstein, *supra* note 13, at 336 (arguing that the President's "implied powers cannot change domestic laws or impose new legal obligations without congressional authorization").

15. Although denominated a "suggestion" of immunity, the government's filing informs the courts that the Executive Branch's immunity determination is binding. See, e.g., Corrected United States' Motion to Vacate October 21, 2002 Order and Statement of Interest or, in the Alternative, Suggestion of Immunity at 15, Plaintiff A v. Jiang Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003) (No. 02C 7530) [hereinafter *United States Suggestion of Immunity*] (informing the court that the State Department's suggestion of head of state immunity for Chinese President Jiang requires dismissal of the suit). The government typically appears in such private litigation pursuant to a statute authorizing an "officer of the Department of Justice" to appear in any court "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517 (2006).

16. The cases are listed below in Appendix A, *infra*, which also describes the few suits involving head of state immunity in which the United States did not participate.

17. In two anomalous cases, a court declined to accept as controlling the Executive Branch's suggestion of head of state immunity. However, those courts either dismissed the suit against the foreign official on other grounds, or held that the Executive Branch appropriately could assert head of state immunity in subsequent litigation against the foreign official. See *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987); *In re Wilson*, 94 B.R. 886 (Bankr. E.D. Va. 1989). I discuss the *Marcos* case below in the text accompanying notes 433–45 and in Appendix A, *infra*, note 450. I also discuss the *Wilson* case in Appendix A, *infra*.

claims, the Executive Branch limits litigants' private rights.<sup>18</sup> That is, it engages in lawmaking.<sup>19</sup> No statute authorizes the Executive Branch to direct courts to dismiss suits against foreign heads of state.<sup>20</sup> And Congress has codified no standards governing the justiciability of suits against foreign officials.<sup>21</sup> Thus, if the Executive Branch has authority to direct the dismissal of a suit, that power must derive from the Constitution.<sup>22</sup>

In this Article, I propose that the Executive Branch's authority to determine head of state immunity derives from a specific constitutional power assigned exclusively to the President—the power to conduct the nation's diplomacy with foreign states.<sup>23</sup> In making this proposal, I take up Henry Monaghan's idea in *The Protective Power of the Presidency* that “the President's ‘specific’ constitutional powers, such as the Commander-in-Chief power and the powers ‘implied’ from presidential duties, now (whatever the original understanding) imply some independent presidential law-making

---

18. See *supra* note 7 (defining “private rights”); *infra* Part III.D.2 (explaining how executive branch suggestions of immunity affect private rights).

19. See *supra* note 6 (explaining conception of “lawmaking” used in this Article); *infra* Part III.D.2 (defending proposition that executive branch suggestions of immunity constitute lawmaking); see also *INS v. Chadha*, 462 U.S. 919, 952 (1983) (finding that an action having “the purpose and effect of altering the legal rights, duties, and relations of persons” is “essentially legislative”).

20. See *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304 (N.Y. Sup. Ct. 1988) (“There is no prescribed statutory procedure for such filing.”).

21. In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA) to specify the circumstances under which private litigants may sue foreign states. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (2006 & Supp. II 2008)). But the Supreme Court recently held that “[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA.” *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

Congress has enacted a limited number of rights of action against foreign officials. See, e.g., 28 U.S.C. § 1605A(c) (Supp. II 2008) (creating right of action against foreign state official for acts of state sponsored terrorism); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), (codified at 28 U.S.C. § 1350 note (2006)) (creating right of action against any individual committing torture or extrajudicial killing while acting “under actual or apparent authority, or color of law, of any foreign nation”). But the Supreme Court has held that the creation of a right of action does not determine the antecedent question of whether a foreign official is immune from suit. *Samantar*, 130 S. Ct. at 2288 n.11.

22. See *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (“The President's authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952)).

23. When referring to the President's power to conduct the nation's diplomacy, I have in mind what I call the “mechanics” of diplomacy—the ability to speak authoritatively on behalf of the United States in the nation's dealings with foreign counterparts. This power differs from (or at least is not coextensive with) the power to determine the nation's foreign policy positions. There is an important disagreement about the political branch's respective authority to determine the United States' foreign policy, see for example, sources cited *infra* note 234, a dispute this Article does not join. The argument here does not depend on any particular resolution of that issue.

power.”<sup>24</sup> Monaghan recognized as examples of presidential lawmaking assertions of foreign *sovereign* immunity on behalf of states.<sup>25</sup> He did not, however, identify a constitutional basis for that authority or endorse the Executive Branch’s claimed role in making immunity determinations.<sup>26</sup> Moreover, Monaghan suggested that Congress’s 1976 enactment of the Foreign Sovereign Immunities Act “seems to have precluded any independent ‘regulatory’ role.”<sup>27</sup> But Congress did not displace the Executive Branch’s role in determining the immunity from suit of foreign heads of state.<sup>28</sup> Thus, it would be useful to know whether the Executive Branch’s lawmaking is constitutionally sanctioned.<sup>29</sup>

24. Monaghan, *supra* note 4, at 54; see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1050 (1967) (“Action by the President within the sphere of his competence . . . may operate as a rule of decision to the same degree as a rule provided by a valid statute or treaty.”).

25. Monaghan, *supra* note 4, at 55–56; see *id.* at 55 n.262 (“[T]o the extent that the courts defer to the Executive acting without statutory authority, it is the latter who claims the right to define the legal rights of American citizens.”); see also Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915, 920 (2011) (identifying pre-FSIA executive branch assertions of foreign sovereign immunity as a primary example of the President’s lawmaking power).

26. Monaghan, *supra* note 4, at 55 (“[I]n the development of both the foreign-sovereign-immunity and act-of-state doctrines, Presidents have in the past asserted the right to determine when either doctrine is properly invoked in judicial proceedings.”); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 54–61 (2d ed. 1996) (identifying suggestions of foreign sovereign immunity as example of presidential lawmaking but giving no explanation for constitutional authority for such activity).

27. Monaghan, *supra* note 4, at 56.

28. See *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (“The FSIA does not, however, address the immunity of foreign heads of states.”); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (“[T]he FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context.”). Recently, the Supreme Court broadly held that the Foreign Sovereign Immunities Act did not displace the Executive Branch’s role in determining the immunity from civil suit of any foreign officials. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

29. See Joseph W. Dellapenna, Case Note, *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994), 88 AM. J. INT’L L. 528, 531 (1994) (“Whether courts should be bound by such ‘suggestions’ [of head of state immunity] or should even pay much attention to them is far from clear, although courts certainly seem inclined to do so.”); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. INT’L L.J. 1, 57–58 (2003) (noting suggestions of head of state immunity as examples of “domestic ‘lawmaking’ by the President” and suggesting that analytical focus “should be on the source and scope of executive authority with respect to domestic courts, particularly in light of the Supremacy Clause, and the ways in which the Constitution provides for lawmaking”); see also Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1789 (2009) (“[T]he President may not, through his foreign affairs executive power, make new domestic law. He can make a treaty. He can negotiate an executive agreement implemented by legislation within Congress’s power. But he can no more make law on his own, through the exercise of the foreign affairs aspect of ‘the executive Power,’ than he can legislate on his own.”).



Part II of this Article considers the courts' explanation for the practice of deferring to executive branch suggestions of immunity. It focuses on a human rights suit brought against Chinese President Jiang Zemin in 2002, during a diplomatic visit to the United States. The suit against President Jiang is one of the more recent and well publicized instances of the courts' dismissal, at the Executive Branch's request, of a suit against a foreign head of state. In dismissing the suit, the district court and court of appeals held that they were required to follow the Executive Branch's suggestion of immunity. They explained their holding by pointing to the President's significant foreign affairs powers and to the harm that would be caused to our foreign relations were the courts to assume jurisdiction over suit in which the Executive Branch has recognized the foreign official's immunity. Part II ends by highlighting the tension between this explanation for judicial deference to the Executive and the notion that the President lacks any inherent lawmaking power. That understanding of Presidential authority is exemplified by the majority opinion in the *Steel Seizure* case,<sup>30</sup> a suit in which the Supreme Court repudiated the Executive Branch's reliance on its general foreign affairs powers as a basis for sole executive lawmaking.

The third Part argues that the Executive Branch's authority to direct the dismissal of suits against foreign heads of state derives from the President's constitutional power to conduct the nation's diplomacy. The separation-of-powers concerns that explain the courts' deference to executive branch suggestions of head of state immunity can be traced back to judicial deference to executive determinations of foreign state immunity in the 150 years prior to the enactment of the Foreign Sovereign Immunities Act in 1976. Head of state immunity emerged from the more general doctrine of foreign state immunity after Congress codified the latter. Understanding the separation-of-powers concerns informing the courts' deference to executive suggestions of state immunity thus helps illuminate the constitutional foundation for the Executive Branch's authority to determine head of state immunity.

The Article accordingly focuses on the courts' understanding of the Executive's role at two key periods. Part III first explores the Supreme Court's initial recognition in 1812 of state sovereign immunity in *The Schooner Exchange v. McFaddon*.<sup>31</sup> While it is generally thought that the Supreme Court created foreign sovereign immunity purely as a "common law" doctrine, a close reading of the Executive Branch's suggestion of immunity, the government's arguments, and the Court's decision in *The Schooner Exchange* show

---

30. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

31. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

that the early Court was aware of the relationship between the recognition of a foreign sovereign's immunity from suit and the President's constitutional foreign affairs powers. Part III next explores the courts' increasing reliance on executive branch suggestions of immunity beginning around the First World War, a period in which the prevailing international norms were becoming uncertain, and in which the Executive Branch's understanding of foreign sovereign immunity diverged from the view adopted by most U.S. courts. Drawing on these historical considerations, Part III argues that the courts' deference to executive suggestions of head of state immunity, and the Executive Branch's concomitant power to make law, is best explained as a component of the President's exclusive authority to conduct the nation's diplomacy free from interference by the other branches. Part III concludes by considering some objections to the argument: whether it would be simpler to ground the Executive's power to suggest head of state immunity in the Reception Clause,<sup>32</sup> and whether suggestions of immunity really are examples of executive lawmaking.

Part IV addresses the respective roles of Congress and the courts in determining the governing principles of head of state immunity. Congress shares with the President the federal government's authority over foreign affairs.<sup>33</sup> Thus, the question arises whether Congress has concurrent authority to identify principles governing head of state immunity. Congress's power to act in an area where the Constitution gives the Executive Branch specific authority raises complicated questions that are difficult to answer in the abstract. However, I propose some general principles shaping the contours of Congress's power to legislate concerning head of state immunity. Most fundamentally, while Congress likely does have some authority to legislate concerning head of state immunity, it could not properly do so if its action would diminish the Executive Branch's ability to conduct the nation's diplomacy. Courts similarly cannot act to limit the President's exercise of a specific constitutional authority. Yet courts also have the responsibility to determine whether a branch of government acts in excess of the authority granted by the Constitution.<sup>34</sup> Accordingly, their principal role is to guard the separation of powers by upholding executive suggestions of head of state immunity that are asserted as part of the President's sole authority to speak for the nation in its relations with foreign states, while ensuring that the Executive Branch does not improperly expand its power beyond its constitutional grant.

---

32. U.S. CONST. art. II, § 3 (giving the President the power to receive ambassadors and other public ministers).

33. See *infra* notes 361–69 and accompanying text.

34. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing this inquiry as “a delicate exercise in constitutional interpretation”).

I should say a word about the scope of this Article's ambitions. In the decades before the enactment of the Foreign Sovereign Immunities Act, courts routinely deferred to executive branch determinations of foreign state and foreign official immunity from suit.<sup>35</sup> Some question the propriety of that practice, arguing that it countenanced unauthorized executive lawmaking.<sup>36</sup> The Foreign Sovereign Immunities Act codified the standards governing foreign state immunity, eliminating judicial deference to executive determinations,<sup>37</sup> and suggesting to some that the question of executive authority in this area had become largely a historical question.<sup>38</sup> In *Samantar v. Yousuf*,<sup>39</sup> however, the Supreme Court recently held that the statute did not similarly codify standards governing the immunity of foreign officials, leaving in place the prior practice of judicial deference.<sup>40</sup> Some commentators have expressed concern that *Samantar* has revitalized the practice of executive suggestions, raising again the question of expansive executive branch lawmaking.<sup>41</sup>

I will not address those concerns here. In this Article, I seek to explain the basis for the Executive Branch's authority to determine

---

35. See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). Chimène Keitner reasonably argues that the paucity of suits against foreign officials preceding the enactment of the Foreign Sovereign Immunities Act makes it difficult to identify with any certainty a practice of judicial deference to executive branch determinations of foreign official immunity. Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 72 (2010). However, there appears to be no record of any court denying a foreign official immunity from suit in the face of an executive branch suggestion of immunity. See cases noted in Appendix A, *infra* for suits involving head of state immunity, most post-dating the FSIA.

36. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1709 (1997) (“[I]n contrast to . . . delegated executive lawmaking . . . the executive suggestion has no legal basis.”); Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT’L L. 168, 169 (1946) (arguing that the State Department “is not organized in such a way as to facilitate what are essentially judicial decisions” in cases involving sovereign immunity); Prakash & Ramsey, *supra* note 13, at 263 n.125 (finding “troubling” mid-twentieth century judicial deference to executive branch determinations of foreign state immunity).

37. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–88 (1983).

38. See, e.g., Monaghan, *supra* note 4, at 55–56. (“Congress has now enacted extensive regulation [concerning foreign sovereign immunity] and seems to have precluded any independent ‘regulatory role.’”).

39. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

40. *Id.* (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”); see *id.* at 2284–85 (discussing pre-FSIA practice of judicial deference).

41. See, e.g., Peter B. Rutledge, *Samantar and Executive Power*, 44 VAND. J. TRANSNAT’L L. 885 (2011) (raising separation of powers concerns with executive branch foreign official immunity determinations made in response to pending litigation); Wuerth, *supra* note 25 (arguing that the Executive Branch lacks lawmaking power over most foreign official immunity determinations).

head of state immunity, not foreign official immunity generally.<sup>42</sup> Thus, although the argument presented here may have implications for the Executive Branch's more general power to determine foreign official immunity, for the most part, I will not attempt to draw out those implications.<sup>43</sup> Similarly, while this argument may have implications for the Executive Branch's authority to suggest the immunity from suit of foreign officials after they leave office, the Article will focus on the Executive's power to determine the immunity of incumbent officials, as the constitutional foundation for the Executive Branch's authority is clearest in that context.<sup>44</sup> While my focus is narrow, it is informed by the belief that the Executive

---

42. Under customary international law, head of state immunity encompasses the immunity of not only heads of state but also of other "holders of high-ranking office in a State" such as "the Head of Government and Minister for Foreign Affairs." *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20–21 (Feb. 14). The Executive Branch has suggested head of state immunity in suits against high-ranking foreign officials such as a foreign minister. See cases cited *infra* Appendix A. I do intend for the arguments made here to justify the Executive Branch's assertions of head of state immunity on behalf of these other high-ranking foreign officials. I discuss the limits of the Executive Branch's authority to determine that a foreign official qualifies for head of state immunity, and the courts' responsibility to police the boundaries of the Executive's exercise of that authority, in Part IV.B, *infra*.

43. Moreover, I recognize that the Executive's authority to determine foreign official immunity may derive from different sources, depending on the type of immunity at issue, and that the scope of the Executive's authority may also vary. See, e.g., Diplomatic Relations Act of 1978, 22 U.S.C. § 254(d) (2006) (defining the jurisdictional immunity of individuals entitled to immunity under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 [hereinafter Vienna Convention]); Keitner, *supra* note 35, at 71–75 (arguing that the Executive Branch has constitutional authority to determine the status-based immunity from suit of diplomats and sitting heads of state, but that courts have ultimate responsibility for determining conduct-based immunities, with input from the Executive); Wuerth, *supra* note 25, at 967–75 (arguing that courts should make foreign official immunity determinations as part of their federal common law power, giving deference to executive branch views on discrete issues).

In a limited manner, I will pursue the implications of the theory presented here outside the context of head of state immunity in Part IV.B, *infra*. There, I will suggest that courts should defer to the Executive Branch's determinations of special missions immunity because the Executive's authority to specify the immunity of foreign officials visiting the United States on official business, like the Executive's authority to determine head of state immunity, derives from the President's authority to conduct the nation's diplomacy.

44. Head of state immunity encompasses the immunity of sitting heads of state, as well as that of former heads of state who have left office. Under customary international law, sitting heads of state are generally completely immune from the jurisdiction of foreign courts, regardless of the nature of the acts alleged or when they occurred. See *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 20–21. Former heads of state have a more limited immunity for acts taken while in office in an official capacity. See *id.* at 25; see also David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 196 n.15 (2005) (noting that under customary international law, sitting "heads of state are absolutely immune" from suit and "former heads of state are entitled to immunity for their official acts" taken while in office).

Branch's authority to suggest the immunity of sitting heads of state has a constitutional basis that the coordinate branches must respect.

## II. THE TENSION BETWEEN HEAD OF STATE IMMUNITY AND EXCLUSIVE CONGRESSIONAL LAWMAKING

Before addressing whether the courts' deference to executive branch suggestions of head of state immunity is constitutionally grounded, it will be helpful to consider how courts themselves have explained the practice. That explanation rests principally on Supreme Court precedent, prior to the enactment of the Foreign Sovereign Immunities Act, in which the Court held that the judiciary must follow the Executive Branch's suggestion of a foreign state's immunity from suit. It also relies on general statements about the Executive's lead role in the conduct of the nation's foreign affairs. This explanation is less than fully satisfying, however, as it fails to make clear how the Executive Branch has the constitutional authority to direct the outcome of private litigation. And it conflicts with the dominant view—exemplified by the Supreme Court's *Steel Seizure* decision<sup>45</sup>—that the Executive Branch lacks any inherent lawmaking power.

### A. *Judicial Deference to Executive Suggestions of Head of State Immunity: The Courts' Explanation*

In October 2002, President Jiang Zemin of the People's Republic of China visited the United States for a diplomatic meeting with President George W. Bush.<sup>46</sup> Before meeting with President Bush at his ranch in Crawford, Texas, President Jiang made stops in a few U.S. cities, including Chicago.<sup>47</sup> Jiang's itinerary was well publicized in advance of his visit.<sup>48</sup> Knowing that he would be in town, practitioners of the Falun Gong spiritual movement brought suit in a

---

45. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

46. Kate Hunger, *Chinese President, Bush to Meet Today; Crawford Ranch Talks Will Probably Focus on N. Korea's Nukes*, SAN ANTONIO EXPRESS-NEWS, Oct. 25, 2002, at B1. The heads of state discussed matters of significant bilateral concern, including North Korea's recently acknowledged nuclear arms program. See Press Release, President George W. Bush, President Bush, Chinese President Jiang Zemin Discuss Iraq, N. Korea: Remarks by the President and Chinese President Jiang Zemin in Press Conference (Oct. 25, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021025.html>.

47. See R.C. Longworth & Liam Ford, *Protesters Greet Jiang in Chicago*, CHI. TRIB., Oct. 23, 2002, at 3.

48. See, e.g., Peter Harmsen, *China Predicts "Success" for Jiang's US Visit*, AGENCE FR.-PRESSE, Oct. 16, 2002.

U.S. district court in Chicago against Jiang and the Falun Gong Control Office, allegedly a component of the Chinese Communist Party established by Jiang to suppress Falun Gong.<sup>49</sup> The complaint alleged truly horrific human rights abuses, including “arrest without trial, execution, rape, disappearance, forced labor in work camps, and torture of thousands of Falun Gong practitioners” for which defendants were alleged to be responsible.<sup>50</sup> The plaintiffs sued under the Alien Tort Statute,<sup>51</sup> the Torture Victim Protection Act,<sup>52</sup> and section 1985,<sup>53</sup> asserting “claims for torture; genocide; violation of the right to life; violation of the right to liberty and security of the person; arbitrary arrest and imprisonment; violation of the right to freedom of thought, conscience, and religion; and conspiracy to commit violations of civil rights within the United States.”<sup>54</sup>

Because they knew that Jiang would be heavily guarded and that it would be difficult to personally serve him with process, the plaintiffs filed an ex parte motion seeking the district court’s leave to effect service by alternative means.<sup>55</sup> The district court granted the motion, permitting the plaintiffs to serve Jiang “by delivering a copy of the summons and complaint ‘to any of the security agents or hotel staff helping to guard’ Jiang during his stay in Chicago.”<sup>56</sup> Relying on that order, the plaintiffs claimed to have delivered the process to a Chicago police commander stationed at Jiang’s hotel and to U.S. Secret Service agents detailed to guard Jiang.<sup>57</sup>

When Jiang and the Control Office failed to respond to the complaint, the plaintiffs sought a default order.<sup>58</sup> The Executive Branch appeared in the litigation, however, to urge dismissal of the

49. Plaintiff A v. Jiang Zemin, 282 F. Supp. 2d 875, 877, 879 (N.D. Ill. 2003), *aff’d sub nom.* Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004). Some plaintiffs and their family members remained residents of China. *Id.* at 877 n.1. Accordingly, they brought the suit under pseudonyms to avoid possible reprisal. *Id.* Other plaintiffs, residents of the United States, sued under their proper names. *Id.* at 877.

50. *Id.* at 878.

51. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). After the district court ruled in *Jiang Zemin*, the Supreme Court held that district courts have authority under the Alien Tort Statute to recognize a limited number of common law rights of action for certain torts in violation of the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–31 (2004).

52. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)); *see id.* § 2 (establishing a right of action for torture and extrajudicial killing).

53. 42 U.S.C. § 1985(3) (2006) (creating a private right of action for damages for conspiracy to violate civil rights).

54. *Jiang Zemin*, 282 F. Supp. 2d at 877–78.

55. *Id.* at 879.

56. *Id.* (quoting Order of October 21, 2002).

57. *Id.*

58. *Id.* at 878.

suit.<sup>59</sup> The State Department Legal Adviser sent a letter concerning the suit to the Assistant Attorney General of the Department of Justice's Civil Division.<sup>60</sup> The letter explained that "President Jiang is the sitting head of state of the People's Republic of China" and that the Chinese government had formally asked the State Department to "take all steps necessary to have this action against President Jiang dismissed."<sup>61</sup> The letter advised that "[t]he Department of State recognizes and allows the immunity of President Jiang from this suit."<sup>62</sup> It explained that "[u]nder customary rules of international law, recognized and applied in the United States, President Jiang is immune from the jurisdiction of the United States courts in this case."<sup>63</sup> The letter also noted "the particular importance attached by the United States to obtaining the prompt dismissal of the proceedings against President Jiang in view of the significant foreign policy implications of such an action against the President of a friendly foreign State."<sup>64</sup>

On the basis of the State Department's letter, the government argued that the district court was "bound by the Executive Branch's determinations of immunity" and was compelled to dismiss the suit.<sup>65</sup> The government cited no statute authorizing the State Department to terminate private litigation against a foreign official. Nevertheless, the district court found "the government's suggestion of immunity dispositive" and dismissed the action against Jiang.<sup>66</sup> The plaintiffs

---

59. *Id.*

60. Letter from William H. Taft IV, Legal Adviser, U.S. Dep't of State, to Robert D. McCallum, Jr., Assistant Att'y Gen., U.S. Dep't of Justice (Dec. 6, 2002) [hereinafter Taft Letter], reprinted in United States Suggestion of Immunity, *supra* note 15, app. Tab E. The Taft Letter is reproduced in Appendix B of this Article, *infra*.

61. *Id.*

62. *Id.*

63. *Id.* The immunity from suit of sitting heads of state has long been recognized in customary international law. See SATOW'S GUIDE TO DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979) ("It has been established for several centuries in customary international law that a sovereign, or head of state, who comes within the territory of another sovereign is entitled to wide privileges and to ceremonial honours appropriate to his position and dignity, and to full immunity from the criminal, civil and administrative jurisdiction of the state which he is visiting." (footnote omitted)). Customary international law is uncodified and "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). It is distinguished from positive international law, such as treaties and other agreements. See, e.g., *The Paquete Habana*, 175 U.S. 677, 702 (1900) (making the distinction).

64. Taft Letter, *infra* Appendix B.

65. Plaintiff A v. Jiang Zemin, 282 F. Supp. 2d 875, 879 (N.D. Ill. 2003). The United States also argued that the alternative service order should be vacated because the district court lacked authority, absent statutory authorization, to direct executive branch security personnel to effect service of process on a visiting head of state they are assigned to protect. United States Suggestion of Immunity, *supra* note 15, at 4-11.

66. *Jiang Zemin*, 282 F. Supp. 2d at 882, 889. The district court rejected the government's argument that, because Jiang enjoyed head of state immunity, the

appealed, and the Executive Branch again participated in the litigation to assert Jiang's immunity from suit.<sup>67</sup> The Seventh Circuit affirmed the district court's dismissal, agreeing that courts are required to accept the Executive Branch's head of state immunity determinations.<sup>68</sup> However, the district court and the Seventh Circuit did not explain in any great detail why they believed courts are required to defer to the Executive Branch's determination that a foreign head of state is immune from civil suit in the United States.<sup>69</sup> Both courts noted a long history of deference to the executive branch determinations of foreign sovereign immunity and the absence of a statute controlling the immunity of foreign officials.<sup>70</sup> And they

plaintiffs could not use him as an involuntary agent for service on the Falun Gong Control Office. *Id.* at 884. However, the district court dismissed the claims against the Control Office because the plaintiffs had failed to establish that the Control Office had sufficient contacts with the forum state to permit the court to exercise personal jurisdiction over it. *Id.* at 886–89. Accordingly, the district court dismissed the entire suit. *Id.* at 889–90.

67. The government's brief to the Seventh Circuit expressed "great[] concern" about the serious charges in the plaintiffs' complaint, and it noted that the State Department "has on various occasions documented and strongly condemned the systematic persecution by the Chinese Government of the followers of Falun Gong." Brief for the United States as Amicus Curiae Supporting Affirmance at 3, *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004) (No. 03-3989) (citing State Department reports on human rights practices and on religious freedom). Nevertheless, the government explained, it appeared to "defend the district court's holding that it was bound to accept the Executive Branch's assertion of President Jiang's immunity from suit." *Id.* at 4.

68. *Wei Ye*, 383 F.3d at 626 ("The obligation of the judicial branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."). The Seventh Circuit also accepted the government's argument that the Executive Branch's determination of Jiang's head of state immunity precludes the plaintiffs' use of Jiang as an involuntary service agent. *Id.* at 627–28. Accordingly, it affirmed the district court's dismissal of the suit against the Control Office, although on different grounds than those accepted by the district court. *Id.* at 630.

69. In holding that executive branch head of state immunity determinations are controlling, the district court and the Seventh Circuit joined the near-uniform view of the few courts to have considered the issue. *See* cases cited *infra* Appendix A.

70. *Wei Ye*, 383 F.3d at 624–25; *Jiang Zemin*, 282 F. Supp. 2d at 879–82. When the district court and the Seventh Circuit issued their decisions, the majority of circuit courts had held that the immunity from suit of foreign officials is controlled by the Foreign Sovereign Immunities Act. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002) (holding that a suit against an individual official for acts committed in an official capacity is governed by the FSIA); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999) (same); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (same); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (same). In *Wei Ye*, the Seventh Circuit joined the Eleventh in holding that the FSIA did not displace the Executive Branch's authority to determine the immunity of foreign heads of state. *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("[T]he FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context..."). Subsequently, the Seventh Circuit extended its holding in *Wei Ye* to foreign officials generally, creating a clear circuit split. *See Enahoro v. Abubakar*, 408 F.3d 877, 881–82



suggested that deference is grounded in the Constitution's separation of powers and the Executive Branch's lead role in foreign affairs.<sup>71</sup>

In grounding their deference to the Executive Branch this way, the Seventh Circuit and the district court followed earlier Supreme Court practice. The principles governing a foreign state's immunity from suit are now codified in the Foreign Sovereign Immunities Act.<sup>72</sup> But before Congress enacted that statute in 1976, courts determined a foreign state's amenability to suit by looking to principles articulated by the Executive Branch.<sup>73</sup> The Supreme Court's explanation for this practice—when it gave one—was typically laconic. The Court would note that U.S. courts' exercise of jurisdiction in a suit against a foreign state could be taken as a "serious . . . challenge to [the foreign state's] dignity, and may so affect our friendly relations with it."<sup>74</sup> After making this factual prediction, the Court would state the constitutional-sounding imperative "that the courts should not so act as to embarrass the executive arm in the conduct of its foreign affairs."<sup>75</sup> And it would then assert the legal rule "that courts are required to accept and follow the executive determination[s]"<sup>76</sup> of immunity and to "surrender [their] jurisdiction in such cases."<sup>77</sup> Thus, the Supreme

---

(7th Cir. 2005) ("If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."). The split deepened when the Second Circuit adopted the majority view and the Fourth Circuit joined the Seventh in holding that the FSIA does not apply to foreign government officials. *Yousuf v. Samantar*, 552 F.3d 371, 379–81 (4th Cir. 2009), *aff'd*, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80–85 (2d Cir. 2008). The Supreme Court resolved the circuit split when it affirmed the Fourth Circuit's holding in the *Samantar* case. *See Samantar*, 130 S. Ct. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.").

71. *Wei Ye*, 383 F.3d at 626–27 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (quoting *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974))); *Jiang Zemin*, 282 F. Supp. 2d at 880 ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945))).

72. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (2006 & Supp. II 2008).

73. *See, e.g., Hoffman*, 324 U.S. at 35 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

74. *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); *see Hoffman*, 324 U.S. at 35 ("Every judicial action exercising or relinquishing jurisdiction . . . has its effect upon our relations with that government.").

75. *Hoffman*, 324 U.S. at 35; *see Ex parte Peru*, 318 U.S. at 588.

76. *Ex parte Peru*, 318 U.S. at 588.

77. *Hoffman*, 324 U.S. at 35. The Court described this requirement of deference as a "rule of substantive law governing the exercise of the jurisdiction of the courts." *Id.* at 36.

Court has grounded the deference rule on the Executive Branch's general foreign affairs powers.<sup>78</sup>

*B. The Uneasy Coexistence of Suggestions of Immunity  
and the "Steel Seizure" Presidency*

But the Supreme Court's explanation creates a conundrum. When the Executive Branch establishes principles of foreign sovereign immunity governing the courts' exercise of jurisdiction, it makes law affecting the private rights of litigants. No statute authorizes the Executive Branch to determine the immunity of foreign states and officials. What then is the source of this authority?

The Supreme Court at times has said that the Executive Branch has no independent lawmaking power; that, under our Constitution, any law that the Executive creates must be pursuant to a delegation of lawmaking authority from Congress. Thus, in *Bowen v. Georgetown University Hospital*, the Supreme Court declared it "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."<sup>79</sup> It might be uncontroversial to say that executive agencies—which are, after all, created by Congress—have no independent lawmaking authority. But the Court has said more generally that "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."<sup>80</sup>

Lest there be any doubt, the Supreme Court in the *Steel Seizure* case<sup>81</sup> said that the President, the embodiment of the executive power,<sup>82</sup> lacks any independent lawmaking authority. In that case, the Supreme Court invalidated President Truman's attempt to take control of the nation's steel mills.<sup>83</sup> The President had ordered the seizure in response to a labor dispute he believed would hinder steel production, which could, in turn, impair the United States' military operations in the Korean conflict.<sup>84</sup> In support of his order, the President cited both the need to protect national security interests

78. See HENKIN, *supra* note 26, at 56 ("In the immunity cases, the Supreme Court did not say (or intimate) that issues of immunity are unique, or that the Executive had special powers in regard to them; to support its doctrine the Court invoked only general Executive powers in foreign affairs.").

79. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

80. *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989).

81. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

82. See U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

83. *Steel Seizure*, 343 U.S. at 589.

84. See Exec. Order No. 10,340, 17 C.F.R. 3139 (1952), *reprinted in Steel Seizure*, 343 U.S. at 589–92 app. ("Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies.").

and the United States' foreign policy decision to work through the United Nations to end the conflict.<sup>85</sup> The government defended the President's action as authorized by "the aggregate of [the President's] constitutional powers as the nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States."<sup>86</sup> But despite the obvious implications for national security and foreign relations, the Supreme Court held that the President had acted beyond his authority.

The Court observed that the President's power to seize the steel mills must derive either from an act of Congress or from the Constitution.<sup>87</sup> No statute authorized the seizure. Indeed, Congress previously had rejected an amendment to the Labor Management Relations Act of 1947 that would have permitted government seizure during times of national emergency.<sup>88</sup> Thus, the seizure was justified by the President's constitutional authority or not at all.<sup>89</sup> The Court tersely dismissed the government's contention that the seizure was a proper exercise of the President's military power as Commander in Chief.<sup>90</sup> The Court found equally unpersuasive the government's argument that the seizure was justified by the Constitution's grant of executive powers to the President:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.<sup>91</sup>

---

85. *Steel Seizure*, 343 U.S. at 589–90.

86. *Id.* at 582.

87. *Id.* at 585.

88. *Id.* at 586 (Frankfurter, J., concurring) (footnote omitted). That the President was acting against the apparent will of Congress is what led Justice Jackson to propose in his celebrated concurring opinion the tripartite scheme for analyzing the validity of presidential acts. *See id.* at 634–638 (Jackson, J., concurring) (proposing that presidential power is: "at its maximum" when the President acts pursuant to congressional authorization because the action is supported by the inherent constitutional authority of both branches; exercised in a "zone of twilight" when the President acts in the absence of congressional direction and where constitutional distribution of authority is uncertain or concurrent between the two political branches; "at its lowest ebb" when the President acts contrary to Congress's will and will be sustained only when the President but not Congress has constitutional authority to act).

89. *Id.* at 598.

90. *Id.* at 587 ("[T]ak[ing] possession of private property in order to keep labor disputes from stopping production [is] a job for the Nation's lawmakers, not for its military authorities.")

91. *Id.* at 587; *see* U.S. CONST. art. I, § 7, cl. 2 (giving the President the power to veto bills presented by Congress); *id.* art. II, § 3 (authorizing the President to recommend legislation to Congress). The Supreme Court has relied on this passage from *Steel Seizure* when reiterating the view that the President lacks any inherent lawmaking authority. *See, e.g.,* *Medellín v. Texas*, 552 U.S. 491, 526–27 (2008); *INS v.*

While the Court found it “beyond question” that Congress could have enacted the seizure order the President issued, it concluded that “[t]he Constitution did not subject this law-making power of Congress to presidential or military supervision or control.”<sup>92</sup>

It is, therefore, far from obvious that the Executive Branch’s general foreign affairs powers authorize the Executive to interfere with private rights, as happens when, at the Executive Branch’s direction, U.S. courts dismiss suits against foreign heads of state. The courts’ deference to executive branch determinations of head of state immunity do not sit well with the idea exemplified by the *Steel Seizure* decision that the Executive Branch is completely subservient to Congress in lawmaking. In the next Part, I will show that the practice of judicial deference to executive branch suggestions of head of state immunity can be explained as an exercise of the President’s lawmaking authority, a power implied from a specific constitutional power vested in the Executive Branch, the power to control the nation’s diplomacy with foreign states. The conception of the Executive as a fully subservient lawmaker must therefore be revised.

### III. THE EXECUTIVE AS LAWMAKER: IMMUNITY AND DIPLOMACY

Head of state immunity has its roots in the broader doctrine of foreign sovereign immunity. As a matter of U.S. law, head of state immunity emerged as a distinct doctrine only after Congress enacted the Foreign Sovereign Immunities Act.<sup>93</sup> Thus, in considering whether the Constitution gives the President authority to suggest the immunity of sitting heads of state, thereby interfering with the private rights of litigants, it will be helpful first to consider the emergence of head of state immunity from the broader doctrine of foreign sovereign immunity.

---

Chadha, 462 U.S. 919, 953 n.16 (1983); see also *Medellin*, 552 U.S. at 527–28 (“As Madison explained in *The Federalist* No. 47, under our constitutional system of checks and balances, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law.”).

92. *Steel Seizure*, 343 U.S. at 587.

93. See Dellapenna, *supra* note 29, at 529 (“There was no precedent for a doctrine of substantive immunity for foreign heads of state (as distinct from the doctrine of foreign sovereign immunity generally) until after the enactment of the Foreign Sovereign Immunities Act in 1976.”); Peter Even Bass, Note, *Ex-Head of State Immunity: A Proposed Statutory Tool for Foreign Policy*, 97 YALE L.J. 299, 301 (1987) (“Since the enactment of the FSIA, immunity for foreign states as entities and immunity for heads of state as individuals have been decided through different procedures and at the initiative of different branches of government.”); Jerrold L. Mallory, Note, *Resolving the Confusion over Head-of-State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170–71 (1986) (“[D]espite their common origin, head-of-state immunity and [foreign] sovereign immunity have evolved into separate legal constructs.”).

Foreign sovereign immunity from suit has long been recognized in U.S. law. The Supreme Court first announced the doctrine in its 1812 decision, *The Schooner Exchange*.<sup>94</sup> It is generally thought that the Supreme Court created foreign sovereign immunity as a “common law” doctrine, and that the courts’ deference to executive branch suggestions of immunity is a twentieth-century development.<sup>95</sup> But a close reading of *The Schooner Exchange* decision and the government’s submissions in that case show the early Court’s awareness of a connection between foreign sovereign immunity and the President’s constitutional foreign affairs powers. After *The Schooner Exchange*, in suits against foreign states or their property, courts routinely applied principles of foreign sovereign immunity. In many of these cases, the Executive Branch suggested the immunity of the foreign sovereign. Courts increasingly relied on executive branch suggestions of immunity beginning around the First World War, a period in which the prevailing international norms were becoming uncertain, and in which the Executive Branch’s understanding of foreign sovereign immunity diverged from the view adopted by most U.S. courts. By the mid-1940s, that reliance became a rule of absolute deference.

We have seen that the courts’ appeal to the President’s general foreign affairs powers does not provide a satisfying explanation for this practice. After laying out the historical development of judicial deference to executive branch suggestions of foreign state immunity, I hope to show that the courts’ deference to executive branch suggestions of head of state immunity can be explained as flowing from the President’s exclusive authority to represent the United States in its diplomatic dealings with foreign nations. I will then consider two objections to the theory proposed here: that head of state immunity can be grounded on the President’s constitutional power to receive foreign ambassadors, providing a simpler justification, and that determinations of head of state immunity do not constitute lawmaking.

---

94. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

95. See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 922 (2007) (“For most of our nation’s history, head-of-state immunity was viewed as a component of foreign sovereign immunity. Prior to *Erie*, and consistent with the view that [customary international law] was treated as nonfederal general common law, federal and state courts alike applied the [customary international law] of foreign sovereign immunity on the domestic plane without authorization from Congress or the Executive.”).

A. *The Emergence of Head of State Immunity and  
Deference to Executive Suggestions*

The Supreme Court's opinion in *The Schooner Exchange*<sup>96</sup> is the fountainhead of the doctrine of foreign sovereign immunity in U.S. law, and it established the practice of executive branch suggestions of immunity.<sup>97</sup> The *Exchange* was an in rem admiralty action seeking possession of a schooner located in the port of Philadelphia.<sup>98</sup> The libellants<sup>99</sup> claimed that they were the sole owners of the schooner but that, while it was sailing to Spain, the ship had been forcibly taken by persons "acting under the decrees and orders of NAPOLEON, Emperor of the French."<sup>100</sup> The libellants further alleged that the schooner's name had been changed to the *Balaou* and that the ship had entered the port of Philadelphia for repairs, having "encountered great stress of weather upon the high seas."<sup>101</sup> While in port, the ship "was seized, arrested, and detained in pursuant of the process of attachment issued upon the prayer of the libellants."<sup>102</sup> After no one responded to oppose the libellants' claim, the court twice issued orders directing any person to show cause why the vessel should not be turned over to the former owners.<sup>103</sup> Subsequently, Alexander Dallas, the U.S. Attorney for the District of Pennsylvania, filed a suggestion of immunity, "at the instance of the executive department of the government of the United States."<sup>104</sup> The government's suggestion asserted:

That in as much as there exists between the United States of America and Napoleon, emperor of France and king of Italy, &c. &c. a state of peace and amity; the public vessel of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United

---

96. *The Schooner Exchange*, 11 U.S. (7 Cranch) 116. The United States Reports contain not only the decision of the Court, but also the reporter's commentary of the case, the Executive Branch's suggestion of immunity, and the arguments of the parties.

97. On direction from the President, a U.S. Attorney had previously suggested the immunity of a foreign sovereign vessel from the U.S. courts' admiralty jurisdiction in *Ketland v. The Cassius*, 14 F. Cas. 431, 432 (C.C.D. Pa. 1796) (No. 7,743). However, the suit was dismissed on alternative jurisdictional grounds. *Id.*

98. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117 (reporter's commentary).

99. In admiralty suits, the plaintiff is called the "libellant" (or "libelant"), and the complaint is called a "libel." See, e.g., *Henderson v. United States*, 517 U.S. 654, 659 (1996) ("The libellant [plaintiff] shall forthwith serve a copy of his libel [complaint] on the United States attorney for [the] district [where suit is brought] and mail a copy thereof by registered mail to the Attorney General of the United States." (quoting Suits in Admiralty Act, Pub. L. No. 66-156, § 2, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. app. § 30906 (2006))) (alterations in original)).

100. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117 (reporter's commentary).

101. *Id.* at 118 (executive branch suggestion of immunity).

102. *Id.*

103. *Id.* at 117 (reporter's commentary).

104. *Id.* at 118 (reporter's commentary).

States, and at pleasure depart therefrom without seizure, arrest, detention or molestation.<sup>105</sup>

The suggestion denied that the vessel had been forcibly taken from the libellants, but asserted that, even if it had been, the ship had become “vested in his Imperial and Royal Majesty . . . according to the decrees and laws of France.”<sup>106</sup> Because the schooner was a public vessel of a friendly foreign sovereign, the suggestion urged the court to quash the attachment and dismiss the libel.<sup>107</sup> The district court dismissed the libel on that ground.<sup>108</sup> After the libellants appealed and the circuit court reversed, the United States appealed to the Supreme Court.<sup>109</sup>

In the Supreme Court, the United States was represented both by Dallas and William Pinkney, the U.S. Attorney General. Their argument intermingled three principal themes. First, they argued that, under the law of nations, a foreign sovereign is immune from suits by the citizens of another sovereign.<sup>110</sup> This immunity stems from the presumption that a foreign sovereign generally does not “consent to submit to the ordinary judicial tribunals of the country,”<sup>111</sup> or, alternatively, from “the assent of the other Sovereign” in whose territory the foreign sovereign appears.<sup>112</sup> Thus, “[w]hen an individual receives an injury from a foreign sovereign, he must complain to his own government, who will make it a matter of negotiation, and if justice be refused may grant reprisal.”<sup>113</sup> Second,

105. *Id.* (executive branch suggestion of immunity).

106. *Id.* at 119 (executive branch suggestion of immunity).

107. *Id.*

108. *Id.* at 119–20 (reporter’s commentary).

109. *Id.* at 120 (reporter’s commentary). At the time, the Supreme Court sat as a court of appeals over judgments from the circuit courts in admiralty and maritime suits. Act of Mar. 3, 1808, ch. 40, § 2, 2 Stat. 244, 244.

110. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 123 (argument of Dallas) (when a sovereign is sued “in his sovereign character . . . no consent to submit to the ordinary judicial tribunals of the country can be implied”); *id.* at 132 (argument of Pinkney) (“We are asked, whence we infer the immunity of the public armed vessel of a sovereign. We answer from the nature of sovereignty, and from the universal practice of nations from the time of *Tyre and Sidon*.”). *Tyre and Sidon* are biblical cities. *See, e.g., Jeremiah 25:22.*

111. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 123 (argument of Dallas).

112. *Id.* at 147 (argument of Pinkney).

113. *Id.* at 123 (argument of Dallas); *see id.* at 133 (argument of Pinkney) (“The remedy is by opposing Sovereign to Sovereign, not by subjecting him to the ordinary jurisdiction.”). This is a version of the idea of “diplomatic protection.” *See Rep. of the Int’l Law Comm’n*, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10, at 16, GAOR, 61st Sess., Supp. No. 10 (2006) (Article I of Draft Articles on Diplomatic Protection) (“[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”). “Reprisal” is a sovereign’s authorization to take foreign property to redress a wrong to a citizen or subject. Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1736–37 (2009). The Constitution assigns to Congress

Dallas contended that a nation has the right “to change the public law as to foreign nations, upon giving notice.”<sup>114</sup> But nothing in our domestic law changed the law-of-nations baseline: “Our acts of Congress never subject foreign public vessels to forfeiture,” and no “practical construction” of U.S. law “by the executive, the legislative, or the judicial department of our government . . . authorizes the jurisdiction now claimed.”<sup>115</sup>

Third, Dallas and Pinkney argued that the courts would exceed their authority if they were to adjudicate the libellants’ claims. The exercise of jurisdiction in this case would “amount to a judicial declaration of war,” Dallas argued.<sup>116</sup> Dallas analogized the case before the Court to another on its docket in which the Court was asked to determine whether a former colony of France had become independent, and another asking the Court to adjudicate who is the proper sovereign of Spain.<sup>117</sup> He urged the Court to refrain from adjudicating cases “of this nature,” as exercising jurisdiction over such cases would “absorb all the functions of government, and leave nothing for the legislative or executive departments to perform.”<sup>118</sup>

the authority to “make Rules concerning Captures on Land and Water,” and to “grant Letters of Marque and Reprisal.” U.S. CONST. art. I, § 8, cl. 11. A letter of marque and reprisal authorizes a private citizen to engage in capture—private conduct that, when engaged in on the high seas, would constitute piracy without such authorization. Wuerth, *supra*, at 1735–39; *see also* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113 (outlawing piracy).

114. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 123 (argument of Dallas).

115. *Id.* at 125 (argument of Dallas). Dallas pointed out that the Non-Intercourse Act authorized judicial forfeiture of private vessels violating an embargo against the importation of British goods but only authorized interdiction of British public vessels. *Id.* at 123; *see* Non-Intercourse Act, ch. 24, §§ 3, 6, 2 Stat. 528, 529–30 (1809). The Non-Intercourse Act imposed an embargo on both British and French goods, but the embargo had been lifted against France by the end of 1810. *See* Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605 (replacing the Non-Intercourse Act and providing that trade restrictions would cease upon determination by President that Great Britain or France had ceased its offending trade practices); James Madison, Proclamation as President of the United States (Nov. 2, 1810), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 481–82 (James D. Richardson, ed. 1896) (declaring that France had so ceased).

116. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 126 (argument of Dallas).

117. *Id.* (argument of Dallas). It is unclear which cases Dallas had in mind. The Spanish case may have involved an appeal from the circuit court’s interlocutory decision in *King of Spain v. Oliver*, 14 F. Cas. 577, 579 (C.C.D. Pa. 1810) (No. 7814) (declining to decide on motion whether Ferdinand VII could maintain suit in the name of the King of Spain before being recognized as such by the government of the United States). But there appears to be no reported Supreme Court decision in that case. As for the other case to which Dallas referred, the Court frequently faced the question of the sovereign status of foreign territory. *See, e.g.*, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (“To what sovereignty any island or country belongs, is a question which often arises before Courts in the exercise of a maritime jurisdiction; and also in actions on policies of insurance.”).

118. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 126 (argument of Dallas). Six years after *The Schooner Exchange*, the Supreme Court heeded Dallas’ caution in holding that courts must follow the political branches in recognizing foreign



Pinkney similarly argued that, “[h]owever unjust a confiscation may be, a judicial condemnation closes the judicial eye upon its enormity. The right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.”<sup>119</sup> Dallas and Pinkney thus strongly suggested that dismissal of the suit was required by the constitutional separation of powers.

The Supreme Court reversed the circuit court and upheld the district court’s dismissal of the suit.<sup>120</sup> In an opinion by Chief Justice Marshall, the Court adopted each of the three themes urged by the government.

### 1. The Law of Nations

The Court agreed with Dallas and Pinkney that the law of nations provides the starting point for its evaluation of the propriety of the suit against a foreign sovereign’s vessel. Finding “few, if any, aids from precedents or written law,” the Court reasoned from “general principles” concerning the nature of sovereignty and by analogy to other circumstances in which sovereigns enjoy immunity.<sup>121</sup> Dallas argued that a foreign sovereign’s immunity is

---

governments. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818). The Court later clarified that the Constitution vests only in the Executive Branch the authority to recognize foreign governments and, for purposes of U.S. law, to resolve disputes about sovereignty over foreign territory. *See, e.g., Williams*, 38 U.S. (13 Pet.) at 420 (when the President, “in the exercise of his constitutional functions” has decided “a fact in regard to the sovereignty of any island or country” the determination is “conclusive on the judicial department”); *Luther v. Borden*, 48 U.S. (7 How.) 1, 44 (1849) (“In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice.”).

Dallas may have believed that the Chief Justice would be particularly receptive to an argument based on the idea that judicial overreaching would undermine the proper function of the political branches. In his well-known speech before the House of Representatives, then-Congressman John Marshall argued that U.S. courts could resolve only disputes presented by parties and could not give advisory opinions. Were it otherwise, “[t]he division of power . . . could exist no longer, and the other departments would be swallowed up by the Judiciary.” John Marshall, Address before the House of Representatives (Mar. 7, 1800), in 10 ANNALS OF CONG. 596, 606 (1800) [hereinafter Marshall Speech]. In this speech, Marshall gave a defense for an expansive conception of the powers of the Presidency, from which he would later retreat as Chief Justice. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 338–53, 362–64 (1990). Nevertheless, even if the Chief Justice would view *The Schooner Exchange* as presenting what would normally be a justiciable controversy, involving a claimed violation of individual rights, giving the injured party “a right to resort to the law of his country for a remedy,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (Marshall, C.J.), he might still be open to the argument that the law of the country requires the judiciary to refrain from adjudicating a claim against a foreign sovereign, requiring the injured party to seek redress from the Executive Branch.

119. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 132.

120. *Id.* at 147.

121. *Id.* at 136.

premised on the assumption that the foreign sovereign had not consented to suit in our courts.<sup>122</sup> But the Supreme Court instead adopted a foundational premise Pinkney suggested:<sup>123</sup>

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.<sup>124</sup>

Sovereigns have found it mutually beneficial to have relations with other sovereigns. And to aid the “interchange of those good offices which humanity dictates and its wants require,” sovereigns have generally agreed to “a relaxation . . . of that absolute and complete jurisdiction within their respective territories.”<sup>125</sup>

Thus, it is “universally understood” that a foreign sovereign invited into the territory of another is free “from arrest or detention.”<sup>126</sup> Similarly, “all civilized nations allow [the immunity of] foreign ministers.”<sup>127</sup> The immunity of foreign ministers follows from considerations of mutual self-interest; without them, “every sovereign would hazard his own dignity by employing a public minister abroad.”<sup>128</sup> Likewise, a sovereign who permits another sovereign’s troops to pass through its territory is understood to waive jurisdiction over the army, because exercising such jurisdiction would divert “a portion of the military force of a foreign independent nation . . . from those national objects and duties to which it was applicable.”<sup>129</sup> In the Court’s view, a foreign sovereign’s military vessels are much like a foreign sovereign’s army, with one important difference. Passage of troops through one’s territory “will probably be at all times inconvenient and injurious.”<sup>130</sup> For this reason, permission to pass must always be explicit.<sup>131</sup> But permitting foreign sovereign warships to dock does not pose the same inconvenience.<sup>132</sup> Thus, permission may be inferred.<sup>133</sup> From these considerations, the Court deduced “a principle of public law that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”<sup>134</sup>

122. *Id.* at 123 (argument of Dallas).

123. *Id.* at 133 (argument of Pinkney).

124. *Id.* at 136.

125. *Id.*

126. *Id.* at 137.

127. *Id.* at 138.

128. *Id.* at 139.

129. *Id.*; see also *id.* at 133–34 (argument of Pinkney) (making this argument).

130. *Id.* at 140.

131. *Id.*

132. *Id.* at 141.

133. *Id.*

134. *Id.* at 145–46.

The Court gave no explanation for why law of nations principles were relevant to the suit.<sup>135</sup> The omission might strike some modern readers as curious, given the current debate about the role of international law in U.S. courts.<sup>136</sup> However, in early American jurisprudence, the law of nations was part of the “common” or “general” law<sup>137</sup> and “was not attached to any particular

---

135. Although the term “law of nations” does not appear in the Court’s decision, there is little doubt that the “principle of public law” the Court announced was a principle of the law of nations. The parties’ arguments were expressly framed in terms of the law of nations. *Id.* at 122–35 (argument of the parties). In discussing the scope of the immunity principles that the Court considers, the Court’s opinion cites Vattel and Bynkershoek—preeminent continental authorities on the law of nations. *Id.* at 143, 144–45; see Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989) (noting that Vattel was the treatise writer on the law of nations most often consulted by eighteenth-century American lawyers). Furthermore, the decision’s appeal to “general principles,” “a train of reasoning” based on considerations of the attributes of sovereignty, and “the unanimous consent of nations” eliminate any doubt that the Court was looking to the law of nations to determine the propriety of adjudicating the suit. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136, 144. The early Supreme Court understood the law of nations to be composed of norms derived from natural law and state practice. See William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531, 536–44 (P. Bekker et al. eds., 2010); see also RAMSEY, *supra* note 13, at 344 (“The eighteenth-century view [of the law of nations] was . . . openly based on natural law identified by reason. . . . Much of the idea, at least, was that principles of international relations could be discovered through reason, from the nature and needs of the international system.”).

136. Compare, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 857 (1997) (arguing that the rejection in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), of federal general common law places limits on the courts’ constitutional authority to apply customary international law as federal common law absent permission from the political branches), and Bradley, Goldsmith & Moore, *supra* note 95, at 885–86 (same), with Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 596–99 (2008) (contesting claim that *Erie* limits federal courts’ authority to apply customary international law norms in adjudicating suits), and Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398–2402 (1991) (broadly defending adjudication of suits claiming violations of customary international law norms), and Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 495 (2011) (arguing that customary international law generally is preemptive federal law enforceable in courts, usually as a defense or as informing statutory interpretation).

137. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 & n.9 (1984); *id.* at 1524 (including the law of nations within the general law); see *The Antelope*, 23 U.S. (10 Wheat.) 66, 122–23 (1825) (Marshall, C.J.) (equating “law of nations” with the “general law”); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (Story, J.) (“[T]he law of nations . . . is part of the common law.”); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–32 (2004) (suggesting that early American jurisprudence conceived of the law of nations as part of the general common law); *id.* at 739 (Scalia, J., concurring in the judgment) (“The law of nations that would have been applied [in the late eighteenth century] in this federal forum was at the time part of the so-called general common law.”). Law deriving from the judicial decisions of state

sovereign.”<sup>138</sup> Rather, “it existed by common practice and consent among a number of sovereigns”<sup>139</sup> or was deduced through reason.<sup>140</sup> A foreign sovereign’s immunity from suit comes within the central subjects of the doctrine,<sup>141</sup> and until the Supreme Court’s *Erie* decision,<sup>142</sup> courts of the United States routinely applied the general law in cases to which it applied.<sup>143</sup>

## 2. Subject to Revision

Although *The Schooner Exchange* recognized the immunity from suit of a foreign sovereign’s public vessel as a principle of the law of nations, the Court nevertheless recognized that the rule is subject to revision.<sup>144</sup> “Without a doubt,” the Court said, “the sovereign of the place is capable of destroying this implication” that foreign sovereign war vessels are immune from suit.<sup>145</sup> The sovereign may “exercise jurisdiction” over the ships “either by employing force, or by subjecting such vessels to the ordinary tribunals.”<sup>146</sup> But in light of the interests at stake, the Court would not construe a general statutory grant of “ordinary jurisdiction” as providing authority for adjudicating claims “in a case, in which the sovereign power has impliedly consented to wa[i]ve its jurisdiction.”<sup>147</sup> Instead, the Court would consider such ships to be immune until “such power be exerted in a manner not to be misunderstood.”<sup>148</sup> Until then, “the sovereign

courts and based in domestic legal principles, which we today call “common law,” was in early America considered to be part of “local” state law. Fletcher, *supra*, at 1514, 1527.

138. Fletcher, *supra* note 137, at 1517.

139. *Id.* Modern customary international law, which is also based on the practice of sovereigns, grew out of the law of nations. Bradley & Goldsmith, *supra* note 136, at 822; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (describing “customary international law” as “result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation”).

140. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1270 (1985).

141. See Jay, *supra* note 135, at 822–23 (explaining that eighteenth-century law of nations generally “comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states”).

142. See *Erie*, 304 U.S. at 78 (holding that federal courts hearing cases under diversity jurisdiction must apply state substantive law instead of “federal general common law”).

143. See generally Fletcher, *supra* note 137, at 1517–27 (discussing general common law as the rule of decision in the federal courts).

144. Under classic formulations of the law of nations, a sovereign’s immunity from suit in the courts of another sovereign fell within a category of mandatory principles from which derogation was not permitted. Dodge, *supra* note 135, at 543. William Dodge argues that *The Schooner Exchange* shifted foreign sovereign immunity to the category of principles based on custom and consent. *Id.* at 543–44.

145. *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 146 (1812).

146. *Id.*

147. *Id.*

148. *Id.*

cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."<sup>149</sup>

### 3. By "the Sovereign"

*The Schooner Exchange* thus identified a background rule—foreign sovereign vessels are absolutely immune from suit in U.S. courts—that is subject to revision. But revision by whom? The Court's explanation that "the sovereign" may revise the applicable immunity rule is not particularly illuminating, since the federal government generally embodies the sovereignty of the United States.<sup>150</sup> Nevertheless, the opinion suggests a more specific answer. As a general matter, the early Supreme Court showed no hesitation in identifying and applying the law-of-nations principles governing a case.<sup>151</sup> But by refusing to construe the general statutory grants of jurisdiction as authority to adjudicate the libellants' claims, *The Schooner Exchange* suggests that courts could not exercise their portion of the nation's sovereignty to alter law-of-nations rules through judge-made law.<sup>152</sup> The converse implication is that Congress could enact a law specifically to provide for jurisdiction over suits involving foreign sovereign ships.<sup>153</sup> Such a statute would be within Congress's constitutional power to establish inferior courts,<sup>154</sup> and

---

149. *Id.*

150. *See, e.g.,* *Conro v. Crane* (The Legal Tender Cases), 110 U.S. 410, 438 (1884) ("The people of the United States by the constitution established a national government, with sovereign powers, legislative, executive, and judicial.").

151. *See, e.g.,* *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 193 (1815) (applying the law of nations to a controversy arising out of a wartime capture of a vessel).

152. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (explaining that the Court would not construe an ordinary grant of jurisdiction to authorize the suit because, among other reasons, "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign"). There appears to be no suggestion that early U.S. courts saw a role for themselves in developing the law of nations, in the way that a modern state common law court develops the common law. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

153. *See* G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 729 (1989) ("The principles of the law of nations that Marshall Court Justices invoked in their international law opinions were thus perceived as versions of natural law. But there were conflicts between domestic laws and those principles, and at times the Justices of the Marshall Court assumed that a nation might not abide by those principles if they conflicted with its self-interest. Even if the principles of the law of nations were simply embodiments of natural law, the Justices believed, natural law might yield to the positive enactments of sovereign nations.").

154. U.S. CONST. art. I, § 8, cl. 9; art. III, § 1.

perhaps within its power to define and punish offenses against the law of nations.<sup>155</sup>

The Court appears to have contemplated another possibility: in the absence of a statute regulating foreign sovereign immunity, the Executive Branch could inform the courts of the immunity principles the United States recognizes in a particular suit against a foreign sovereign. After announcing the background immunity rule and recognizing that the rule could be changed by the sovereign, the Court applied “[t]he principles . . . to the case at bar.”<sup>156</sup> Because *The Schooner Exchange* was a public armed ship of a friendly foreign sovereign, under the applicable background law-of-nations principle, the vessel “must be considered as having come into the American territory under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.”<sup>157</sup> No statute changed the background rule. If the United States could derogate from the law of nations only through an act of Congress, the Court’s decision could have ended here. But the Court added that, “[i]f this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.”<sup>158</sup>

I grant that this last statement is far from pellucid.<sup>159</sup> But it suggests that the Court was willing to accept the Executive Branch’s assertion that the “implied promise” remains intact and that the United States has not rescinded the foreign sovereign’s immunity from suit. This interpretation is consistent with the separation-of-powers arguments the government made to the Court, and, in

155. *Id.* art. I, § 8, cl. 10; see H.R. REP. NO. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6611 (identifying, among others, the Inferior Tribunal Clauses and Define and Punish Clause as authority for enactment of the Foreign Sovereign Immunities Act). *But see infra* note 375 (suggesting that it is not apparent that, as a matter of original intent, the Define and Punish Clause gives Congress authority to implement legislation diverging from the prevailing law of nations).

156. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

157. *Id.* at 147.

158. *Id.*

159. In particular, “it is not at all clear whether [the Court] is referring to the ‘fact’ of ownership or the legal question of immunity, or both.” John Norton Moore, *The Role of the State Department in Judicial Proceedings*, 31 *FORDHAM L. REV.* 277, 286 (1962) (discussing *The Schooner Exchange*). It could be that the “fact” the Executive Branch might disclose is the fact that the vessel at issue belongs to the foreign sovereign. There may be some support in the record of the *The Schooner Exchange* to support this interpretation. For example, there may have been a dispute in the district court about whether the United States had established that the schooner was a *public* vessel. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 119–20 (reporter’s commentary). But the libelants’ objection on this point was not pressed before the Supreme Court, so it is unlikely that the Court intended to limit the Executive’s suggestion to the fact of the foreign sovereign’s ownership. See also *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 334–35 (1822) (resolving dispute about whether ship was a foreign public vessel without input from Executive Branch).

particular, with Attorney General Pinkney's contention that the "executive department . . . alone represents the sovereignty of the nation in its intercourse with other nations."<sup>160</sup> It is also consistent with the Court's implication in a later case that it *would* construe the general statutory grants of jurisdiction as a basis for adjudicating suits against a foreign sovereign *if* the United States "expressly exerted" power over the foreign sovereign.<sup>161</sup> This statement suggests that the Court would look to the Executive Branch for the express exertion of power. If Congress enacted a statute authorizing suit against some foreign sovereign, that statute would establish the courts' jurisdiction; there would be no need to rely on general jurisdictional grants.

It is tempting to suggest another reason the Court may have believed that separation-of-powers principles required the Executive Branch's participation in foreign sovereign immunity determinations. Recall that the United States appealed the adverse circuit court decision; France did not participate in the litigation.<sup>162</sup> This might imply that the Executive Branch suffered an injury to some legally cognizable interest, because the requirements of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."<sup>163</sup> In the absence of standing, the Supreme Court would have lacked Article III jurisdiction over the appeal.<sup>164</sup> Since Congress had not conferred on the Executive Branch any power to assert foreign sovereign immunity, the Court must have believed that the Executive Branch possessed that authority under the Constitution, and the circuit court's rejection of the Executive's suggestion of immunity caused a legally cognizable injury sufficient to support appeal.

---

160. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 132 (1812) (argument of Pinkney); see also *id.* at 126 (argument of Dallas).

161. See *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 71 n.3 (1819) ("[U]ntil such power be expressly exerted, those general provisions which are descriptive of the ordinary jurisdiction of the judicial tribunals . . . ought not to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction." (emphasis added)); see also *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (stating that the sovereign can indicate an intent to exercise jurisdiction over a foreign sovereign "by employing force").

162. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 120 (reporter's commentary).

163. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); see *id.* ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome." (internal quotation marks omitted)); see also *Parr v. United States*, 351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed can appeal.").

164. See *Arizonans*, 520 U.S. at 64 ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."); *Diamond v. Charles*, 476 U.S. 54, 54 (1986) (dismissing appeal for lack of Article III jurisdiction where intervenor defendant lacked standing to appeal adverse judgment and where defendant state chose not to seek Supreme Court review).

Such an argument would be anachronistic. Modern standing doctrine, with its requirement of injury in fact, did not emerge until the Progressive and New Deal eras.<sup>165</sup> In early American jurisprudence, the federal courts' authority to entertain a suit tracked a plaintiffs' ability to assert a viable right of action, either under the common law or under an act of Congress.<sup>166</sup> It is clear that the libellants in *The Schooner Exchange* asserted a cognizable right of action in admiralty.<sup>167</sup> And Congress had established appellate jurisdiction in the Supreme Court over admiralty suits.<sup>168</sup> Thus, it seems unlikely that the Marshall Court would have questioned its constitutional authority to hear the appeal in *The Schooner Exchange*.<sup>169</sup> Nevertheless, the fact that the Supreme Court entertained an appeal from the government—a nonparty to the suit<sup>170</sup>—is at least suggestive that the Court believed that the Executive Branch had a special stake in the litigation.

### B. From the Law of Nations to the Separation of Powers

*The Schooner Exchange* thus established the practice under which courts would look to the Executive Branch for direction on whether to recognize a foreign sovereign's immunity from suit.<sup>171</sup> Within forty years, the *Exchange* came to be understood as giving the Executive Branch an absolute right "to intercept the jurisdiction of the court over the subject matter of the suit" by suggesting the

165. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (discussing the evolution of the modern standing doctrine).

166. See *id.* at 173–77 (outlining early American jurisprudence, which did not require injury in fact or concrete interest for standing).

167. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (giving district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction"); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794) (recognizing district court jurisdiction over admiralty libel seeking restitution for capture alleged to be in violation of law of nations).

168. Act of Mar. 3, 1808, ch. 40, § 2, 2 Stat. 244, 244.

169. *But cf.* *United States v. Lee*, 106 U.S. 196, 197 (1882) (questioning whether the United States, which was not a party to the underlying suit, could "prosecute the writ of error in its own name," but declining to address the issue because parties to the suit had filed their own writs of error, raising all the questions addressed by the United States' writ).

170. See *Percy Summer Club v. Astle*, 110 F. 486, 489 (C.C.D.N.H. 1901) (No. 315) (noting that the United States was not a party in the *Schooner Exchange* litigation).

171. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) ("[I]n *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General.").



immunity of the foreign sovereign vessel subject to suit.<sup>172</sup> And, until the First World War, in the rare suit raising issues of foreign sovereign immunity, courts generally would apply the baseline principle of immunity announced by *The Schooner Exchange* but look to the Executive Branch for confirmation that the principle should be applied in the case, at least in suits in which the Executive Branch participated.<sup>173</sup> The Executive Branch's authority to direct a deviation from the immunity rule announced in *The Schooner Exchange* was not tested for most of this period, as the Executive suggested immunity in cases in which it appeared,<sup>174</sup> and courts applied the baseline principle when the Executive Branch did not participate.<sup>175</sup>

### 1. The First World War and the Rise of State Commercial Activity

That began to change around the First World War. During that period, governments became increasingly involved in traditionally private conduct. Thus, for example, foreign governments requisitioned private ships to engage in commercial activities.<sup>176</sup> Foreign states similarly began using their own vessels, agencies, and instrumentalities in commerce.<sup>177</sup> Both of these developments led to an increase in suits against foreign sovereigns or their property, and

---

172. *The Pizarro v. Matthias*, 19 F. Cas. 786, 787 (S.D.N.Y. 1852) (No. 11,199) (citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)); *see id.* ("[T]he effect of the procedure is to interdict to the citizen a right of resort to any judicatory of the country for redress of injuries sustained by him.")

173. *See, e.g., Hassard v. United States of Mexico*, 61 N.Y.S. 939, 939-40 (N.Y. Sup. Ct. 1899) (vacating attachment against foreign sovereign property on motion by U.S. Attorney on instruction from the Attorney General); *see also* Stefan A. Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1, 36-37 & n.137 (1940) (noting paucity of foreign sovereign immunity cases prior to the First World War). When the Executive Branch did not appear, courts grappled with the question of who could suggest immunity on the foreign sovereign's behalf. *See infra* text accompanying notes 186-88.

174. *See, e.g., The Pizarro*, 19 F. Cas. 786; *Hassard*, 61 N.Y.S. 939.

175. *See, e.g., Mason v. Intercolonial Ry. of Can.*, 83 N.E. 876, 877 (Mass. 1908) (dismissing suit because foreign sovereign defendant was immune); *Walley v. The Schooner Liberty*, 12 La. 98, 99 (1838) (same); *Leavitt v. Dabney*, 37 How. Pr. 264, 268 (N.Y. Sup. Ct. 1868) (same); *see also Long v. The Tampico*, 16 F. 491, 493-94, 496-97 (S.D.N.Y. 1883) (stating baseline principle but denying immunity because vessel not in foreign sovereign's possession).

176. Riesenfeld, *supra* note 173, at 38; *see* A.H. Feller, *Procedures in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83, 86 (1931) (noting increase in sovereign immunity cases during the First World War).

177. *See* Riesenfeld, *supra* note 173, at 39-40 (discussing cases involving state-owned commercial vessels); Recent Case, *Compania Naviera Vascongado v. S.S. Christina*, [1938] A.C. 485 (H.L.) (*Appeal Taken from Eng.*), 39 COLUM. L. REV. 510, 512 (1939) ("After the World War there was a great increase of state-owned merchant marine."); *see, e.g., Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397, 398-99 (N.J. 1918) (deciding suit involving foreign state commercial corporation).

the courts were divided on the immunity of requisitioned vessels and of foreign sovereign instrumentalities used for commercial purposes.<sup>178</sup> The dominant view was that foreign state instrumentalities engaged in commerce were immune from suit.<sup>179</sup> However, when the Executive Branch did participate in litigation involving foreign state commercial activity, it generally informed the courts that it did not consider foreign states to be immune from suit when they engaged in commercial activity.

In 1921, for example, the State Department informed a district court that “[i]t is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war.”<sup>180</sup> Similarly, in 1929, the State Department informed another court that

it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here, and that they should conform to the laws of this country governing such transactions.<sup>181</sup>

---

178. See Riesenfeld, *supra* note 173, at 38 & nn.144–45 (discussing requisition cases). Compare, e.g., *Molina*, 103 A. at 398–99 (declining to dismiss suit against foreign sovereign corporation on foreign sovereign immunity grounds), with *The Maipo*, 252 F. 627, 628–30 (S.D.N.Y. 1918) (holding Chilean navy vessel chartered to private person and used in commerce immune from suit because owned and possessed by foreign sovereign).

179. See Riesenfeld, *supra* note 173, at 40 & n.150 (discussing “the main trend of the lower federal courts” and identifying exemplary decisions).

180. *The Pesaro*, 277 F. 473, 480 n.3 (S.D.N.Y. 1921) (quoting Letter from Fred K. Nielsen, Solicitor, U.S. Dep’t of State to Julian W. Mack, U.S. District Judge (Aug. 2, 1921)). See generally *Other Public Vessels*, 2 Hackworth DIGEST § 173, at 427–30. Earlier, in 1918, the Secretary of State urged the Attorney General to argue, in an appropriate case in the Supreme Court, that state-owned vessels engaged in commercial pursuits are not immune from suit. *Id.* at 429. The Attorney General declined the suggestion, because he believed such vessels to be immune “as the law now stands” and, evidently, out of concern that such a rule could undermine the immunity of merchant vessels owned by the United States. See *id.* at 430 (quoting Letter from Tomas Gregory, Att’y Gen., to Robert Lansing, Sec’y of State (Nov. 25, 1918)); *id.* (“[T]he Department [of Justice] must continue to assert, in all appropriate cases, the immunity of merchant vessels which are the property of the United States.”). It is not clear whether the “law as it now stands” that the Attorney General had in mind was domestic or international. However, not long after this exchange, Congress enacted the Suits in Admiralty Act, which waived the United States’ immunity for in personam suits in cases involving U.S.-owned merchant vessels in which a private party could be sued in admiralty. See *Suits in Admiralty Act*, Pub. L. No. 66-156, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. §§ 30901–30918 (Supp. I 2007)). I suggest below that the enactment of the Suits in Admiralty Act may have been one of the factors that encouraged the trend toward absolute judicial deference to the Executive Branch’s articulation of principles of foreign sovereign immunity. See *infra* note 184 and accompanying text.

181. *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929). In *Deutsches Kalisyndikat*, the United States brought an antitrust suit

In both cases, the court denied the foreign state's claimed immunity, noting, in particular, that no claim of immunity had been made by the Executive Branch.<sup>182</sup>

The Executive Branch's decision not to recognize the immunity of foreign state instrumentalities engaged in commerce thus conflicted with the dominant view adopted by most courts in suits in which the Executive Branch had not participated. The dominant judicial view also conflicted with the proposal of prominent contemporary international conferences to subject state commercial activity to regular judicial process.<sup>183</sup> And the dominant view was inconsistent with Congress's decision to waive the United States' immunity from suit in cases in U.S. courts involving U.S.-owned merchant vessels, and not to oppose litigation involving such vessels in foreign courts.<sup>184</sup> Perhaps for these reasons, courts began to deny immunity

---

against foreign corporations, including a corporation that was an instrumentality of France. *Id.* at 200.

182. *Deutsches Kalisyndikat*, 31 F.2d at 203; *The Pesaro*, 277 F. at 482.

183. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 40 (1945) (Frankfurter, J., concurring) (noting that the State Department's reluctance to grant immunity for commercial ships owned by foreign government was largely supported by international conferences held in the 1920s); Recent Case, *supra* note 177, at 512 n.12 ("The International Marine Conferences of 1922 and 1926 recommended that governments should accept full liability for state-owned merchant ships, with the complete support of the Committee of Experts on the Progressive Codification of International Law and the Imperial Conference of 1926."). The 1926 International Conference on Maritime Law, referenced in the case note just cited, produced the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, Apr. 10, 1926, 176 L.N.T.S. 199 (entered into force Jan. 8, 1937) [hereinafter Brussels Convention]. The convention subjects state parties owning or operating commercial seagoing vessels to the same rules of liability as governs the commercial activity of private vessels, and it provides for the same adjudication of commercial claims against states as exists for claims involving private parties. *Id.* arts. 1-3. Not many states became parties to the convention; as of 1937, only ten states had ratified the treaty. *Id.* at 201 n.2. The United States did not participate in drafting the Brussels Convention and has never ratified it, although its immunity provisions are broadly consistent with the position taken by the Executive Branch around the same time, as Justice Frankfurter suggested.

184. The Suits in Admiralty Act, enacted in 1920, establishes the immunity of U.S.-owned merchant vessels from in rem suit (and its attendant seizure or attachment of the vessel), but authorizes in personam suits against the United States in actions involving such vessels in circumstances in which a private party could be sued in admiralty. See Suits in Admiralty Act, §§ 1-2. See generally *E. Transp. Co. v. United States*, 272 U.S. 675 (1927) (providing overview of the Suits in Admiralty Act). Section 7 of the Suits in Admiralty Act authorizes the Secretary of State to assert in foreign courts the immunity of U.S.-owned merchant vessels from attachment or seizure but to consent to in personam suits against the United States. See *Agreements Waiving Sovereign Immunity*, 42 Op. Att'y Gen. 3, 8-11 (1960) (so construing § 7).

The State Department relied on the non-immunity of U.S.-owned merchant vessels in explaining to foreign states that it does not recognize the immunity of state-owned commercial vessels. Thus, for example, in its letter to the court in *The Pesaro*, the State Department explained that "[i]t is the view of the Department [of State] that government-owned merchant vessels . . . should not be regarded as entitled to the immunities accorded [to] public vessels of war. The Department has not claimed

to state commercial enterprises in cases in which the United States did not appear and suggest the entity's immunity from suit.<sup>185</sup> This practice reflected a trend toward absolute deference to executive branch articulation of principles of foreign sovereign immunity, a trend also reflected in the Supreme Court's channeling of immunity determinations to the Executive. In cases in which the Executive did not participate, courts typically would entertain a foreign state's claim of immunity if the state participated as a litigant in the suit.<sup>186</sup> But many courts also permitted an authorized representative of the state to suggest immunity, even where the state refused party status.<sup>187</sup> The Supreme Court eventually rejected that approach, requiring the foreign state either to appear as a party or request a suggestion of immunity from the State Department.<sup>188</sup>

In explanation, the Court relied principally on a dictum from *United States v. Lee*,<sup>189</sup> a post-Civil War case in which the plaintiff sued federal officials for the possession of land comprising Arlington National Cemetery.<sup>190</sup> In *Lee*, the United States urged dismissal of the suit for lack of jurisdiction, arguing that the officials were immune from suit because they possessed the land on authority from the Executive Branch.<sup>191</sup> The Court rejected that argument and

immunity for American vessels of this character." *The Pesaro*, 277 F. at 479 n.3 (quoting Letter from Fred K. Nielsen, Solicitor for the U.S. Dep't of State, to Julian W. Mack, U.S. District Judge (Aug. 2, 1921)); see also Protection of Human Rights, 2 Hackworth DIGEST § 6, at 439-41 (quoting Letter from Charles E. Hughes, Sec'y of State, to American Diplomatic and Consular Officers (Jan. 11, 1923)) (instructing U.S. diplomatic and consular officials not to claim immunity in in personam suits against the United States involving U.S.-owned commercial vessels.).

185. See, e.g., *The Secundus*, 13 F.2d 469, 472 (E.D.N.Y. 1926) (declining to dismiss suit against foreign state commercial vessel on foreign sovereign immunity grounds, but giving France sixty days to seek a suggestion of immunity from the Executive Branch); *Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397, 398-99 (N.J. 1918) (declining to dismiss suit against foreign state corporation on foreign sovereign immunity grounds; noting State Department decision not to ask the Attorney General to suggest immunity of foreign state corporation); see also *The Attualita*, 238 F. 909, 909, 911 (4th Cir. 1916) (reversing dismissal of suit against commercial vessel requisitioned by Italy where Executive Branch noted the fact of requisition but did not ask that the case be dismissed on immunity grounds).

186. See, e.g., *The Pampa*, 245 F. 137 (E.D.N.Y. 1917) (dismissing suit against a naval vessel where foreign state participated in the litigation).

187. See *Riesenfeld*, *supra* note 173, at 46 n.174 (citing cases). This required courts to determine who was "authorized" to represent the state. See, e.g., *The Anne*, 16 U.S. (3 Wheat.) 435, 445-46 (1818) (holding that a consul without special authority is not an authorized representative of a foreign sovereign).

188. *The Pesaro*, 255 U.S. 216, 219 (1921); *In re Muir*, 254 U.S. 522, 532-33 (1921). See generally *Feller*, *supra* note 176, at 86-87 (discussing procedures for asserting foreign sovereign immunity in courts in the United States from the early republic through the late 1920s).

189. *United States v. Lee*, 106 U.S. 196 (1882).

190. *The Pesaro*, 255 U.S. at 219 (citing *Lee*, 106 U.S. at 209); *In re Muir*, 254 U.S. at 533 (citing *Lee*, 106 U.S. at 209).

191. *Lee*, 106 U.S. at 198, 220.

affirmed the judgment returning the property to the plaintiff, principally because the plaintiff's claim was based on the contention that the government took the land without just compensation, in violation of the Fifth Amendment.<sup>192</sup> In reaching that holding, the Court surveyed its precedent bearing on claims to sovereign property.<sup>193</sup> Noting its decision in *The Schooner Exchange*, the Court explained that principles of foreign sovereign immunity were "inapplicable to this case" because in suits against foreign sovereign property, "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."<sup>194</sup>

The trend toward absolute deference was briefly interrupted in 1926 when the Supreme Court announced its decision in *Berizzi Bros. Co. v. Steamship Pesaro*.<sup>195</sup> In *Berizzi Brothers*, the Court held that a foreign sovereign vessel was immune from suit, even though it was used exclusively for commercial purposes.<sup>196</sup> At an earlier stage in the proceedings, the Executive Branch informed the district court that it did not recognize the immunity of a foreign sovereign vessel used in commercial activity.<sup>197</sup> The district court denied the claimed immunity, based, in part, on the Executive Branch's communication.<sup>198</sup> However, that decision was later vacated because of a procedural irregularity.<sup>199</sup> A second judge thereafter heard the case and dismissed the suit on immunity grounds.<sup>200</sup> The Supreme Court affirmed the dismissal in *Berizzi Brothers* without considering the Executive's submission in the district court.<sup>201</sup> That decision is the only case during the period in which foreign sovereign immunity principles were not codified in which the Supreme Court decided an immunity claim contrary to the views of the Executive Branch.

---

192. *Id.* at 218, 220, 223. Within three months of the Court's decision, Congress appropriated funds for the purchase of the land from the Plaintiff. Appropriations Act of Mar. 3, 1883, ch. 141, 22 Stat. 582, 584.

193. *Lee*, 106 U.S. at 209-12.

194. *Id.* at 209 ("[I]t has been uniformly held that these were questions, the decisions of which, as they might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war.")

195. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

196. *Id.* at 574, 576.

197. *The Pesaro*, 277 F. 473, 480 n.3 (S.D.N.Y. 1921); *see supra* text accompanying note 180.

198. *The Pesaro*, 277 F. at 482.

199. *The Pesaro*, 13 F.2d 468, 468-69 (S.D.N.Y. 1926).

200. *Id.* at 469.

201. *Berizzi Bros.*, 271 U.S. at 576.

## 2. Uncertainty and Deference

The Supreme Court's decision in *Berizzi Brothers* was short lived. By the late 1930s and early 1940s, the Supreme Court continued the trend toward absolute deference, eventually elevating the *Lee* dictum to a holding. In *The Navemar*, the Supreme Court stated the *Berizzi Brothers* rule that foreign state-owned commercial vessels are immune from suit.<sup>202</sup> The Court explained that the foreign state can participate in the litigation to assert "the public status of the vessel and to claim her immunity from suit."<sup>203</sup> Alternatively, the foreign state can present its claims diplomatically, to the Executive Branch, and "[i]f the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."<sup>204</sup> *The Navemar* appears to be the first case in which the Supreme Court said that courts are *required* to dismiss a suit against a foreign state based on the Executive Branch's suggestion of immunity. But because the Executive had not suggested immunity in that case, the statement was a dictum.<sup>205</sup> Within a few years, however, the Supreme Court reiterated that courts must defer to the Executive Branch's assertion of a foreign state's immunity—this time in a holding.<sup>206</sup> In *Ex Parte Republic of Peru*, the Court again relied on the *Lee* dictum as a justification for judicial deference.<sup>207</sup> Yet neither *The Navemar* nor *Ex parte Peru* addressed what would happen if the Executive declined to recognize the immunity of a foreign state-owned commercial vessel, notwithstanding the rule announced in *Berizzi Brothers*.

The Court answered that question in 1945 in *Republic of Mexico v. Hoffman*.<sup>208</sup> *Hoffman* held that courts not only must defer to executive branch suggestions of immunity, they cannot recognize a foreign state's immunity unless it is founded on a principle recognized by the Executive.<sup>209</sup> *Hoffman* thus completed the trend toward absolute deference to the Executive Branch and constituted a repudiation of *Berizzi Brothers*.

In *Hoffman*, an in rem admiralty action was brought against a Mexican cargo vessel that damaged an American ship.<sup>210</sup> Acting on

202. *The Navemar*, 303 U.S. 68, 74 (1938). The suit was an admiralty action seeking possession of a vessel of which Spain claimed ownership. *Id.* at 70.

203. *Id.* at 74.

204. *Id.*

205. *Id.* at 74–75.

206. *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943).

207. *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

208. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

209. *Id.*

210. *Id.* at 31.

behalf of his government, the Mexican Ambassador filed in the district court a suggestion of immunity, stating that when the vessel was attached, it was in Mexico's ownership and possession.<sup>211</sup> The libellant disputed that the vessel was in Mexico's possession, which put at issue the ship's immunity, because the "overwhelming weight of authority" denied immunity to vessels owned by foreign states but not in their possession.<sup>212</sup> The Executive Branch filed a letter from the Secretary of State to the Attorney General, noting the Mexican government's claim of immunity. But the letter "took no position with respect to the asserted immunity of the vessel from suit," except to cite precedent recognizing immunity when the vessel was in possession of the foreign state and rejecting it when it was not.<sup>213</sup> The district court determined that the vessel was in the possession of a private shipping corporation, which was using the ship for commercial purposes.<sup>214</sup> Consequently, it rejected Mexico's suggestion of immunity.<sup>215</sup> The court of appeals affirmed, and the Supreme Court granted certiorari to decide whether a foreign state's ownership without possession was sufficient to establish the immunity of the ship.<sup>216</sup>

In considering that issue, the Supreme Court recited the conventional story that "[e]ver since *The Exchange*, this Government" has recognized the immunity from suit of foreign sovereign vessels in possession of a foreign sovereign, and that, upon the "recognition, allowance and certification of the asserted immunity" by the Executive Branch, courts will surrender their jurisdiction over the suit.<sup>217</sup> The Court explained that the practice of deference to executive suggestions is based on "the policy" that "national interests will be best served" when disputes about foreign sovereign vessels "are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings."<sup>218</sup> Thus, it is a "guiding principle" that courts must "follow[] the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."<sup>219</sup>

But courts must not only dismiss suits upon the Executive's suggestion of immunity. Carrying the logic of the *Lee* dictum to its conclusion, the Court held that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an

---

211. *Id.*

212. *Id.* at 38.

213. *Id.* at 32. The Executive Branch later made a second filing, again taking no position on immunity but relaying that it accepted Mexico's claim to own the vessel and Mexico's representation that it would accept any liability that was determined "as a binding international obligation." *Id.*

214. *Id.* at 32-33.

215. *Id.*

216. *Id.* at 33.

217. *Id.* at 34.

218. *Id.*

219. *Id.* at 35 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

immunity on new grounds which the government has not seen fit to recognize.”<sup>220</sup> That is because recognition of immunity on principles not accepted by the Executive “may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations” as would be denying immunity in the face of an executive suggestion.<sup>221</sup> The Court found “controlling” the fact that, “despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government,” the Executive Branch chose not to do so.<sup>222</sup> This, the Court inferred, reflected the Executive Branch’s adoption of a “national policy not to extend the immunity in the manner now suggested.”<sup>223</sup> In light of “duty of the courts . . . not to enlarge an immunity” that the Executive “has not seen fit to recognize,” the Court held that the vessel was not immune from suit.<sup>224</sup> In so holding, the Court disapproved *Berizzi Brothers*’s failure to consider the Executive’s views, noting that “[t]he propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.”<sup>225</sup> The concurring Justices welcomed the repudiation, suggesting that the Court had effectively overruled *Berizzi Brothers*.<sup>226</sup>

---

220. *Id.*

221. *Id.* at 36.

222. *Id.* at 38.

223. *Id.*

224. *Id.*

225. *Id.* at 35 n.1.

226. *Id.* at 39 (Frankfurter, J., concurring, joined by Black, J.).

The history I have just recounted suggests an oddity in the conventional story of the enactment of the Foreign Sovereign Immunities Act. According to that account, “[u]ntil 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In that year, the State Department issued the so-called Tate Letter, in which “the State Department announced its adoption of the ‘restrictive’ theory of foreign sovereign immunity” under which “immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.” *Id.* at 487; see Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen., U.S. Dep’t of Justice (May 19, 1952), in 26 DEP’T ST. BULL. 984–85 (1952) [hereinafter Tate Letter]. Application of the restrictive theory “proved troublesome,” because, as a result of diplomatic pressure, “political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.” *Verlinden*, 461 U.S. at 487. Thus, Congress enacted the Foreign Sovereign Immunities Act to clarify the governing standard and relieve the Executive Branch of diplomatic pressure. *Id.* at 488. This conventional account of the enactment of the Foreign Sovereign Immunities Act is inconsistent with the State Department’s historical practice. Although the account (and the Tate Letter itself) suggests that the Executive Branch’s adoption of the restrictive theory in 1952 was a new development, the State Department in 1921 informed the district court in an earlier stage of *Berizzi Brothers* that it would not recognize the immunity of a foreign state vessel used in commerce. See *supra* text accompanying note 180. And in 1929 the State Department informed a different district court that “it has long been [its] view” that foreign sovereigns are not immune from suits relating to their commercial activities. *United States v. Deutsches*



From the Court's announcement of the *Hoffman* decision in 1945 until Congress's enactment of the Foreign Sovereign Immunities Act in 1976, courts routinely deferred absolutely to executive branch suggestions of immunity, or did their best to decide claims of immunity in conformity with the decisions the Executive Branch had previously announced.<sup>227</sup> As I have suggested, the trend leading to absolute deference was probably the result of the combination of an increased involvement of foreign sovereigns in commerce, a traditionally private enterprise; uncertainty about the state of international law, making it difficult for courts to identify the governing rules of decision; the United States' decision to waive its own immunity in like circumstances; and a concern that the courts not undermine the Executive Branch's conduct of foreign relations. But description is not justification. While these factors might explain why judicial deference to executive suggestions came about, they do not in themselves show that deference is constitutionally grounded. That is, they do not demonstrate that the Executive Branch has the constitutional power to make law.

*Hoffman's* gesture towards the Executive Branch's foreign affairs powers contains the seeds of a justification. Indeed, the separation-of-powers themes implicit in the United States' argument and the Supreme Court's decision in *The Schooner Exchange* came to be the sole rationale for the practice of judicial deference to executive suggestions of foreign sovereign immunity.<sup>228</sup> But as we have seen, the courts' appeal to the Executive Branch's general foreign affairs powers does not provide a satisfying explanation of the constitutional basis for this lawmaking.<sup>229</sup> As Henry Monaghan has suggested, Congress's 1976 enactment of the Foreign Sovereign Immunities Act rendered the question of judicial deference to executive suggestions largely a historical curiosity.<sup>230</sup> Largely, but not entirely: even after Congress codified the standards governing foreign sovereign

---

Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (1929); see *supra* text accompanying note 181.

227. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

228. Thus, in 1974, the Fifth Circuit explained that "we are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law." *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974). The second sentence would have astounded Chief Justice Marshall. See also *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.").

229. See *supra* Part II.B.

230. Monaghan, *supra* note 4, at 56; see 28 U.S.C. § 1602 (2006) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

immunity, courts continued to defer to the Executive Branch when it suggested the immunity of a head of state.<sup>231</sup> Coincident with the enactment of the Foreign Sovereign Immunities Act was a significant increase in litigation against foreign heads of state.<sup>232</sup> The Executive Branch has not been shy about appearing in such cases and suggesting the head of state's immunity.<sup>233</sup> As I will now explain, the Executive Branch's power to make law by determining the immunity of sitting heads of state derives from the Constitution's assignment to the President of the specific authority to conduct the nation's diplomacy.

### C. Executive Suggestions and Executive Diplomacy

It is commonly understood, and not seriously disputed, that "[t]he President has sole and exclusive authority over diplomacy and the diplomatic process, the recognition of foreign states and governments, the maintenance of diplomatic relations, [and] the conduct of negotiations."<sup>234</sup> The Constitution does not mention the

231. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). The Supreme Court recently held that the Foreign Sovereign Immunities Act does not govern the immunity from suit of foreign officials generally, thus leaving intact the Executive's practice of suggesting immunity. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

232. See *Dellapenna*, *supra* note 29, at 531 ("In the upsurge of litigation against foreign states and foreign-state-related entities in the United States that followed the enactment of the Foreign Sovereign Immunities Act in 1976, a rather remarkable number of suits (given the prior dearth of such suits) was filed against heads of foreign states.").

233. See cases cited *infra* Appendix A.

234. LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 32 (1990); see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 219 (2d ed. 1988) ("[T]he Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic [affairs]."). I do not mean to suggest that the distribution of the foreign affairs powers between the Executive Branch and Congress is uncontroversial. Many pages have been written on that topic. Compare, e.g., Prakash & Ramsey, *supra* note 13, at 355–56 (arguing that the Constitution vests in Congress relatively little power over foreign affairs), with HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69 (1990) ("In foreign as well as domestic affairs, the Constitution requires that we be governed by separated institutions *sharing* foreign policy powers. Under this constitutional power-sharing scheme, the president, Congress, and the courts all play integral roles in both making and validating foreign-policy decisions." (footnote omitted)). I am making the more limited point that there is little controversy that the President "alone represents the sovereignty of the nation in its intercourse with other nations." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132 (argument of Pinkney). Even those who are skeptical of the extent to which the Executive Branch claims authority over foreign affairs acknowledge that the Constitution assigns only to the President authority over diplomatic relations. See, e.g., KOH, *supra*, at 69 (describing, as among the President's "limited . . . exclusive powers," the President's authority over "diplomatic relations and negotiations and . . . the recognition of nations and governments"); Oona A. Hathaway, *Presidential Power over International Law*:

power to conduct the nation's diplomacy with foreign sovereigns. But the assignment of that authority has been implied from specific powers vested in the President, and the absence of any provision giving Congress authority to communicate directly with foreign states on behalf of the United States. The Executive Branch's exclusive authority to conduct the nation's diplomacy itself implies the authority to determine the principles governing head of state immunity.<sup>235</sup>

### 1. The Executive as Sole Diplomat

From very early in our Republic, it was recognized that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>236</sup> In establishing what became the U.S. Department of State, the First Congress acknowledged the Executive Branch's exclusive authority over diplomacy. The act created the Department of Foreign Affairs and the office of the Secretary.<sup>237</sup> It directed the Secretary to

perform and execute such duties as shall from time to time be enjoined or entrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondence, communications, or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States shall assign to the said department.<sup>238</sup>

The State Department's organic act thus recognized that a central foreign affairs function of the Executive Branch is to be the nation's representative with foreign sovereigns. Moreover, the act authorized the Secretary to undertake the nation's diplomacy to the extent the President delegated that responsibility. Neither this statute nor any other granted the President diplomatic powers. Thus, Congress must have assumed that this was a specific power vested in the President by the Constitution, as Michael Ramsey has argued.<sup>239</sup>

*Restoring the Balance*, 119 YALE L.J. 140, 206 (2009) ("The President is the sole actor charged with representing the United States on the international stage.")

235. Cf. Monaghan, *supra* note 4, at 54 ("[T]he President's 'specific' constitutional powers, such as the Commander-in-Chief power and the powers 'implied' from presidential duties, now (whatever the original understanding) imply some independent presidential law-making power.")

236. Marshall Speech, *supra* note 118, at 613.

237. Act of July 27, 1789 (Foreign Affairs Act), ch. 4, § 1, 1 Stat. 28, 29. Soon after, Congress changed the name of the new department to the Department of State. Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68, 68.

238. Foreign Affairs Act, ch. 4, § 1.

239. RAMSEY, *supra* note 13, at 76 ("[A]ll the duties detailed in the bill are, by the Constitution, pertaining to the department of the Executive Magistrate." (quoting Rep. Theodore Sedgwick, Statement Discussing Bill that Became the Foreign Affairs

It was also broadly understood that Congress did not share the diplomatic power; the authority to communicate directly with foreign sovereigns was assigned *exclusively* to the Executive.<sup>240</sup> Thus, for example, in 1793, Secretary of State Thomas Jefferson—“hardly an exponent of expansive constitutional construction or of large Presidential power”<sup>241</sup>—explained to the French Ambassador: “[The President] being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation.”<sup>242</sup> In a similar vein, in a speech to the House of Representatives in 1800, then-Representative John Marshall observed that the Executive Branch

is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violations.<sup>243</sup>

And in 1816, the newly formed Senate Foreign Relations Committee recommended against adopting a proposal that the Senate urge the

Act (June 18, 1789), in 1 ANNALS OF CONG. 521 (1789) (Joseph Gales ed., 1834)); see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (noting “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress”).

240. The Constitution assigns none of the foreign relations powers to the courts. See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government.”). It expressly prohibits domestic states from entering “into any Treaty, Alliance, or Confederation” and implicitly delegates to the federal government alone responsibility for the nation’s foreign relations. U.S. CONST. art. I, § 10. And the Logan Act, which prohibits unauthorized citizens of the United States from engaging in diplomatic activity with foreign states, reflects the understanding that private parties have no constitutional right to undertake diplomacy on behalf of the United States. Logan Act, ch. 2, § 1, 1 Stat. 613 (Jan. 30, 1799) (codified as amended at 18 U.S.C. § 953 (2006)). Thus, if the President shares the power to conduct the nation’s diplomacy, he would share it only with Congress.

241. HENKIN, *supra* note 26, at 337 n.11.

242. Letter from Thomas Jefferson, Sec’y of State, to Edouard Genêt, Ambassador (Nov. 22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 414, 414 (John Catanzariti ed., 1997); see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, & The Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1023 (2010) (“[In his notes to Genêt,] Jefferson insisted on what is now established doctrine, but which was not stated explicitly in the constitutional text, that the President is the sole representative of the nation in communicating with foreign diplomats.”); see also Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961) [hereinafter Jefferson Opinion] (“The transaction of business with foreign nations is Executive altogether. It belongs to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.”).

243. Marshall Speech, *supra* note 118, at 614.

President to pursue certain treaty negotiations with Great Britain because

[t]he President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be the most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.<sup>244</sup>

There are numerous other examples.<sup>245</sup>

The founding generation did not typically explain in any detail the constitutional basis for the Executive's authority as our nation's sole diplomat.<sup>246</sup> Some contemporary scholars have argued that the President's diplomatic powers, like the broader foreign affairs powers the Executive Branch exercises, derive from the vesting of executive power in the President.<sup>247</sup> But even if reliance on the Article II Vesting Clause<sup>248</sup> is necessary to explain the full reach of the President's foreign affairs powers (an issue I do not here address), the Constitution's specific grants of powers seem to provide ample basis

244. S. COMM. ON FOREIGN RELATIONS, 14TH CONG., 1ST SESS., (Feb. 15, 1816), reprinted in 7 COMPILATION OF REPORTS OF COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789-1901, at 21 (1901).

245. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320-21 (1936) (discussing President Washington's refusal "to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted"); cf. HENKIN, *supra* note 26, at 88 ("Since the early years, too, Congress has not seriously doubted that the President is the sole organ of communications with foreign governments . . .").

246. Marshall and Jefferson, for example, seem to appeal to the Article II Vesting Clause in explaining why the President is the sole representative of the United States with foreign sovereigns. Jefferson Opinion, *supra* note 242, at 379 ("The transaction of business with foreign nations is Executive altogether."); Marshall Speech, *supra* note 118, at 613 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power."). Hamilton does as well. Hamilton, *supra* note 13, at 38-40. However, they also rely on the President's role in making treaties, Hamilton, *supra* note 13, at 37-38; Marshall Speech, *supra* note 118, at 614, and in nominating, appointing, and commissioning U.S. diplomatic officials, Jefferson Opinion, *supra* note 242, at 379. See Bradley & Flaherty, *supra* note 13, at 549 n.19, 654-55, 680 (discussing these sources). Story relied on the Treaty Clause. See JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1505 (1833) (stating that the Treaty Clause makes the President "the constitutional representative of the nation itself"). But he also placed great emphasis on the Reception Clause. See *id.* § 1560 ("The power to receive ambassadors and ministers . . . constitutes the only accredited medium, through which negotiation and friendly relations are ordinarily carried out with foreign powers. . . . The constitution has expressly invested the executive with the power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them.").

247. See, e.g., RAMSEY, *supra* note 13, at 78-79; Prakash & Ramsey, *supra* note 13, at 317-24.

248. U.S. CONST. art. II, § 1, cl. 1.

for the President's authority to act as the nation's representative in its dealings with foreign sovereigns. As Curtis Bradley and Martin Flaherty have argued, each of the enumerated powers identified in the 1789 Foreign Affairs Act finds a counterpart in specific authority conferred on the President by the Constitution:

The duty to handle the correspondence, commissions, and instructions to U.S. "public Ministers or Consuls" finds a provenance in both the President's power "to appoint Ambassadors, other public Ministers and Consuls," as well as the duty to "Commission all the Officers of the United States." Likewise, the same duty as applied to "negotiations" with foreign nations fairly clearly alludes to the President's authority "to make Treaties." The reference to other applications from foreign public ministers, finally, echoes presidential authority to "receive Ambassadors and other public Ministers." Further supporting each set of obligations is the President's authority to "require the Opinion, in Writing, of the principal officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."<sup>249</sup>

Thus, the statute that principally authorizes the Secretary to communicate with foreign sovereigns on the nation's behalf, "can be understood as a function of discrete statutory allocations tracking specific constitutional grants."<sup>250</sup> The Founders' understanding that the Constitution vests in the President alone the authority to conduct the United States' foreign relations has been upheld by the courts throughout our history.<sup>251</sup>

## 2. Diplomacy and Immunity

From a duty the Constitution assigns to the President can be inferred other authorities of the Executive Branch that are necessary to permit the President effectively to carry out the constitutionally delegated power.<sup>252</sup> I have just explained that the Constitution vests diplomatic functions in the President alone. In this section, I will show that the Executive Branch's authority to determine the applicable principles of head of state immunity derives from the President's role as the sole representative of the United States in its direct dealings with foreign sovereigns. This follows from two separate considerations.

249. Bradley & Flaherty, *supra* note 13, at 643–44 (footnotes omitted) (quoting U.S. CONST. art. II, § 2, cl. 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3).

250. *Id.* at 644.

251. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–54 (9th Cir. 1993) (holding unenforceable the statutory provision requiring Executive Branch to initiate negotiations with foreign states).

252. See generally Monaghan, *supra* note 4.

First, and principally, the Executive Branch's ability to suggest the immunity from suit of a sitting head of state is necessary to protect its ability—and that of the President in particular—to engage in diplomacy at the highest levels. Because of the restrictions of the due process clause, our courts generally obtain personal jurisdiction over a foreign head of state when process is served on the official while he or she is within the court's jurisdiction.<sup>253</sup> However, sitting heads of state almost always visit the United States as part of a diplomatic mission, usually to meet with the President. And when heads of state travel to the United States on diplomatic missions, it is quite often for momentous purposes, such as to engage in discussions affecting the United States' national security or to consummate an important treaty.<sup>254</sup> If traveling to the United States would subject a head of state to private litigation in our courts, the Executive Branch's ability to conduct diplomacy would be dramatically impaired. At best, foreign governments would view such suits as a nuisance. But most foreign states take service of process on a sitting head of state during a state visit as a major breach of diplomatic norms, and potentially a violation of international law.<sup>255</sup> Were the Executive Branch not able to suggest the foreign leader's immunity, thereby addressing the problem, the suit against the head of state could affect the course of the diplomatic discussions, and foreign leaders might be dissuaded from visiting the United States at all.<sup>256</sup>

---

253. See *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (Scalia, J., plurality opinion) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."). Although the *Burnham* case produced a fractured Court, all of the Justices agreed that, under the doctrine of transient jurisdiction, a court may obtain personal jurisdiction over a defendant by service of process on the defendant while he or she is within the court's jurisdiction.

So-called long-arm jurisdiction is not generally available in suits against foreign heads of state. Heads of state typically lack sufficient contacts with the forum to support "general jurisdiction." See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 & n.9 (1984) (explaining that courts may exercise personal jurisdiction over a defendant "in a suit not arising out of or related to the defendant's contacts with the forum" provided that the defendant has sufficient contacts with the forum). And the matters for which heads of state are sued usually do not arise out of their contacts with the forum. Thus, "specific jurisdiction" is typically not available. See *id.* at 414 (discussing concept of specific jurisdiction). See generally cases cited *infra* Appendix A.

254. See, e.g., The President's News Conference with President Dmitry A. Medvedev of Russia, 2010 DAILY COMP. PRES. DOC. 1 (June 24, 2010) (noting discussions concerning reductions in nuclear weapons); Bernard Gwertzman, *Egypt and Israel Sign Formal Treaty, Ending a State of War After 30 Years; Sadat and Begin Praise Carter's Role*, N.Y. TIMES, Mar. 26, 1979, at A1 (noting that Egyptian President Anwar el-Sadat and Israeli Prime Minister Begin signed peace treaty at White House).

255. See SATOW'S GUIDE TO DIPLOMATIC PRACTICE, *supra* note 63, at 9 (noting that head of state's immunity from the civil jurisdiction of state that he or she is visiting is firmly established in customary international law).

256. As a matter of customary international law, sitting heads of state are generally completely immune from the civil jurisdiction of a foreign state. *Id.* Accordingly, these same considerations apply to suits instituted against foreign heads

These concerns are neither idle nor exaggerated. For example, in the litigation against Chinese President Jiang Zemin,<sup>257</sup> the United States filed in the district court a declaration from a State Department official detailing the consequences of the suit. Jiang had stopped in Chicago while en route to a meeting with President George W. Bush in Crawford, Texas.<sup>258</sup> Under an alternative service order, practitioners of Falun Gong attempted to effect service by leaving process with Jiang's Chicago security detail.<sup>259</sup> When the Chinese government learned of the suit, it "immediately and forcefully protested to the Department of State."<sup>260</sup> The Chinese Ambassador to the United States, who was traveling with Jiang, informed the State Department that the suit "could have a most deleterious impact on the atmosphere surrounding the Crawford summit and on the bilateral relationship."<sup>261</sup> Next, the Ambassador, the Chinese Executive Vice Minister, and a high official in the Chinese Foreign Ministry each approached State Department officials "to register the Chinese government's serious concerns about the matter and to insist that the U.S. side take immediate steps to address" the suit.<sup>262</sup> And in China, the Chinese Assistant Foreign Minister called in the U.S. Ambassador "to stress the Chinese Government's objection to the suit and to make clear that it could have a serious negative impact on U.S.-China relations."<sup>263</sup>

As with most head of state visits, the agenda for President Bush's meeting with President Jiang included matters of great interest to the United States, including critical issues of national security.<sup>264</sup> The lawsuit against President Jiang thus threatened to disrupt the summit and interfere dramatically with the President's ability to effectively conduct the nation's diplomacy. In fact, suits against high-ranking Chinese officials already had affected the United States' diplomatic relations. The State Department informed the court that the Chinese government had refrained from sending representatives to the United States on prior occasions because of the

---

of state visiting in a non-official capacity, and to suits in which service is attempted abroad. However, service on heads of state in this country on an official visit appears to be the historical norm, see cases cited *infra* Appendix A, and for the reasons discussed immediately above, would seem to be the best opportunity for prospective plaintiffs to effect service.

257. See *supra* text accompanying notes 46–78.

258. See *supra* note 47 and accompanying text.

259. See *supra* note 56 and accompanying text.

260. Declaration of Donald W. Keyser, Deputy Assistant Sec'y of State for the Bureau of E. Asian and Pacific Affairs, U.S. Dept. of State ¶ 7 (Dec. 10, 2002) [hereinafter Keyser Declaration], attached as Tab A to United States Suggestion of Immunity, *supra* note 15.

261. *Id.*

262. *Id.*

263. *Id.*

264. Not long before President Jiang's visit, North Korea had disclosed its nuclear weapons program. See *supra* note 46.



possibility that its leaders could be subject to private lawsuits in U.S. courts.<sup>265</sup> The State Department explained that “[t]he consequences of a reluctance by foreign leaders and officials to come to the United States to engage in diplomacy are potentially severe for the government’s ability to conduct foreign relations.”<sup>266</sup>

The effect of such suits could not be contained within our shores, as the State Department also emphasized. Were courts to permit suits such as this one to proceed, “it is increasingly likely that foreign governments and judicial authorities will be inclined to permit service and legal proceedings that may be detrimental and embarrassing to high-level United States officials visiting abroad.”<sup>267</sup> The reciprocal conduct of foreign states would thus threaten to undermine the international practice of according head of state immunity to our own high government officials.<sup>268</sup> For these reasons, the suit against Jiang would be “disruptive to the conduct of our foreign relations,” and could have “potentially serious adverse consequences.”<sup>269</sup> The Executive Branch’s ability to direct the dismissal of private suits against sitting heads of state is thus critical

---

265. Keyser Declaration, *supra* note 260, ¶ 4. The State Department also noted the highly problematic nature of the alternative service the district court permitted—through the U.S. security detail guarding Jiang. *Id.* ¶ 3. The declaration suggested that permitting service through U.S. officials directly interferes with the Executive Branch’s ability to communicate with foreign states by making foreign officials suspicious of U.S. officials. *Id.* ¶ 5. The declaration relayed an incident, occurring prior to the suit, in which a Chinese embassy official refused to accept a communication from a State Department official for fear that he would unintentionally accept judicial process. *Id.* “Exchanging diplomatic notes and written positions between governments is the essence of diplomacy,” the State Department explained. *Id.* Thus, alternative service orders such as the one in this case could “severely hamper[ ]” the United States’ ability to communicate with foreign governments and to implement its foreign policy. *Id.*

266. *Id.* ¶ 4. The State Department here appears to be referring to suits against officials who likely would not qualify for head of state immunity. The Supreme Court recently held that the State Department continues to have authority, after the enactment of the Foreign Sovereign Immunities Act, to determine the principles of immunity governing suits against all foreign officials. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010). Although this Article might suggest a constitutional basis for the Executive Branch’s suggestions of immunity for officials who do not otherwise qualify for head of state immunity, that is not its focus. I quote the State Department’s concerns about the willingness of foreign officials to visit the United States because they are fully applicable to visits from heads of state.

267. Keyser Declaration, *supra* note 260, ¶ 9.

268. *Id.*

269. *Id.* ¶¶ 9–10. Some commentators have argued that litigation against Chinese officials for human rights abuses has not produced irreparable harm in Sino-American relations. *E.g.*, Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473 (2002). However, even such skeptics at least implicitly recognize that suits against high-ranking Chinese officials raise the potential for significant harm to the Executive Branch’s conduct of our foreign relations. *See id.* at 525–27 (arguing that recognition of head of state immunity “might be effective in warding off suits that are claimed to pose some of the potentially most serious problems for U.S. foreign policy”).

to maintaining channels of diplomatic communication at the highest levels.<sup>270</sup>

The first consideration, just discussed, concerns the mechanics of diplomacy. A second, subsidiary consideration concerns its content. As we have seen, head of state immunity is a longstanding doctrine of customary international law.<sup>271</sup> Customary international law is based on the practice of states, followed out of a sense of legal obligation.<sup>272</sup> All three branches of government have a role in identifying customary international law. The Constitution gives Congress the power to “define and punish . . . Offenses against the Law of Nations.”<sup>273</sup> The First Congress relied on that authority to criminalize piracy and attacks on ambassadors.<sup>274</sup> And Congress again relied on that authority in enacting the Foreign Sovereign Immunities Act.<sup>275</sup> The courts also have a role in identifying customary international law. The Supreme Court has held that U.S. courts have some limited authority to apply customary international law norms in creating federal common law rights of action under the Alien Tort Statute.<sup>276</sup> The Executive Branch also has a considerable role in identifying customary international law norms, as it has the principal responsibility to ensure that the United States complies with its international obligations.<sup>277</sup>

However, over the course of our constitutional history, the Executive’s role has increased in proportion to that of the other branches. Early in our nation’s history, the law of nations was the unwritten international law.<sup>278</sup> One important strand of the

270. Cf. HENKIN, *supra* note 26, at 42 (“As ‘sole organ’, the President determines also how, when, where, and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited as to time, place, form, or forum.”).

271. SATOW’S GUIDE TO DIPLOMATIC PRACTICE, *supra* note 63, at 9.

272. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

273. U.S. CONST. art. I, § 8, cl. 10.

274. Act of Apr. 30, 1790, ch. 9, §§ 8, 28, 1 Stat. 112, 113, 118.

275. See H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 (“Constitutional authority for enacting such legislation derives from the constitutional power . . . to define offenses against the ‘Law of Nations’ . . .”); S. REP. NO. 94-1310, at 12 (1976) (same).

276. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–31 (2004). There is a dispute about whether courts properly have this authority, after the elimination of general common law as a basis for decision (at least in diversity cases) in U.S. courts. See sources cited *supra* note 136. Courts may also properly rely on customary international law in some circumstances when interpreting federal statutes and considering defenses to claims. See Vázquez, *supra* note 136.

277. See HENKIN, *supra* note 26, at 235 (“[The President] is the direct and principal repository of the international obligations of the United States. Under the Constitution, the President, as the national Executive and under his Foreign Affairs authority, has the power and the duty to carry out the U.S. obligations under international law.”).

278. Dodge, *supra* note 135, at 536.

eighteenth-century American understanding of the law of nations was premised on the idea that principles of international law could be deduced by reason.<sup>279</sup> Another strand derived law-of-nations principles from state practice.<sup>280</sup> But over time, the customary strand of the law of nations came to be synonymous with unwritten international law. As eighteenth-century rationalism was superseded by nineteenth- and twentieth-century positivism,<sup>281</sup> it became less clear that reason would disclose law-of-nations principles and increasingly important for courts to identify state practice or consensus as a basis for unwritten international law.<sup>282</sup> Because modern customary international law is based on state practice,<sup>283</sup> it is not static.<sup>284</sup> And because the President alone controls our nation's direct communications with foreign states, it is the Executive Branch that speaks for the United States concerning the desirability of one practice or another. For that reason, the President has the predominant role in developing customary international law on behalf of the United States.<sup>285</sup>

---

279. See Jay, *supra* note 135, at 821–28 (discussing this strand); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084–90 (1985) (same).

280. Dodge, *supra* note 135, at 539–40, 542–44.

281. Legal positivism is a complex doctrine that originated in England with Jeremy Bentham and John Austin and that evolved as it was incorporated into American jurisprudence. See generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995). But a central and reasonably enduring tenet of classical positivism was that, rather than deriving from reason, “every valid legal norm was promulgated by the legal system’s sovereign, and the norm’s authority can be traced to that sovereign.” *Id.* at 2064.

282. See Lobel, *supra* note 279, at 1112 (“By the latter part of the nineteenth century, positivism had almost entirely replaced natural law theory in the international arena.”); Dodge, *supra* note 135, at 544–48 (tracing the shift from natural law to positivism in the Supreme Court’s nineteenth-century international law decisions).

283. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (describing “customary international law” as “result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation”).

284. *The Paquete Habana*, 175 U.S. 677, 686 (1900) (explaining that “an ancient usage among civilized nations, beginning centuries ago” can “gradually ripen[] into a rule of international law”). The legislative history for the Torture Victim Protection Act, for example, recognizes that international norms “may ripen in the future into rules of customary international law.” H.R. REP. NO. 102-367, pt. 1, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84; see Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)) (establishing a civil action against individuals who commit torture or extrajudicial killing while acting under authority of any foreign nation).

285. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 433–34 (1964) (“When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1

It is, perhaps, because our courts are not generally suited to developing customary international law (as opposed to applying its settled principles) that, beginning around the First World War, the courts looked to the Executive Branch with increasing dependence for guidance on the applicable principles of foreign sovereign immunity.<sup>286</sup> As we saw, around the First World War, the dominant judicial view was that foreign sovereigns are entitled to immunity from suit in all cases, regardless of the subject of the suit.<sup>287</sup> But that view seemed inconsistent with an emerging trend toward state liability for commercial activity.<sup>288</sup> It was certainly inconsistent with the State Department's view of foreign sovereign immunity.<sup>289</sup> Thus, it seems likely that, as they began to doubt the stability of the governing immunity rule in international practice, and in the absence of any legislative guidance, courts increasingly looked to the Executive Branch for the applicable principles.

The Executive Branch's authority to determine the applicable principles of head of state immunity thus finds additional support in the President's constitutional authority to speak for the nation in support of principles that should bind the international community. That advocacy can occur in traditional diplomatic exchanges with other states. But the Executive Branch also can advocate on behalf of certain head of state immunity principles by directing courts to adopt them in suits against foreign, high-ranking government officials.<sup>290</sup> In doing so, the Executive Branch participates in the development of

---

reporter's note 2 ("The United States role in the development of customary international law . . . consists in substantial measure of governmental and diplomatic practice, largely, though not exclusively, the work of the President and those acting on his behalf."); HENKIN, *supra* note 26, at 43 ("[The President] acts and speaks the part of the United States in the subtle process by which customary international law is formed."); Hathaway, *supra* note 234, at 209 ("[T]he sole power to communicate on behalf of the nation on the international stage is not to be underestimated. . . . It carries with it an absolute veto power over international lawmaking."); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 538-39 (2000) ("[T]he executive branch participates in the formation of customary [international] norms, sifts through emerging norms, and determines which norms reach binding status.").

286. See *supra* text accompanying notes 176-201.

287. See *supra* note 179 and accompanying text.

288. See *supra* notes 183-84 and accompanying text.

289. See *supra* text accompanying notes 180-81.

290. To be clear, I am not suggesting that the President's role in the development of customary international law compels courts to accept as a rule of decision any principle the President wishes to endorse internationally. The limited point I am making is that where the Executive Branch has independent constitutional authority to determine the governing rule, that authority is supplemented where the rule is one that the Executive Branch wishes to advocate as a matter of customary international law. Accordingly, the President's role in developing customary international law is subsidiary to the President's role as the nation's diplomat in justifying the Executive Branch's authority to determine principles of head of state immunity.

customary international law, and exercises its constitutional authority as the nation's "sole representative with foreign nations."<sup>291</sup>

#### D. *Some Objections Considered*

In the next Part, I will consider the roles of the coordinate branches of government in head of state immunity determinations under the theory I have advanced. But before turning to that, I will address two objections to the argument made here. The first objection is that there is a simpler, textual basis in the Constitution on which to ground the Executive Branch's authority to determine head of state immunity: the Reception Clause.<sup>292</sup> The second objection questions whether an executive branch determination of head of state immunity is really lawmaking or something else.

##### 1. Diplomacy or Reception?

The Constitution assigns to the President alone the power to "receive Ambassadors and other public Ministers."<sup>293</sup> Historically, that authority has been understood to encompass more than the ceremonial reception of foreign diplomats who visit the United States on official business. Because the power to receive ambassadors includes the power to decide which ambassadors to receive and, hence, with which governments to establish diplomatic relations, since the founding, the Executive Branch has claimed the sole authority to recognize which government represents a foreign state.<sup>294</sup> In 1793, for example, President Washington asked his cabinet whether he should receive the ambassador from the republican government of France, the first emissary from that state since the revolution overthrew the French monarchy.<sup>295</sup> The cabinet unanimously recommended that Washington receive the ambassador, and all agreed that the President need not consult Congress before doing so.<sup>296</sup> To this day, Presidents claim the exclusive right to

---

291. Marshall Speech, *supra* note 118, at 613.

292. U.S. CONST. art. II, § 3.

293. *Id.*

294. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a (explaining that the President's authority to recognize foreign governments "is implied in the President's express constitutional power to appoint Ambassadors (Article II, Section 2) and to receive Ambassadors (Article II, Section 3), and his implied power to conduct the foreign relations of the United States").

295. George Washington to the Cabinet, (April 18, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 568-69 (John Catanzariti ed., 1992).

296. Thomas Jefferson, *Notes on Washington's Questions on Neutrality and the Alliance with France*, in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 295, at 666.

recognize foreign governments, and that power is firmly established.<sup>297</sup>

Some have suggested that the President's authority to determine foreign state immunity prior to the enactment of the Foreign Sovereign Immunities Act stemmed from the President's recognition power.<sup>298</sup> More recently, after the Supreme Court's *Samantar* decision,<sup>299</sup> others contend that the Reception Clause supports executive branch determination of foreign official immunity, at least where the immunity turns on the official's status, such as head of state or accredited diplomat.<sup>300</sup> I have argued that the Executive Branch's authority to determine governing principles of head of state immunity is an incident of the President's exclusive control over the mechanics of diplomacy, and the President's predominant role in representing the United States in the development of customary

297. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign government] is exclusively a function of the Executive."); HENKIN, *supra* note 26, at 43 ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government . . ."). The Supreme Court is likely to address the President's recognition power during the 2011 Term in *Zivotofsky v. Sec'y of State*, No. 10-699 (to be argued Nov. 7, 2011). See 131 S. Ct. 2897 (2011) (granting certiorari).

298. See, e.g., Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1635-36 (2007) (suggesting that the President's power regarding immunity "was arguably an incident of recognition"); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 367-68 & n.380 (2006) (arguing that the President's exercise of the recognition power "may carry derivative effects in domestic law," including effects on foreign sovereign immunity). The Supreme Court, however, did not rely on the Reception Clause in its decisions requiring absolute judicial deference to executive branch suggestions of foreign state immunity. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (justifying executive deference on the ground that the court should not "embarrass the executive arm in its conduct of foreign affairs"); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("[A]n overriding principle of substantive law" is "that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."); see also HENKIN, *supra* note 26, at 56 (noting that the Supreme Court "invoked only general Executive powers in foreign affairs").

299. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (holding that the FSIA does not govern the immunity of foreign officials from suit).

300. See, e.g., Keitner, *supra* note 35, at 71 ("Courts should treat Executive representations about status-based immunity as conclusive because they are a function of the Executive's power under Article II, section 3 of the Constitution to accredit diplomats ('receive ambassadors') and, by implication, to recognize foreign heads of state."); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2712 (2011) ("Executive Branch 'suggestions of immunity' for heads of state and diplomats are controlling on the judiciary, in recognition of the Constitution's assignment of the power to 'receive Ambassadors and other public Ministers' to the President." (footnote omitted)). Wuerth argues that courts should defer only to the Executive Branch's determination of the official's status. Wuerth, *supra* note 25, at 971. Wuerth suggests that immunity will follow as a matter of course and that "courts will rarely have a role to play," but she does not identify the source of domestic law from which the immunity determination flows. *Id.*

international law.<sup>301</sup> Perhaps the Reception Clause provides a less complicated basis for this power.

Relying entirely on the Reception Clause as the basis for the Executive Branch's authority to determine head of state immunity has much intuitive appeal. As noted, there is little question that the President's exercise of authority under the Reception Clause has substantive domestic effect, including determining which government represents a foreign state.<sup>302</sup> And the Supreme Court has held that the President's recognition of a foreign government has implications for suits in our courts involving foreign states. Thus, "[i]t has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."<sup>303</sup> In addition, the Court has held that some executive acts taken pursuant to the Reception Clause can affect the private rights of citizens. For example, as part of its decision to recognize the Soviet government of the USSR, the Executive Branch negotiated a sole-executive agreement (an agreement made with a foreign state without participation by either chamber of Congress) under which it espoused and settled the claims of U.S. nationals relating to the Soviet Union's expropriation of private property.<sup>304</sup> The Supreme Court held that settling the claims of U.S. nationals against a foreign state "is a modest implied power of the President," which is necessary to avoid

---

301. See *supra* Part III.C.2.

302. See *supra* note 293–97 and accompanying text.

303. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 319–20 (1978); see *id.* at 320 (describing the rule as one of "complete judicial deference to the Executive Branch"); see also, e.g., *The Rogdai*, 278 F. 294, 296 (N.D. Cal. 1920) (dismissing admiralty libel brought by Russian Socialist Federal Soviet Republic seeking possession of a ship in control of the overthrown Russian government, where the Executive Branch had not recognized the new government).

304. *United States v. Belmont*, 301 U.S. 324, 326–27 (1937). "Espousal," a form of diplomatic protection, see *supra* note 113, is an act by which a country resolves the claims of its nationals against a foreign state or foreign nationals, typically in exchange for payment by the foreign state. See *Asociación de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1987) (discussing espousal). Espousal through executive agreement goes back at least to the turn of the nineteenth century and is well established. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981) (noting that presidents have exercised executive agreements to settle the claims of nationals since the case of the "Wilmington Packet" in 1799); see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 cmt. a (1965) ("[I]t is clear that the government of the United States can, without consent of the injured party, effect a waiver or settlement that relieves the foreign state of further responsibility."). Espousal is a practice that the Executive Branch continues to employ from time to time to obtain compensation for injuries to U.S. nationals by foreign states. See, e.g., Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008) (espousing claims of U.S. nationals against Libya, pursuant to executive agreement with Libya, for injuries related to state-sponsored terrorism).

“thwart[ing] or seriously dilut[ing]” the recognition authority.<sup>305</sup> Thus, it might be thought, the Reception Clause and the recognition power that is inferred from it provide more than enough authority for the Executive Branch’s determination of head of state immunity.

There is no doubt that the Reception Clause plays an important role in explaining the Executive’s constitutional authority to determine head of state immunity.<sup>306</sup> In my view, however, the Reception Clause is not alone sufficient to justify complete judicial deference to the Executive Branch. The Reception Clause features prominently in what are historically the most common suits against heads of state: suits in which service is attempted while the foreign official is in the United States on a diplomatic trip. Such suits implicate the heartland of the Reception Clause, since they involve the President’s decision to receive a foreign, high-ranking official as the representative of a foreign state. Those who propose reliance on the Reception Clause as the source of the Executive Branch’s authority to determine head of state (or other status-based) immunity appear to assume that the power to receive the official includes the power to determine the conditions under which the official will be received, including the official’s amenability to suit. But that supposition is not unassailable.

The Supreme Court has not accepted a similar argument concerning the recognition power, which, as I have noted, is an authority inferred from the Reception Clause. While it is settled that courts are bound by executive branch decisions to recognize particular persons and governments as representatives of foreign states, the Supreme Court has not held that courts are similarly bound by the Executive’s views concerning the legal effect of such recognition; quite the opposite. In *Guaranty Trust Co. of New York v. United States*, the Supreme Court “accept[ed] as conclusive . . . the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917, to November 16, 1933, when the Soviet Government was recognized.”<sup>307</sup> The Court explained, however, that, although the Executive Branch’s “action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination,” nevertheless, courts “are free to draw for themselves [the determination’s] legal consequences in litigations pending before them.”<sup>308</sup> The Court went on to reject the government’s argument that a state statute of limitations was tolled during the period between the Soviet Revolution and the United

---

305. *United States v. Pink*, 315 U.S. 203, 229, 230 (1942).

306. *See infra* text accompanying notes 324–25.

307. *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938).

308. *Id.*



States' recognition of the Soviet government because the Soviet government could not bring suit on the claim during the period of non-recognition.<sup>309</sup>

The *Guaranty Trust* principle that courts are bound by the Executive's recognition decisions but are free to determine for themselves the legal consequences of recognition is a consistent theme in the Supreme Court's central decisions, resulting from litigation in the wake of President Roosevelt's recognition of the Soviet government, addressing the Executive's recognition power.<sup>310</sup> Thus, in *United States v. Bank of New York*, the Court rejected the government's argument that the Executive Branch's recognition of the Soviet government divested a New York state court of in rem jurisdiction over assets held on deposit in the name of a nationalized Russian company.<sup>311</sup> The Court explained: "Whatever the effect of recognition, it is manifest that it did not terminate the state proceedings."<sup>312</sup> In *United States v. Belmont*, the Court accepted as determinative the Executive Branch's recognition of the Soviet government.<sup>313</sup> But, in rejecting the contention that New York state policy against confiscation prohibited acknowledging the Soviet government's interest in the property at issue, the Court applied the judicially-crafted doctrine that executive branch recognition of a foreign government "is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence."<sup>314</sup> And, in *United States v. Pink*, the Supreme Court gave no deference to the Executive Branch in deciding that the executive agreement's preferential treatment of U.S. nationals over foreign creditors of Russia did not offend the Fifth Amendment.<sup>315</sup>

Head of state immunity is a legal consequence flowing from the fact of recognition: an individual may be immune from suit as a sitting head of state only if the Executive Branch recognizes the individual as a high-ranking official within the government of a foreign state. Accordingly, the *Guaranty Trust* principle weakens the contention that the Reception Clause alone can support the practice of complete judicial deference to executive branch head of state immunity determinations.

---

309. *Id.* at 140. The Court held that the statute of limitations was not tolled because, during that period, the United States continued to recognize the so-called Provisional Government of Russia, which could have brought suit. *Id.* at 138-39 & n.4.

310. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 reporter's note 1 ("The Court's principal 'recognition' decisions dealt with the President's recognition of the Soviet regime as the government of Russia.").

311. *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 478-79 (1936).

312. *Id.*

313. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

314. *Id.* at 328 (discussing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918)).

315. *United States v. Pink*, 315 U.S. 203, 228 (1942). Earlier in the decision, the Court rejected the claim that the Soviet nationalization orders did not have extraterritorial effect, relying on *Belmont*. *Id.* at 221-26.

But perhaps there is a way to distinguish head of state immunity from other legal consequences of recognition. One might argue that, unlike the legal consequences discussed above, head of state immunity most centrally involves the question of amenability to suit. In this way, the Executive's determination of head of state immunity is similar to the President's claims settlement authority: espousing the claims of U.S. nationals against a foreign state has the consequence that those claims may no longer be pursued in litigation.<sup>316</sup> The Court has described the President's claims settlement authority as "a modest implied power" of the recognition authority.<sup>317</sup> Perhaps the authority to determine head of state immunity is similar. Even if this is so, it is not especially helpful in justifying complete judicial deference to executive branch head of state immunity determinations. Outside the context of establishing or "rehabilitating"<sup>318</sup> relations with a foreign state, the Court has upheld the Executive Branch's authority to settle claims principally because Congress demonstrated its implicit approval of the practice by enacting legislation implementing claims settlement agreements.<sup>319</sup> There is no similar history of congressional enactments supporting the Executive Branch's practice of determining head of state immunity. There is only congressional silence.<sup>320</sup> It may be argued that congressional inaction in this context is itself evidence of congressional acquiescence.<sup>321</sup> But the

---

316. For example, the Executive Order implementing the 2008 U.S.–Libya Claims Settlement Agreement espoused and settled the covered claims of U.S. nationals against Libya and provides that "[n]o United States national may assert or maintain any claim within the terms of Article I [of the claims settlement agreement] in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State." Exec. Order No. 13,477 § 1(a)(i), 73 Fed. Reg. 65,965 (Oct. 31, 2008).

317. *Pink*, 315 U.S. at 229.

318. *Id.* at 230.

319. See *Dames & Moore v. Regan*, 453 U.S. 654, 680–82 (1981) (discussing legislation and describing Congress's implicit approval as "[c]rucial to our decision today"); see also *Medellín v. Texas*, 552 U.S. 491, 530–31 (2008) (noting the importance of congressional acquiescence in executive claims settlement agreements); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (same).

320. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010) ("[A]lthough questions of official immunity did arise in the pre-FSIA period, they were few and far between. The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." (footnote omitted)).

321. See, e.g., *Haig v. Agee*, 453 U.S. 280, 300 (1981) ("[C]ongressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy."); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("[A] long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [practice] had been made in pursuance of its consent or of a recognized administrative power of the Executive . . .").

absence of supporting legislation makes the case for acquiescence significantly more difficult.<sup>322</sup>

Moreover, because grounding the authority to determine head of state immunity solely on the Reception Clause requires reliance on the recognition power, and because the recognition power is itself an inferred authority, the Reception Clause cannot provide a purely textually based foundation for the Executive's head of state power. In this regard, reliance on the Reception Clause alone offers no advantage over a theory, such as that presented here, that grounds the Executive's authority over head of state immunity on a different inferred power of the President.

Although Reception Clause is, at best, an uncertain basis for the practice of complete judicial deference to executive branch determinations of head of state immunity, there remains a broad consensus, even among those who are generally skeptical of the Executive Branch's role in making foreign official immunity determinations, that courts must defer not only to the Executive Branch's identification of a foreign head of state, but also to its determination of legal consequences of that recognition in suits against a head of state in our courts.<sup>323</sup> Either this consensus is mistaken, or there is a different basis for the Executive's authority. The consensus is not mistaken. As explained above, the President's constitutional authority to serve as the United States' sole diplomat, and his role as the representative of the nation in the development of customary international law, together provide the basis for the Executive's authority to determine head of state immunity.<sup>324</sup> The Reception Clause plays an important role in explaining the Executive Branch's authority to determine head of state immunity, as one of the express constitutional delegations of power from which the President's exclusive control of diplomatic functions is inferred.<sup>325</sup> But the Reception Clause, standing alone, is insufficient to justify

---

322. See *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.").

323. See decisions cited *infra* Appendix A; see also, e.g., Keitner, *supra* note 35, at 71 ("Courts should treat Executive representations about status-based immunity as conclusive because they are a function of the Executive's power under Article II, § 3 of the Constitution to accredit diplomats ('receive ambassadors') and, by implication, to recognize foreign heads of state."); Rutledge, *supra* note 41, at 914 ("[H]ead of state immunity represents a limited area, traceable to an express constitutional provision, where the Executive Branch appropriately enjoys an adjudicatory role." (referring to the Reception Clause)); Stephens, *supra* note 300, at 2712 ("As a result [of the Reception Clause], courts defer to Executive Branch suggestions of immunity as to diplomats and heads of state.").

324. See *supra* Part III.C.2.

325. See *supra* Part III.C.1.

complete judicial deference to executive branch determinations of head of state immunity.<sup>326</sup>

## 2. Lawmaking or Something Else?

Apart from the source of the Executive Branch's authority to determine head of state immunity is a question about the character of the Executive's act. I have argued that the Executive Branch engages in undelegated lawmaking when it makes head of state immunity determinations. But is that so? Perhaps the Executive Branch's suggestions of head of state immunity are something short of lawmaking, even if the courts treat them as binding. In this section, I will consider some objections to the notion that the Executive Branch makes law when it directs the dismissal of suits on head of state immunity grounds. The objections stem from two considerations: that assertions of head of state immunity do not directly extinguish claims, and that determinations of head of state immunity are based on customary international law. As will be seen, there are good reasons, both conceptual and historical, for viewing executive branch determinations of head of state immunity as lawmaking.

A court's dismissal of a suit against a sitting official based on the Executive Branch's assertion of head of state immunity is not a determination on the merits; such suits typically are dismissed without prejudice.<sup>327</sup> That is to say, even though it cannot be litigated at that time, a plaintiff's claim survives dismissal of the suit. It can be espoused and settled by the Executive Branch in an agreement with the foreign state,<sup>328</sup> or, if the claim does not come within the foreign official's residual immunity, the claim can possibly be relitigated after the foreign official leaves office.<sup>329</sup> It is true that the dismissal of a suit, as a practical matter, might make it very unlikely

326. In addition to the deficiency discussed in the text, reliance on the Reception Clause is problematic in atypical suits in which service on a head of state is attempted abroad. Such cases do not implicate the heartland of the Reception Clause since they do not involve the President's decision to receive a visiting official. Thus, even if the President's power to receive a foreign official implies the authority to determine the legal terms and conditions under which the official will be received, that power would not explain the President's authority to determine head of state immunity in cases where suit is initiated when the foreign official is not within the United States.

327. See, e.g., *Howland v. Rosteiner*, No. 07-CV-2332, 2007 WL 4299176, at \*1 (E.D.N.Y. Dec. 5, 2007) (dismissing without prejudice suit against sitting Prime Minister of Grenada because defendant may not be immune from claims after leaving office).

328. See *supra* note 304 (discussing the Executive Branch's authority to espouse and settle claims).

329. See, e.g., *Swarna v. Al-Awadi*, 622 F.3d 123, 130 (2d Cir. 2010) (noting that district court dismissed earlier suit against diplomat without prejudice because defendant might not be entitled to immunity from claim after leaving post); see also *supra* note 44 (explaining that, under customary international law, former heads of state are entitled to immunity only for acts taken in an official capacity while in office).

that the plaintiff will ever vindicate the claim asserted. Espousal and claims settlement is entirely discretionary,<sup>330</sup> and often undertaken to resolve diplomatic friction.<sup>331</sup> Thus, there is no guarantee that a frustrated plaintiff will be able to obtain satisfaction through diplomatic protection. Resort to self-help once the official leaves office is no more certain, as it may be difficult to obtain personal jurisdiction over a former foreign official who remains in a foreign state.<sup>332</sup> Nevertheless, because a suggestion of immunity does not extinguish a plaintiff's claim against the foreign official, it might be thought that any effect the Executive's action has on the plaintiff's rights is incidental, and does not amount to lawmaking.<sup>333</sup>

The thought's premise—that executive branch determinations of head of state immunity do not directly affect substantive rights—is correct. Indeed, the Executive's suggestions of immunity do not address the validity of the claims asserted or purport to extinguish them.<sup>334</sup> Nevertheless, the idea that lawmaking is limited to acts directly affecting substantive rights is overly restrictive. Although an action having “the purpose and effect of altering the legal rights, duties, and relations of persons” is “essentially legislative,”<sup>335</sup> lawmaking is not limited to the regulation of substantive rights or primary conduct. Congress engages in lawmaking when it establishes rules to regulate disputes concerning substantive rights, such as those in the Foreign Sovereign Immunities Act, which define the immunity of foreign states from suit.<sup>336</sup> It is uncontroversial that

---

330. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 cmt. a (1965).

331. *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981).

332. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 n.20 (2010).

333. Thought of this way, the Executive Branch's authority to determine head of state immunity can be analogized to the Supreme Court's authority to prescribe rules of procedure under the Rules Enabling Act. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)). Congress authorized the Court “to prescribe general rules of practice and procedure” governing “cases in the United States district courts . . . and courts of appeals.” § 2072(a). But to protect its authority over lawmaking, Congress provided that any such rules “shall not abridge, enlarge or modify any substantive right.” § 2072(b). The Supreme Court has interpreted this limitation as permitting it to adopt “[r]ules which incidentally affect litigants' substantive rights” so long as they are “reasonably necessary to maintain the integrity of that system of rules.” *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5–6 (1987). See generally Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26 (2008) (defending an incidental effects interpretation of the Rules Enabling Act). Similarly, the Executive Branch's authority to determine head of state immunity might be thought proper because it is necessary to preserve the President's constitutional diplomatic function and because suggestions of immunity have only an incidental effect on plaintiffs' substantive rights.

334. See, e.g., *United States Suggestion of Immunity*, *supra* note 15; see also Taft Letter, *infra* Appendix B.

335. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

336. 28 U.S.C. § 1604 (2006).

Congress acted legislatively when it passed the Foreign Sovereign Immunities Act.<sup>337</sup> If Congress engaged in lawmaking when it codified the restrictive theory of foreign sovereign immunity, there is no good reason for distinguishing the Executive Branch's pre-enactment conduct, when it identified the governing immunity principles applied by the courts. The Executive Branch's continued practice of determining principles of head of state immunity similarly qualifies as lawmaking.<sup>338</sup>

Moreover, executive branch head of state immunity determinations share one of the central characteristics of federal law: they are binding in state court proceedings and preempt inconsistent state law.<sup>339</sup> Accordingly, courts treat head of state immunity determinations as "law" under the Supremacy Clause,<sup>340</sup> at least implicitly. Head of state immunity determinations are thus lawmaking in a very basic, constitutional sense. Conceiving of head of state immunity determinations as preemptive substantive law is also

337. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) ("Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity.").

338. The Executive Branch's suggestions of head of state immunity might not be lawmaking if they represented purely ad hoc, foreign policy-based decision making rather than the implementation of a prescriptive rule that can be applied in future cases by the courts. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (explaining that, before enactment of the Foreign Sovereign Immunities Act, in suits against foreign states in which the Executive Branch did not participate, courts would determine whether the foreign state was entitled to immunity under principles accepted by the Executive). However, although the State Department has acknowledged foreign relations concerns among its reasons for recognizing and allowing the immunity of a head of state, it has generally explained that its determinations of head of state immunity are based on its adoption and application of the governing customary international law principles. See, e.g., Taft Letter, *infra* Appendix B.

339. See *Guardian F. v. Archdiocese of San Antonio*, No. 93-CI-11345 (Tex. Dist. Ct. 1994), available at <http://www.state.gov/documents/organization/65798.pdf> (dismissing suit against Pope John Paul II pursuant to executive branch suggestion of head of state immunity); *Anonymous v. Anonymous*, 581 N.Y.S.2d 776, 777 (App. Div. 1992) (same for suit against unnamed head of state); *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304 (Sup. Ct. 1988) (same for suit against Paloma Cordero de la Madrid, the wife of the President of the United Mexican States); *Chong Boon Kim v. Kim Yong Shik* (Haw. Cir. Ct. 1963) (same for suit against Korean Foreign Minister Kim), summarized in Richard B. Bilder et al., *Contemporary Practice of the United States Relating to International Law*, 58 AM. J. INT'L L. 165, 186–87 (1964).

340. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). There is a debate about whether anything other than statutes enacted by Congress properly qualifies as "Laws of the United States . . . made in Pursuance" of the Constitution. See generally Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010). This Article contributes to that debate insofar as it suggests that the Executive Branch's determination of head of state immunity is law made pursuant to the Executive Branch's constitutional authority, legally binding in state and federal courts.

consistent with the courts' historical treatment of the Executive Branch's determinations of foreign state immunity before the enactment of the Foreign Sovereign Immunities Act. In *Hoffman*, for example, the Supreme Court described judicial deference to executive foreign state immunity determinations as "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts."<sup>341</sup> And state courts held that they were bound by the Executive Branch's immunity determinations, regardless of state law.<sup>342</sup> In this regard, the Executive Branch's immunity determinations have the same domestic law effect as executive agreements settling claims of U.S. nationals against foreign states, which also preempt inconsistent state law,<sup>343</sup> and which are commonly understood to be examples of sole executive lawmaking.<sup>344</sup>

---

341. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945); see also *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (describing executive branch determination of foreign state immunity as "an overriding principle of substantive law" requiring relinquishment of jurisdiction).

342. See, e.g., *State ex rel. Nat'l Inst. of Agrarian Reform v. Dekle*, 137 So.2d 581, 583 (Fla. Dist. Ct. App. 1962) ("The determination of immunity by the Department of State and the filing of the suggestion in this case, effectively terminated the power and jurisdiction of the trial court with reference to matters contained in the suggestion."); *Republic of Cuba v. Dixie Paint & Varnish Co.*, 123 S.E.2d 198, 198 (Ga. Ct. App. 1961) (determining that, in light of suggestion of immunity, "the trial court was without further jurisdiction of the case and the attachment should have been dismissed"); *United States of Mexico v. Schmuck*, 294 N.Y. 265, 272 (1945) (describing executive branch foreign sovereign immunity determinations as "hav[ing] the force of law"); *F. W. Stone Eng'g Co. v. Petroleos Mexicanos of Mex.*, 42 A.2d 57, 60 (Pa. 1945) ("Such being the Department's province, the Secretary of State, in furtherance of our Government's friendly relations with the Republic of Mexico, formally recognized the defendant as a governmental instrumentality of that power and, as such, entitled to sovereign immunity in a court in the United States.").

343. *United States v. Pink*, 315 U.S. 203, 229, 230 (1942) (holding that an executive agreement settling claims of U.S. nationals against foreign state preempted state law determining priority of creditors); *United States v. Belmont*, 301 U.S. 324, 330-32 (1937) (holding that an executive agreement settling claims of U.S. nationals against foreign state preempted state law denying recognition of foreign state property rights acquired through extraterritorial expropriation); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) ("[V]alid executive agreements are fit to preempt state law, just as treaties are . . ."). But see *Medellin v. Texas*, 552 U.S. 491, 530-32 (2008) (holding that President's authority to settle claims through executive agreements does not empower the President to require state compliance with decision of International Court of Justice).

344. See HENKIN, *supra* note 26, at 228 ("At least some sole executive agreements . . . can be self-executing and have some status as law of the land." (discussing claims settlement agreements as examples)); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporter's note 5 (2011) ("A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law." (citing *Belmont*, 301 U.S. at 331 and *Pink*, 315 U.S. at 229)). But see Clark, *supra* note 298, at 1575 (arguing that the Constitution does not give President authority to make executive agreements that are enforceable as a matter of domestic law); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 144 (1998) (arguing that, as an original matter, executive agreements were not understood to be supreme law of the land).

Even if head of state immunity determinations are binding on the courts and preempt inconsistent state law, they may not be executive branch lawmaking for another reason: the Executive Branch may not make the law. As I have noted, head of state immunity has deep roots in customary international law.<sup>345</sup> And under customary international law, sitting heads of state are absolutely immune from civil suit in a foreign court, regardless of the nature of the claim.<sup>346</sup> In virtually all suits to date against sitting heads of state, the Executive Branch has appeared to inform the court that the foreign official is immune from suit.<sup>347</sup> In “determining” head of state immunity, then, the Executive Branch may be doing nothing more than identifying the applicable customary international law principles for the court to apply. Courts have some authority to apply customary international law in cases properly before them.<sup>348</sup> Thus, it may be courts that are making law when they accept and apply the principles the Executive Branch identifies.

The problem with this conception of head of state immunity is that it is shared by neither the Executive Branch nor the courts, the two actors that implement head of state immunity in our domestic legal system. For its part, the Executive Branch believes that it determines the applicable principles of immunity. In the *Jiang* case, for example, the State Department informed the Department of Justice that, having taken into account customary international law, it “recognizes and allows the immunity of President Jiang from this suit.”<sup>349</sup> And the government’s suggestion of immunity informed the district court that “courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch,” and courts may not “second-guess” the Executive’s determinations.<sup>350</sup> Thus, the Executive Branch believes that courts have no discretion to look behind the suggestion of immunity to determine for themselves the applicable principles of customary international law. In addition, the Executive reserves for itself the right to modify the applicable principles governing head of

---

345. See *supra* note 63.

346. See *supra* note 63.

347. See cases cited *infra* Appendix A.

348. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”). The courts’ constitutional authority to apply customary international law without congressional authorization is contested. See sources cited *supra* note 136.

349. Taft Letter, *infra* Appendix B.

350. United States Suggestion of Immunity, *supra* note 15, at 15–16.



state immunity.<sup>351</sup> And although “international law principles certainly have a substantial impact on the policy decisions made by the Executive Branch in this area,” in the Executive’s view “they do not govern.”<sup>352</sup> Thus, the Executive Branch does not perceive its role to be a passive conduit of customary international law. This is in keeping with the President’s role as the nation’s advocate for desirable principles of customary international law.<sup>353</sup>

Courts, for their part, have a similar view of their role and that of the Executive Branch. While they understand that customary international law recognizes the immunity of sitting heads of state,<sup>354</sup> courts have generally recognized that it is for the Executive Branch alone to determine whether to apply the customary international law principles in a particular case.<sup>355</sup> In *Wei Ye*, for example, the Seventh Circuit explained that its principal task was “to ascertain the proper relationship between the Executive and Judicial Branches insofar as the immunity of foreign leaders is concerned.”<sup>356</sup> Addressing that question, the court held that the Executive Branch’s head of state immunity determination “is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.”<sup>357</sup> And the court recognized and endorsed the Executive

---

351. See, e.g., Brief for United States as Amicus Curiae Supporting Affirmance, *supra* note 67, at 30 n.13 (“[I]t does not follow from the fact that the Executive Branch has the constitutional power to assert head-of-state immunity in cases regardless of the type of conduct alleged that it will do so in every case involving serious human rights abuses. As noted, the Executive Branch’s decision in each case is guided by consideration of international norms and the implications of the litigation for the Nation’s foreign relations.”).

352. *Id.* at 31 n.14.

353. See *supra* text accompanying notes 271–91. *But see* Jay, *supra* note 135, at 835 (arguing that Framers of the Constitution believed the President had a duty to ensure compliance with the law of nations on matters within the Executive Branch’s competence); Lobel, *supra* note 279, at 1116–20 (arguing that the President lacks inherent constitutional authority to act contrary to customary international law); cf. Jay, *supra* note 135, at 849 (“Notwithstanding the fascination we may feel for the events of the early Republic in regard to international relations, their contextual differences from world affairs today should lead us to view the various statements about the law of nations from that era as having no bearing on modern controversies.”).

354. See, e.g., *Doe v. Roman Catholic Diocese of Galveston-Hous.*, 408 F. Supp. 2d 272, 277 (S.D. Tex. 2005); *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990).

355. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) (“We are no more free to ignore the Executive Branch’s determination [of head of state immunity] than we are free to ignore a legislative determination concerning a foreign state.”); *Roman Catholic Diocese*, 408 F. Supp. 2d at 278 (“The executive’s determination is not subject to additional review by a federal court.”); *Noriega*, 746 F. Supp. at 1520 (“Since the only reason Noriega would be entitled to immunity as a head of state is because of . . . judicial deference to the Executive, his claim to a ‘right’ of immunity against the express wishes of the Government is wholly without merit.”).

356. *Wei Ye*, 383 F.3d at 626.

357. *Id.*

Branch's reservation of the right to recognize exceptions to head of state immunity.<sup>358</sup>

Neither the courts nor the Executive Branch view customary international law as dictating the scope of head of state immunity that the Executive may recognize as a matter of domestic law. It is thus the Executive Branch that makes law when it determines the effect to be given to customary international law in our courts and when courts defer to the Executive's determinations.<sup>359</sup>

#### IV. THE BOUNDARIES OF SOLE EXECUTIVE LAWMAKING

In this final Part, I will address the roles of the other two branches of government, Congress and the courts, in determining and applying principles of head of state immunity. As a general matter, the Constitution gives Congress and the Executive Branch overlapping foreign affairs authority.<sup>360</sup> Thus, the question arises: even if the Executive Branch has authority to define principles of head of state immunity, does Congress also have that power? If it does, would an act of Congress override a conflicting determination of the Executive Branch concerning head of state immunity? And what is the role of the courts? Do they have any authority independently to develop head of state immunity principles as a matter of federal common law? If not, do they have any role in cases in which the Executive asserts head of state immunity, other than to dismiss the suit?

Congress very likely does have some authority to legislate concerning head of state immunity. But that authority is cabined by the principle that Congress may not act so as to diminish the Executive Branch's ability to conduct the nation's diplomacy. Courts are similarly constrained and cannot act to limit the President's exercise of a specific constitutional authority. Accordingly, their principal role is to guard the separation of powers by protecting the President's sole authority to speak for the nation in its relations with foreign states, while ensuring that the Executive Branch does not act outside its constitutional power.

---

358. *Id.* at 627 ("Just as the FSIA is the Legislative Branch's determination that a nation should be immune from suit in the courts of this country, the immunity of foreign leaders remains the province of the Executive Branch. . . . Pursuant to their respective authorities, Congress or the Executive Branch can create exceptions to blanket immunity. In such cases the courts would be obliged to respect such exceptions.").

359. *See* Monaghan, *supra* note 4, at 56 n.262 ("[T]o the extent that the courts defer to the Executive acting without statutory authority, it is the latter who claims the right to define the legal rights of American citizens.").

360. *See* *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) ("[T]he Constitution entrusts to the President and the Congress [the field of foreign affairs].").

A. *The Scope and Limits of Head of State Immunity:  
The Executive Branch and Congress*

Congress has undoubted constitutional authority over important aspects of foreign affairs.<sup>361</sup> The Constitution gives it the power “[t]o regulate Commerce with foreign Nations,”<sup>362</sup> to “regulate the Value . . . of foreign coin,”<sup>363</sup> “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”<sup>364</sup> “[t]o raise and support Armies,”<sup>365</sup> “[t]o provide and maintain a Navy,”<sup>366</sup> and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>367</sup> In addition, the Senate has the authority to provide its “Advice and Consent” to treaties the President may negotiate, and to the ambassadors the President nominates.<sup>368</sup> Most important for present purposes, Congress has the authority “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>369</sup>

The Define and Punish Clause gives Congress authority to implement in our domestic law principles of existing customary international law, and to provide a mechanism for redress of their violation.<sup>370</sup> As I have noted, the First Congress relied on its Define and Punish power to criminalize attacks on ambassadors, a long-standing violation of the law of nations.<sup>371</sup> It relied on that same authority more recently in enacting the Foreign Sovereign

361. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (“Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.”), *overruled on other grounds*, *Afroyim v. Rusk*, 387 U.S. 253 (1967).

362. U.S. CONST. art. I, § 8, cl. 3.

363. *Id.* art. I, § 8, cl. 5.

364. *Id.* art. I, § 8, cl. 11. See *supra* note 113 for a brief explanation of Captures and Marque and Reprisals Clauses.

365. *Id.* art. I, § 8, cl. 12.

366. *Id.* art. I, § 8, cl. 13.

367. *Id.* art. I, § 8, cl. 14.

368. *Id.* art. II, § 2, cl. 2.

369. *Id.* art. I, § 8, cl. 10.

370. See generally J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (arguing that the clause authorizes Congress to codify international legal obligations to regulate individuals and domestic states as well as to take coercive measures against foreign states for violations of international law); Stephens, *supra* note 285 (arguing that the clause authorizes Congress to implement in civil and criminal domestic law the nation’s international obligations).

371. See Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118 (criminalizing violence against ambassadors and other public ministers); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (noting that an attack on an ambassador was such a serious violation of the law of nations during the Founding Era that, “if not adequately redressed could rise to an issue of war.”).

Immunities Act.<sup>372</sup> Head of state immunity is a doctrine with a long history in the law of nations.<sup>373</sup> Could Congress similarly rely on its authority to define and punish offenses against that law to codify principles of head of state immunity, as some have urged?<sup>374</sup> The full reach of Congress's authority under the Define and Punish Clause is not well understood.<sup>375</sup> In addition, Congress's power to act in an area where the Constitution gives the Executive Branch specific authority raises complicated questions not readily answerable in the abstract.<sup>376</sup> There are, however, some identifiable general principles that shape the contours of Congress's power to legislate concerning head of state immunity. It is fundamental to separation-of-powers jurisprudence that one branch of government may not exercise its

372. S. REP. NO. 94-1310, at 12 (1976); H.R. REP. NO. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604. The FSIA regulates the civil liability of foreign sovereigns. *Republic of Austria v. Altmann*, 541 U.S. 677, 685 (2004). One might think that the power to "define and punish . . . offenses" is only a grant of authority to create crimes based on the law of nations, especially in light of its inclusion in a provision authorizing Congress to define and punish "Piracies and Felonies committed on the high Seas." See U.S. CONST. art. I, § 8, cl. 10. However, the Supreme Court has suggested that civil torts are encompassed within the term "offenses." *Sosa*, 542 U.S. at 723–24. The Court has also noted without comment Congress's grounding of the FSIA, in part, on the Define and Punish Clause. *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 437 (1989); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.19 (1983). And there is reason to believe that the Founding generation understood "offenses" to be remediable through civil as well as criminal law. See generally Stephens, *supra* note 285, at 490–504 (providing overview of the Framers' views of "offenses against the law of nations," eighteenth-century usage of "offenses," and the Constitution's usage of "offenses"). For other statutes grounded on Congress's power to define and punish the law of nations see Kent, *supra* note 370, at 861–68.

373. SATOW'S GUIDE TO DIPLOMATIC PRACTICE, *supra* note 63, at 9.

374. See, e.g., Dellapenna, *supra* note 29, at 532 (proposing amending the FSIA to include the political head of state within the definition of "foreign state" and to add a provision prohibiting service of process on a visiting head of state); Mallory, *supra* note 93, at 187–88 ("Congress, working with the executive branch, as it did in adopting the FSIA, should develop a standard of immunity for heads of state that meets the domestic and foreign policy interests of the United States, and then defer to the courts for the application of that standard."); Shobha Varughese George, Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051, 1076–82 (1995) (proposing amending the FSIA to apply restrictive theory of immunity to heads of state).

375. See Kent, *supra* note 370, at 847 ("Among Congress's powers, there is probably none less understood or subject to such widely varying interpretations as the Law of Nations Clause [i.e., the Define and Punish Clause]."). As a matter of original intent, it appears that the constitutional drafters adopted the Define and Punish Clause to authorize Congress to receive and implement international law, not to create it. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 180 (1997) ("The power to "punish" offenses seems to have been included in order to make clear that the subject was one of federal rather than state concern; the power to 'define' them was added because of a conviction that the law of nations was 'often too vague and deficient to be a rule.'" (footnote omitted) (quoting 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 615 (Max Ferrand, ed. 1937) (Gouverneur Morris))); RAMSEY, *supra* note 13, at 346–50 (similar); Stephens, *supra* note 285, at 475 (similar).

376. See Monaghan, *supra* note 4, at 54 n.259.

constitutional authorities in a manner that encroaches upon or diminishes the constitutional powers of the others.<sup>377</sup> Thus, for example, Congress may not use its spending power to limit the effect of a presidential pardon.<sup>378</sup> Similarly, Congress could not use its power to define and punish offenses against the law of nations to limit the Executive Branch's exclusive constitutional authority to conduct the nation's diplomacy.<sup>379</sup> This principle has the following consequences for Congress's power to codify head of state immunity.

First, Congress undoubtedly could enact legislation affirming the President's authority to determine the immunity of heads of state and directing the President's subordinates in the Executive Branch to follow the President's directions.<sup>380</sup> Congress has previously enacted legislation along these lines relating to the President's diplomatic functions.<sup>381</sup> Still within Congress's authority would be a statute codifying the current customary international law of head of state immunity, or implementing a treaty codifying that law, but directing courts to accept executive branch suggestions of head of state immunity diverging from the codified standard. Congress did something just like this with respect to the immunities of foreign diplomats who are members of permanent diplomatic missions in the

---

377. See, e.g., *Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . [it must] not impair another in the performance of its constitutional duties."); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." (internal quotation marks omitted)); see also *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) ("[T]he Constitution vests certain powers in the President that 'the Legislature has no right to diminish or modify.'" (quoting James Madison, Statement Discussing Bill that Became the Foreign Affairs Act (June 16, 1789), in 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1834))).

378. *United States v. Klein*, 80 U.S. 128, 133–34, 147–48 (1871) (holding unconstitutional a proviso in an appropriation act because, in part, the proviso "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive"); see U.S. CONST. art. II, § 2 (giving the President power to grant pardons for offenses against the United States).

379. Cf. Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1, 4 (2009), available at <http://www.justice.gov/olc/2009/section7054.pdf> (Office of Legal Counsel opinion concluding that appropriations provision prohibiting expenditure of funds to send a delegation to certain United Nations commission "impermissibly interferes with the President's authority to manage the Nation's foreign diplomacy").

380. See U.S. CONST. art. I, § 8, cl. 14 (empowering Congress to enact legislation "necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

381. See, e.g., 22 U.S.C. § 287(a) (2006) ("[W]hen representing the United States in the respective organs and agencies of the United Nations, [U.S. representatives] shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President . . .").

United States, an issue implicating both the President's authority to receive ambassadors and other foreign ministers<sup>382</sup> as well as Congress's power to define offenses against the law of nations.<sup>383</sup> For many years, settled customary international law specified that foreign diplomats are generally immune from the jurisdiction of domestic courts.<sup>384</sup> The Vienna Convention on Diplomatic Relations, a treaty to which the United States is a party, codified those customary international law principles in 1961.<sup>385</sup> And in enacting the Diplomatic Relations Act,<sup>386</sup> Congress, in part, implemented the United States' obligations under the Vienna Convention. That statute generally provides that suits against diplomats must be dismissed if the defendant would qualify for immunity under the Vienna Convention.<sup>387</sup> However, the act authorizes the President, "on the basis of reciprocity and under such terms and conditions as he may determine," to specify a diplomat's immunity "which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention."<sup>388</sup> The Diplomatic Relations Act thus preserves the President's domestic authority to diverge from the immunity standards identified in the Vienna Convention. In this way, the statute respects the constitutional authority of both political branches.<sup>389</sup>

382. U.S. CONST. art. II, § 3.

383. *Id.* art. I, § 8, cl. 10; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

384. *See, e.g.,* *Bergman v. De Sieyes*, 170 F.2d 360, 362 (2d Cir. 1948) (L. Hand, J.) (recognizing that "diplomatic officers are exempt from all civil or criminal jurisdiction of the state to which they are accredited" is a principle "generally accepted as part of international law"); EILEEN DENZA, *DIPLOMATIC LAW* 1 (3d ed. 2008) ("These rules protecting the sanctity of ambassadors and enabling them to carry out their functions are the oldest established and most fundamental rules of international law.").

385. Vienna Convention, *supra* note 43; *see* *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("The principles embodied in the Vienna Convention were for the most part already established under customary international law."), *aff'd in part, rev'd in part sub nom.* *Boos v. Barry*, 485 U.S. 312 (1988); *see also* DENZA, *supra* note 384, at 516 (noting "near universal participation" among sovereign states in Vienna Convention).

386. Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)–(e) (2006), 28 U.S.C. §§ 1251, 1351, 1364 (2006).

387. *Id.* 22 U.S.C. § 254(d); *see id.* § 254(b) (extending immunity to diplomats whose state is not a party to the Vienna Convention).

388. *Id.* § 254(c).

389. I should note that I am not suggesting that, by authorizing the President to diverge from Vienna Convention standards, Congress intended to protect the President's diplomatic prerogatives under the Constitution. I have found no evidence to support such a claim. More likely, Congress was implementing a provision of the Vienna Convention. *See* Vienna Convention, *supra* note 43, art. 47 (authorizing restrictive application of convention, or more favorable treatment than required by convention, on the basis of reciprocity); S. REP. NO. 95-958, at 5 (1978) (explaining that § 254(c) "reflects Article 47 of the Convention"). My claim, instead, is that the statutory provision has the effect of respecting the President's constitutional authority under the Reception Clause.

At the other extreme, Congress likely could not enact a statute entirely abrogating head of state immunity. Nothing in the Constitution makes customary international law a limit on Congress's legislative authority, of course. From early in our nation's history, the Supreme Court has recognized that Congress may enact legislation deviating from the law of nations.<sup>390</sup> But the Executive's ability to suggest head of state immunity is necessary to preserve the Executive Branch's ability to conduct the nation's diplomacy at the highest levels.<sup>391</sup> Because Congress may not act so as to diminish a constitutional power vested in the Executive Branch, it could not properly rely on its specific grants of authority, such as its authority to prescribe the jurisdiction of the federal courts,<sup>392</sup> to abolish head of state immunity.

Between these extremes is more difficult ground. Congress, for example, could enact into domestic law the current customary international law standard of head of state immunity, but without requiring deference to executive branch suggestions that diverge from the standard. Arguably, Congress did something like that in 1976 when it codified the restrictive theory<sup>393</sup> of foreign state immunity in the Foreign Sovereign Immunities Act. As discussed above, by at least the 1920s, the State Department recognized a restrictive theory of foreign sovereign immunity, under which foreign states are not immune from suits relating to their commercial activities.<sup>394</sup> In 1952, the State Department declared that the restrictive theory had become "widely held and firmly established," along with the older, absolute theory of foreign sovereign immunity.<sup>395</sup> By 1976, the State

---

390. See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987) ("An act of Congress will . . . be given effect as domestic law in the face of . . . a [conflicting] preexisting rule of customary international law."). William Dodge explains that, in its classic formulation, the eighteenth-century law of nations contains at least one category of norms that are binding domestically. Dodge, *supra* note 135, at 534. While some American jurists adhered to the view that some law-of-nations norms were domestically binding, the Supreme Court abandoned that position early in its history. *Id.* at 536-44. *The Schooner Exchange* is a good example. Under the classical formulation of the law of nations, a foreign sovereign's immunity from the jurisdiction of another sovereign was a norm from which no derogation was permitted. *Id.* at 543. However, the Supreme Court recognized that the United States could subject a foreign sovereign to its courts' jurisdiction by acting "in a manner not to be misunderstood." *The Schooner Exchange*, 11 U.S. (7 Cranch.) at 146; see Dodge, *supra* note 135, at 543-44 (discussing *The Schooner Exchange*).

391. See *supra* Part III.C.

392. U.S. CONST. arts. I, § 8, cl. 9, III, § 1.

393. For a description of the restrictive theory, see *supra* note 226.

394. See *supra* notes 180-82 and accompanying text.

395. Tate Letter, *supra* note 226, at 984.

Department viewed the restrictive theory as settled customary international law,<sup>396</sup> a view that is reflected in the Foreign Sovereign Immunities Act itself.<sup>397</sup> A central purpose of the act was “to transfer the determination of sovereign immunity from the executive branch to the judicial branch,”<sup>398</sup> and the statute makes no provision for deference to executive branch determinations that depart from the codified standard.

Although the Supreme Court has upheld the Foreign Sovereign Immunities Act against some constitutional challenges,<sup>399</sup> the Court has not considered whether the statute impairs the Executive Branch’s constitutional role as the nation’s sole diplomat. Nevertheless, it seems unlikely that codifying the prevailing customary international law norm would interfere with the mechanics of executive branch diplomacy because that norm creates the baseline against which state conduct is judged.<sup>400</sup> And, indeed, as a historical matter, adjudication of suits under the Foreign Sovereign Immunities Act has not resulted in the sort of international objection that could undermine the Executive Branch’s ability to conduct the

396. *Jurisdiction of U.S. Courts in Suits against Foreign States, Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Monroe Leigh, Acting Legal Adviser, U.S. Dep’t of State) (“Under international law today, a foreign state is entitled to sovereign immunity only in cases based on its ‘public’ acts. However, where a lawsuit is based on a commercial transaction or some other ‘private’ act of the foreign state, the foreign state is not entitled to sovereign immunity.”); see also *id.* at 32 (testimony of Bruno A. Ristau, Chief, Foreign Litig. Section, Civil Div., Dep’t of Justice) (stating that the bill that became the FSIA “fully comports with . . . international practice”).

397. 28 U.S.C. § 1602 (2006) (“Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.”); see *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (“[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law.”); see also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 702 (1976) (observing that, by 1976, the restrictive theory had “been accepted by a large and increasing number of foreign states in the international community”); *id.* at 702 n.15 (collecting foreign cases).

398. H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

399. See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (holding that Congress did not exceed the scope of Article III of the U.S. Constitution by granting federal courts subject matter jurisdiction over civil actions by foreign plaintiffs against foreign states where the rule of decision may be provided by state law).

400. Some have argued that the so-called “terrorism exception” to foreign sovereign immunity, added to the Foreign Sovereign Immunities Act in 1996 and amended in 2008, does not reflect a principle of customary international law. See, e.g., Stewart, *supra* note 44, at 205–06; see also 28 U.S.C. § 1605A (Supp. II 2008). However, that provision applies only to foreign states that the Executive Branch has designated as state sponsors of terrorism. *Id.* § 1605A(h)(6). Thus, the Executive Branch retains considerable control over which states may be sued under the terrorism exception, and the Executive Branch can take into account the effect of such a designation on its ability to conduct diplomacy.



nation's diplomacy.<sup>401</sup> Codification of the prevailing customary international law standard of head of state immunity, under which sitting heads of state are absolutely immune from civil suit,<sup>402</sup> would likely be similarly unproblematic in this regard.<sup>403</sup>

But I have argued that the President's authority to identify principles of head of state immunity is also supported by the President's role as the nation's representative in the development of customary international law.<sup>404</sup> There may be cases where the Executive Branch would wish to advocate for an emerging trend in customary international law, for example, a trend that recognizes certain, limited exceptions to head of state immunity. A statute codifying existing standards of head of state immunity without giving the Executive Branch the discretion to diverge from those standards would inhibit the President's ability to act as advocate, by preventing the Executive Branch from establishing state practice in the United States, and, through the existence of inconsistent domestic law, by undercutting the Executive Branch's diplomatic endeavors. Perhaps, given Congress's unquestioned legislative primacy,<sup>405</sup> this limited impairment of the Executive's diplomatic function is insufficient to undermine the validity of a statute enshrining prevailing international head of state norms in domestic law, since such a statute would not interfere with the President's ability to engage in the mechanics of diplomacy.<sup>406</sup> I am unable to resolve that question

---

401. See Wuerth, *supra* note 25, at 952 (“[E]xperience under the FSIA demonstrates that although an occasional state immunity decision might have high foreign policy stakes, most do not.”).

402. See *supra* note 44.

403. The proposal of some to codify a “restrictive theory” of head of state immunity would be considerably more troublesome, as would the codification of any theory that recognizes anything less than the full immunity of sitting heads of state. See Bass, *supra* note 93, at 315–19 (proposing a statute that would exempt from executive branch suggestions of head of state immunity suits involving acts that violate international human rights principles); George, *supra* note 374, at 1077–82 (proposing codification of restrictive theory of head of state immunity). Such a statute would very likely interfere with the Executive Branch's ability to conduct the mechanics of diplomacy, since it would diverge markedly from the existing customary international law of head of state immunity. See *supra* note 44 (explaining that, under current customary international law, heads of state and other high-ranking officials are generally completely immune from the jurisdiction of foreign courts); see also *supra* text accompanying notes 257–66 (discussing reaction of Chinese government to suit against President Jiang and declarations of State Department concerning consequences of permitting suit).

404. See *supra* text accompanying notes 271–91.

405. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”); see Clark, *supra* note 298, at 1636 (noting “the traditional understanding that a statute falling within Congress's constitutional powers binds the executive no less than the courts”).

406. See *supra* note 290 (explaining that the President's role in developing customary international law is subsidiary to the President's ability to conduct diplomacy in the justification of the Executive Branch's authority to determine principles of head of state immunity).

here. However, legislation codifying head of state immunity that interferes with the President's ability to participate in the international development of head of state immunity standards at least raises constitutional questions.

B. *The Scope and Limits of Head of State Immunity:  
The Executive Branch and the Courts*

We saw that until at least the First World War, courts applied foreign sovereign immunity principles as prescribed by the law of nations, looking to the Executive Branch principally for confirmation that the United States continued to adhere to those principles.<sup>407</sup> At times, disagreement arose about the details of the governing principles.<sup>408</sup> Courts typically resolved these disputes without feeling obliged to obtain the views of the Executive Branch.<sup>409</sup> As the governing international principles became less clear and as the Executive asserted views contrary to the prevailing judicial norm, the courts began to hew more closely to executive branch articulations of foreign sovereign immunity principles, until the practice of absolute deference arose.<sup>410</sup> I have argued that, in the context of head of state immunity, judicial deference is constitutionally justified because executive suggestions of immunity are integral to protecting the President's authority to act as the nation's sole diplomat. But do the courts have any authority to determine the scope of head of state immunity? Is their only role to dismiss a suit once the Executive Branch determines that a foreign official enjoys head of state immunity? The courts have a critical role, but it is not to define the principles that determine when suits against foreign heads of state should be dismissed. Rather, the courts' role is to protect the Executive Branch's diplomatic function by respecting appropriate assertions of head of state immunity, and to police the outer boundaries of the Executive Branch's constitutional authority.

Under current Supreme Court doctrine, courts do not have authority to be creative when it comes to domesticating customary international law. In *Sosa v. Alvarez-Machain*, the Supreme Court held that U.S. courts have some limited authority, under the Alien

407. See *supra* Part III.B.1.

408. For example, there was disagreement about whether a foreign sovereign's ownership of a vessel was sufficient for immunity, or whether the foreign sovereign also had to be in possession of the ship. See *supra* text accompanying note 212. See generally David J. Bederman, *The "Common-Law Regime" of Foreign Sovereign Immunity: The Actual Possession Rule in Admiralty*, 44 VAND. J. TRANSNAT'L L. 853 (2011).

409. See, e.g., *Long v. The Tampico*, 16 F. 491, 501 (S.D.N.Y. 1883) (holding that foreign state must be in possession of vessel for vessel to be immune from suit and denying immunity for lack of possession).

410. See *supra* Part III.B.2.

Tort Statute's jurisdictional grant,<sup>411</sup> to create federal common law rights of action for violations of certain customary international law norms.<sup>412</sup> The Court stressed the limited nature of the common law authority it recognized. The separation of powers was central to the Courts' concerns. The Court observed that its "watershed" decision in *Erie Railroad Co. v. Tompkins*<sup>413</sup> reflected a "significant rethinking of the role of the federal courts in making" federal common law under which "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."<sup>414</sup> However, the judiciary has "no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."<sup>415</sup> For these and other reasons, "judicial caution"<sup>416</sup> is required and courts may recognize federal common law rights of action only if they are based on customary international law norms having "definite content" and broad "acceptance among civilized nations."<sup>417</sup> In addition, the courts' authority to create federal common law rights of action based on international law norms appears limited to cases arising under the Alien Tort Statute.<sup>418</sup>

*Sosa* addressed only the courts' authority to create common law rights of action.<sup>419</sup> Thus, the decision did not consider the propriety of judicial recognition of customary international law in other contexts, such as common law defenses to claims. Nevertheless, some have construed the cautions identified by the Court as suggesting generally that, in the absence of congressional authorization, courts only have limited constitutional authority to craft customary international law into rules of decision.<sup>420</sup> Others believe that courts

---

411. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

412. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

413. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

414. *Sosa*, 542 U.S. at 726.

415. *Id.* at 728.

416. *Id.* at 725.

417. *Id.* at 732.

418. *See id.* at 731 n.19; *Mohamad v. Rajoub*, 634 F.3d 604, 609–10 (D.C. Cir. 2011) (affirming dismissal of suit, brought, in part, under federal question statute, asserting violation of customary international law); *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010) ("[Besides the Alien Tort Statute,] no other statute recognizes a general cause of action under the law of nations."); *see also* *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994) ("While it is true that 'international law is part of our law,' it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction." (citation omitted)).

419. *Sosa*, 542 U.S. at 724–25.

420. *See, e.g.,* Bradley, Goldsmith & Moore, *supra* note 95; David H. Moore, Medellín, *the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT'L L. 485, 507 (2010); David H. Moore, *An Emerging Uniformity for International*

have considerably more flexibility in incorporating customary international norms into domestic law.<sup>421</sup> This is an important dispute, but it is one I do not intend to engage, except to suggest that, whatever their authority to make law using international norms, courts, like Congress, may not act in ways that diminish the Executive Branch's diplomatic functions.<sup>422</sup>

Accordingly, the courts' primary role in cases involving head of state immunity is to guard the separation of powers. Courts typically will be called upon to exercise that role in one of two ways, both of which involve policing the political branches. First, courts must protect the President's power over diplomacy in cases in which Congress oversteps and enacts legislation that improperly interferes with the Executive Branch's ability to determine the applicable principles of head of state immunity.<sup>423</sup> If Congress were to abrogate the doctrine entirely, for example, it would be a court's responsibility to abide by an executive branch suggestion of a head of state's immunity, despite the conflicting statute.<sup>424</sup>

Second, it is always the ultimate responsibility of the courts to determine the extent of the Constitution's commitment of authority to

*Law*, 75 GEO. WASH. L. REV. 1 (2006); see also Wuerth, *supra* note 25, at 964 (noting that "many read *Erie* as having a strong separation of powers component that limits lawmaking by federal judges" and citing examples of this interpretation).

421. See, e.g., Green, *supra* note 136; Vázquez, *supra* note 136; Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010).

422. Accordingly, a theory under which courts may independently develop principles governing foreign head of state immunity is incompatible with the account proposed here. See, e.g., Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT'L L.J. 332 (2011) (arguing that courts should adopt a "totality of the circumstances" analysis, drawing on domestic and international law, to govern the immunity of foreign officials, including heads of state). Such a theory fails to give proper regard to the constitutional foundations for executive branch suggestions of head of state immunity.

423. It would be no answer to say that if Congress enacts such legislation, the President consented to it by failing to veto it. See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) ("Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment. The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.")

424. Cf., e.g., *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009) (upholding State Department designation of "Jerusalem" rather than "Israel" as place of birth in U.S. passport despite statute to the contrary because resolving disputes concerning foreign sovereign territory, for purposes of U.S. law, is a power vested solely in the President by the Constitution as part of President's recognition power) (dismissing suit on political question grounds), *cert. granted*, 131 S. Ct. 2897 (2011); *id.* at 1233–45 (Edwards, J., concurring) (agreeing on constitutional authority question but concluding that suit should be dismissed on the merits).

one of the branches of government.<sup>425</sup> Thus, the courts may properly consider a claim that a particular executive branch suggestion of immunity falls outside the President's constitutional powers. But in undertaking that analysis, the role of the court is not to consider whether the Executive Branch's suggestion is consistent with international law.<sup>426</sup> The court's focus should instead be on whether the suggestion reasonably can be viewed as flowing from the President's sole authority to conduct the nation's diplomacy.<sup>427</sup> Accordingly, while it would be appropriate for a court to decline to recognize a suggestion of head of state immunity made on behalf of a U.S. citizen who has no relation to a foreign state (an admittedly far-fetched example), it is not for the courts to ignore a suggestion of head of state immunity because customary international law is unsettled on whether head of state immunity reaches the office in question.

Under current customary international law, head of state immunity encompasses the immunity not only of heads of state but also of other "holders of high-ranking office in a State" such as "the Head of Government and Minister for Foreign Affairs."<sup>428</sup> A high official's family members traveling with the official receive similar recognition under international law.<sup>429</sup> Consistent with this international understanding, the Executive Branch has suggested the immunity of heads of state, heads of government, other high government officials such as foreign ministers, and family members

---

425. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1964) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

426. The Supreme Court has implicitly recognized that the more an issue of international law has significant impact on the United States' foreign relations (and, I would add, the more significant the issue implicates the Executive Branch's ability to conduct the nation's diplomacy), the less fit the issue is for judicial resolution. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

427. Cf. *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

428. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 20-21 (Feb. 14).

429. See, e.g., *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents* art. 1(a), Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (including, within definition of "internationally protected person," "a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him"); *SATOW'S GUIDE TO DIPLOMATIC PRACTICE*, *supra* note 63, at 10.

traveling with these officials.<sup>430</sup> Under current customary international law, it is unclear whether head of state immunity also applies to suits against certain other very high-ranking officials, such as a minister of defense.<sup>431</sup> The Executive Branch could reasonably conclude that affording head of state immunity to foreign ministers of defense is necessary to preserve the Executive's ability to conduct diplomacy. The Executive could also reasonably decide to recognize such immunity to encourage a trend in international law. Should the Executive Branch assert head of state immunity in a suit against a foreign Defense Minister, courts should defer to that determination.<sup>432</sup>

The district court's decision in *Republic of Philippines v. Marcos*<sup>433</sup> is instructive. In that case, the district court declined to recognize what it believed was the Executive Branch's suggestion of head of state immunity made on behalf of the Philippine Solicitor General, who was served with a subpoena to compel testimony while he "was in San Francisco in his official capacity to deliver a speech in commemoration of the third anniversary of the assassination of Benigno Aquino, deceased husband of Corazon Aquino, President of the Republic of the Philippines."<sup>434</sup> The district court declined the Executive Branch's suggestion of immunity because it believed that head of state immunity is available only to "a sovereign [or] a foreign minister, the two traditional bases for a recognition or grant of head of state immunity."<sup>435</sup> Accordingly, it declined to recognize the suggestion, because it believed that "the government in this instance seeks to expand the head of state doctrine to encompass all government officials of a foreign state to whom the State Department chooses to extend immunity."<sup>436</sup> The district court nevertheless recognized the Philippine Solicitor General's immunity under the Diplomatic Relations Act—despite the fact that diplomatic immunity

430. See *infra* Appendix A.

431. See, e.g., Application for Arrest Warrant Against General Shaul Mofaz, [2004] EWMC (Crim) (Eng.), reprinted in 53 INT'L & COMP. L.Q. 769, 771–73 (2004) (recognizing Israeli Defense Minister as enjoying the same immunity as that of a head of state or foreign minister, but acknowledging that the court "is working in somewhat uncharted waters"); Katherine Gallagher, *Universal Jurisdiction in Practice*, 7 J. INT'L CRIM. JUST. 1087, 1109–12 (2009) (discussing 2007 dismissal by French prosecutor of criminal complaint against former U.S. Secretary of Defense Rumsfeld based on determination that defense minister enjoys same immunity as that of a head of state or foreign minister).

432. See Wuerth, *supra* note 25, at 971 ("[T]o the extent that international law is unclear or in a state of development" concerning status-based immunities of foreign officials, courts should "afford deference to the executive as to the desirable content of international law.").

433. *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987).

434. *Id.* at 795.

435. *Id.* at 797 (citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137–38 (1812)).

436. *Id.* at 798.

covers only the members of a permanent diplomatic mission, and despite the fact that the Philippine Solicitor General was not a member of the Philippine Embassy, and so was not entitled to diplomatic immunity.<sup>437</sup>

In fact, the Executive Branch did not suggest that the Philippine Solicitor General enjoyed head of state immunity. Instead, the Executive Branch's statement of interest in that case is better understood as an early example of an assertion of "special mission immunity," an emerging doctrine in international law.<sup>438</sup> Special mission immunity applies to non-diplomatic foreign personnel "who have travelled to the United States to conduct official business."<sup>439</sup> That is, of course, an accurate description of the Philippine Solicitor General in the *Marcos* case.<sup>440</sup> And the Executive Branch's statement of interest, though not entirely free from ambiguity, explained that the Executive Branch recognized the Philippine Solicitor General's immunity as a "senior official[ ] and representative[ ] of [a] foreign government[ ] in this country on official business."<sup>441</sup> Special mission immunity is a status-based immunity that directly impacts the Executive Branch's ability to conduct the nation's diplomacy. Thus, absolute judicial deference to executive branch determinations of special mission immunity is justified under the theory developed

---

437. *Id.* at 798–99 (referring to the Vienna Convention and the Diplomatic Relations Act of 1978, both *supra* note 43). As noted, *see supra* text accompanying note 387, the Diplomatic Relations Act establishes the privileges and immunities of diplomats, as provided for in the Vienna Convention. *See* 22 U.S.C. § 254(d) (2006). The Vienna Convention provides for immunities of a "diplomatic agent," who is a member of a permanent diplomatic mission to the United States (such as an embassy). Vienna Convention, *supra* note 43, arts. 1(e), 2, 31. The Philippine Solicitor General was not a member of the Philippine permanent mission, and so was not entitled to diplomatic immunities under the Vienna Convention.

438. *See* Convention on Special Missions art. 31(2), *opened for signature* Dec. 16, 1969, 1500 U.N.T.S. 231 (entered into force June 21, 1985) (providing that members of a special mission are immune from the civil jurisdiction of the receiving state, with limited exceptions involving immovable property in the sending state, acts done as an executor of an estate, commercial activity outside of official functions, and vehicle accidents when the vehicle is used outside of official functions); *Bat v. The Investigating Judge of the German Fed. Court*, [2011] EWHC (QB) 2029, [22] (Eng.); *see also* John B. Bellinger III, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*, 44 VAND. J. TRANSNAT'L L. 819, 832 (2011) ("[While] [r]elatively few States have joined [the Convention on Special Missions] the doctrine is based largely upon principles of customary international law.").

439. Bellinger, *supra* note 438, at 837.

440. *See supra* text accompanying note 434.

441. Suggestion of Immunity Submitted by the United States at 6, *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. Aug. 22, 1986) (No. 86-0155); *see id.* at 4 ("Under customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign ministers and other diplomatic representatives, including senior officials on special diplomatic missions, are immune from the jurisdiction of United States federal and state courts.").

here.<sup>442</sup> Accordingly, it was error for the *Marcos* district court to ask whether the Executive Branch's suggestion of immunity came within "the two traditional bases" of head of state immunity.<sup>443</sup> Instead, the court should have considered whether the Executive Branch's assertion of immunity was reasonably grounded in the Executive's constitutional authority to protect its diplomatic function.<sup>444</sup> Indeed, that consideration is what seems to have motivated the court to misapply diplomatic immunity law to permit it to quash the testimonial subpoena served on the Philippine Solicitor General.<sup>445</sup>

So long as the Executive Branch's suggestion of immunity has a reasonable relationship either to the mechanics of diplomacy or to the President's authority to advocate on behalf of the United States for standards governing head of state immunity or other status-based immunities relating to the Executive's conduct of diplomacy, courts should give complete deference to the Executive's immunity determinations.

## V. CONCLUSION

The courts have never clearly explained the source of the Executive Branch's authority to direct the dismissal of private litigation against a sitting head of state by suggesting the official's immunity. Adding to the confusion, courts have described the earlier regime, under which courts deferred to executive branch suggestions of immunity for foreign states, as creating a "common law" doctrine of foreign sovereign immunity.<sup>446</sup> That description obfuscates the

442. And, with the exception of the *Marcos* case, courts have deferred to the Executive Branch's determinations in the few suits against a visiting foreign official in which the Executive determined that the official enjoyed special missions immunity. See, e.g., *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 38 (D.D.C. 2008) ("According to due deference to the Executive Branch, the Court will therefore defer to the Executive's determination that Minister Bo was immune from service of process for the duration of the special diplomatic mission."); *Kilroy v. Windsor*, No. C 78 291 (N.D. Ohio Dec. 7, 1978) (deferring to Executive Branch's determination that Prince Charles enjoyed special missions immunity as a "person[] representing a foreign nation on an official visit"), excerpted in *Special Missions and Trade Delegations*, 1978 DIGEST § 3, at 641-43.

443. *Marcos*, 665 F. Supp. at 797.

444. Addressing that question would likely have allayed the district court's concern that the Executive Branch sought "to expand the head-of-state doctrine to encompass all government officials of a foreign state to whom the State Department chooses to extend immunity." *Id.* at 798.

445. See, e.g., *id.* at 799 (inferring the State Department's "clear intent to grant diplomatic status" to the Philippine Solicitor General).

446. See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284-85 (2010) ("The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976."); *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) ("We have some doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity . . .").



separation-of-powers considerations informing the practice. The confusion about the Executive's authority to suggest a head of state's immunity has led some to question the propriety of judicial deference<sup>447</sup> and has prompted others to recommend that Congress codify the governing standards.<sup>448</sup> But the Executive Branch's ability to suggest the immunity from suit in our courts of a sitting head of state is necessary to protect the President's ability to conduct the nation's diplomacy. Suggestions of head of state immunity are, therefore, an exercise of a lawmaking power that is directly implied from a specific constitutional power of the Presidency.

---

447. See, e.g., Dellapenna, *supra* note 29, at 531.

448. See, e.g., sources cited *supra* note 374.

## APPENDIX A: SUITS INVOLVING HEAD OF STATE IMMUNITY

This Appendix contains all of the cases I could locate, forty-three in all, involving determinations of head of state immunity.<sup>449</sup> There appears to be no case in which a court required a foreign, high-ranking official to stand suit despite the Executive Branch's assertion of head of state immunity.

Section A lists twenty-six cases in which a private litigant sued a high-ranking official of a foreign state or the official's family member, the Executive Branch suggested the defendant's head of state immunity, and the court dismissed the suit against the defendant on that basis. Section B identifies four suits in which the United States suggested head of state immunity, but the court dismissed the claims against the defendant on other grounds, or the parties terminated the litigation before the courts ruled on the immunity question.<sup>450</sup> Section C notes two suits against former foreign, high-ranking officials in which the Executive Branch did not participate, and courts applied the immunity principles they believed controlling. Section D identifies five cases in which courts refused to dismiss claims against a defendant on head of state immunity grounds when the Executive Branch made clear that it does not recognize the defendant as enjoying that immunity. Section D also notes five suits involving a former head of state in which courts refused to recognize head of state immunity when the Executive Branch did not assert it or when the foreign state waived the former official's immunity.

Section E lists what appears to be the only case in which a court declined to accept as controlling the Executive Branch's suggestion of

449. I am grateful to Judith Osborn and Mary Catherine Malin, who helped locate many of the unreported cases identified in this Appendix.

This Appendix does not generally include suits against a foreign, high-ranking official in which a court held that the Foreign Sovereign Immunities Act governs the official's immunity. *See, e.g.,* *Baumel v. Syrian Arab Republic*, 667 F. Supp. 2d 39 (D.D.C. 2009) (suit against Syrian President Assad); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002) (suit against Iranian Supreme Leader Khamenei and former Iranian President Rafsanjani). Those decisions have been superseded by *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). I do, however, list cases in which a court applied the FSIA despite the Executive Branch's suggestion of immunity. This Appendix also does not include the few cases against a sitting, foreign, high-ranking official in which the Executive Branch did not suggest head of state immunity and in which the court did not independently consider the official's immunity from suit. *See, e.g.,* *Asemami v. Ahmadinejad*, No. RDB-10-874, 2010 WL 1609787 (D. Md. Apr. 20, 2010) (suit against Iranian President Ahmadinejad).

450. In *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987), the district court dismissed a suit against the Philippine Solicitor General, holding that the foreign official enjoyed diplomatic immunity. In so holding, the court declined to accede to what it understood to be an executive branch suggestion of head of state immunity. *See id.* at 798. However, the court appears to have misunderstood the Executive Branch's suggestion of immunity, which is best understood as an early example of an assertion of special missions immunity. I discuss the Marcos case *supra* in the text accompanying notes 433–45.

head of state immunity and did not otherwise hold that the official is not amenable to suit. In that case, a bankruptcy court granted a debtor's request for permission to pursue a right of action otherwise belonging to the bankruptcy estate. One of the potential defendants was Egyptian President Hosni Mubarak, and the Executive Branch objected to the debtor's request, unless the head of state and another official were removed as possible defendants, pursuant to a suggestion of immunity. The bankruptcy court held that the suggestion of immunity was misplaced because the foreign officials were not subject to the jurisdiction of the court, and because the Executive Branch could suggest the officials' immunity in any subsequent litigation. However, there appears to be no record of any subsequent litigation against President Mubarak.

**A. Executive Branch Suggestion of Head of State Immunity Filed, Suit Dismissed on that Basis**

1. *Habyarimana v. Kagame*, No. 10-473 (W.D. Ok. Oct. 28, 2011) (unreported) (order dismissing claims against Rwandan President Kagame, based on Executive Branch's suggestion of head of state immunity).
2. *Balcero Giraldo v. Drummond Co.*, No. 10-mc-00764 (JDB), 2011 WL 3926372 (D.D.C. Sept. 08, 2011) (order denying motion to compel testimony of former Colombian President Uribe, based on Executive Branch's suggestion of residual head of state immunity).
3. *Al Hassan v. Al Nahyan*, No. 09-01106 (C.D. Cal. Sept. 17, 2010) (unreported) (order dismissing claims against United Arab Emirates President Sheikh Khalifa, based on Executive Branch's suggestion of head of state immunity).
4. *Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176 (E.D.N.Y. Dec. 5, 2007) (same for claims against Grenadian Prime Minister Mitchell and his wife).
5. *Doe v. Roman Catholic Diocese of Galveston-Hous.*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (same for claims against Pope Benedict XVI).
6. *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (same for claims against Israeli Prime Minister Sharon).
7. *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004) (same for claims against Chinese President Jiang Zemin).
8. *Daventree Ltd. v. Republic of Azerbaijan*, No. 02-6356 (S.D.N.Y. Oct. 15, 2003) (unreported) (same for claims against Azerbaijani Prime Minister Ilham Aliyev), *discussed in Immunity and Related Issues*, 2003 DIGEST ch. 10, at 571.
9. *Daventree Ltd. v. Republic of Azerbaijan*, No. 02-6356 (S.D.N.Y. Mar. 10, 2003) (unreported) (same for claims

- against Azerbaijani President Heydar Aliyev), *discussed in* 2003 DIGEST ch. 10, at 571.
10. Rhanime v. Solomon, No. 01-1479 (D.C.D. May 15, 2002), *available at* <http://www.state.gov/documents/organization/57536.pdf> (same for claims against Moroccan Foreign Minister Benaissa).
  11. Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277 (S.D.N.Y. 2001) (same for claims against Jordanian Queen Rania).
  12. Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (same for claims against Zimbabwean President Mugabe and Foreign Minister Mudenge), *aff'd on other grounds sub nom.* Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004).
  13. ABC Info., Inc. v. Lloyd, No. 01-03456-GHK (C.D. Cal. Aug. 27, 2001) (unreported) (same for claims against Gabonese President Bongo).
  14. Marketic v. Kaliber Talent Consultants, Inc., No. CV97-0356-CBM, 1998 WL 1147140 (C.D. Cal. Mar. 15, 1998) (unreported) (same for claims against Brunei Sultan Bolkiah).
  15. First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (same for claims against United Arab Emirates President Sheikh Zayed).
  16. Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994) (same for claims against Saudi King Fahd), *aff'd*, 79 F.3d 1145 (5th Cir. 1996)
  17. Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) (same for claims against Haitian President Aristide).
  18. Guardian F. v. Archdiocese of San Antonio, No. 93-CI-11345 (Dist. Ct. Tex. 1994), *available at* <http://www.state.gov/documents/organization/65798.pdf> (same for claims against Pope John Paul II).
  19. Anonymous v. Anonymous, 181 A.D.2d 629, 629-30 (N.Y. Sup. Ct. App. Div. 1992) (same for claims against unnamed head of state).<sup>451</sup>
  20. Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) (same for claims against British Prime Minister Margaret Thatcher),

---

451. In the opinion cited here, a New York appellate court affirmed the trial court's dismissal based on the Executive Branch's suggestion of head of state immunity. However, after the trial court dismissed the action but before the appellate court ruled, the Executive Branch informed the trial court that the defendant had resigned his position as head of state, and it advised that the defendant no longer enjoyed head of state immunity from suits, such as this one, involving purely private claims. See Notice of Changed Circumstances Submitted by the United States, *Mumtaz v. Ershad*, No. 74258/89 (N.Y. Sup. Ct. Mar. 1991), *available at* <http://www.state.gov/documents/organization/28495.pdf>. There appears to be no record of further trial court proceedings following the Executive Branch's Notice of Changed Circumstances.

*aff'd in part, rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989).

21. *Kline v. Kaneko*, 535 N.Y.S. 2d 303 (Sup. Ct. 1988) (same for claims against Paloma Cordero de la Madrid, the wife of the President of the United Mexican States), *aff'd*, 546 N.Y.S. 2d 506 (App. Div. 1989).
22. *Gerritsen v. De la Madrid*, No. CV 85-5020-PAR (C.D. Cal. Feb. 5, 1986) (unreported) (same for claims against Mexican President de la Madrid), *rev'd as to other defendants on other grounds*, 819 F.2d 1119, 1511 (9th Cir. 1987).
23. *Estate of Domingo v. Marcos*, No. C82-1055V (W.D. Wash. Dec. 23, 1982) (unreported) (same for claims against Philippine President Marcos and his wife), *noted in Estate of Domingo v. Marcos*, No. C82-1055V, 1983 WL 482332 (W.D. Wash. July 14, 1983).
24. *Psinakis v. Marcos*, No. C-75-1725-RHS (N.D. Cal. 1975), (same for claims against Philippine President Marcos), *excerpted in State Territory, Jurisdiction, and Jurisdictional Immunities*, 1975 DIGEST § 5, at 344–45.
25. *Kendall v. Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965) (same for claims against Saudi King Faisal), *reported in Sovereign Immunity Decisions of the Department of State*, May 1952 to January 1977, 1977 DIGEST app., at 1053–34.
26. *Chong Boon Kim v. Kim Yong Shik* (Haw. Cir. Ct. 1963) (same for claims against Korean Foreign Minister Kim), *excerpted in Richard B. Bilder et al., Contemporary Practice of the United States Relating to International Law*, 58 AM. J. INT'L L. 165, 186–87 (1964).

#### **B. Executive Branch Suggestion of Head of State Immunity Filed, Suit Dismissed on Other Grounds or Settled**

1. *Wang Dan v. Hu Jintao*, No. 05-1788-RMU (D.D.C. Oct. 19, 2006) (suggestion of immunity for Chinese President Hu Jintao); *Wang Dan v. Hu Jintao*, No. 05-1788-RMU (D.C.C. Mar. 27, 2008) (unreported) (order dismissing suit against President Hu for failure to demonstrate proper service of process).
2. *Al Fassi v. Abdulaziz*, No. 03-3841 (C.D. Cal. Aug. 4, 2003) (suggestion of immunity for Saudi King Fahd); *id.* (C.D. Cal. Aug. 4, 2003) (order remanding suit for lack of removal jurisdiction); *Al Fassi v. King Fahd Bin Abdulaziz*, No. BC 266084 (Sup. Ct. L.A. Oct. 3, 2003) (suggestion of immunity for Saudi King Fahd); 2003 DIGEST ch. 10, at 571–72 (reporting settlement of suit by parties prior to court ruling on suggestion of immunity).

3. *Hartmann v. Al Nahyan*, No. 94-5547 (S.D.N.Y. Jan. 19, 1995), available at <http://www.state.gov/s/l/65687.htm> (suggestion of immunity for United Arab Emirates President Sheikh Zayed); *Hartmann v. Al Nahyan*, No. 94-5547 (S.D.N.Y. Jan. 11, 1996) (unreported) (notice of voluntary dismissal with prejudice).
4. *Livingstone v. Estate of Col. Badereddin A. Zaza*, No. 64218 (D. Ct. Mont. Oct. 19, 1984) (suggestion of immunity for Jordanian King Hussein); *Livingstone v. Estate of Col. Badereddin A. Zaza*, No. 64218 (D. Ct. Mont. Nov. 5, 1984) (unreported) (order dismissing suit against King Hussein) (holding that Foreign Sovereign Immunities Act governs immunity of foreign officials), *superseded by Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

**C. No Executive Branch Suggestion of Head of State Immunity Filed, Suit Dismissed under Head of State Immunity Principles Identified by Court**

1. *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003) (7th Cir. 2005) (dismissing suit against former Nigerian President Abubakar), *aff'd sub nom. Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005).
2. *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N.Y. Feb. 13, 1996) (order dismissing suit against estate of former Israeli President Rabin, relying on both head of state immunity principles and the Foreign Sovereign Immunities Act), *superseded in part by Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

**D. No Executive Branch Suggestion of Head of State Immunity Filed, Defendant's Motion to Dismiss under Head of State Immunity Principles Denied**

1. *Yousuf v. Samantar*, No. 1:04cv1360 (E.D. Va. Feb. 15, 2011) (unreported) (order denying motion to dismiss suit against former Somali President and Defense Minister Samantar, where Executive Branch determined that no immunity applied).
2. *Roxas v. Marcos*, 969 P.2d 1209 (Haw. 1998) (declining to dismiss suit against former Philippine President Marcos, holding head of state immunity inapplicable to former official).
3. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (denying claim of head of state immunity by Panamanian General Manuel Noriega because, by prosecuting Noriega,

Executive Branch manifested its intention not to recognize any immunity).

4. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (reversing dismissal of private civil litigation against former Bosnian Serb insurgent leader Karadzic, where United States, as amicus, repudiated defendant's claim to head of state immunity).
5. *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (denying motion to dismiss suit against former military ruler Prosper Avril under head of state immunity principles where Haiti waived immunity).
6. *United States v. Marcos*, No. 87-CR-598, 1990 WL 29368 (S.D.N.Y. Mar. 9, 1990) (declining to dismiss criminal charges against wife of former Philippine President Marcos on grounds of head of state immunity where Philippines waived immunity).
7. *In re Doe*, 860 F.2d 40 (2d Cir. 1988) (declining to recognize head of state immunity for former Philippine President Marcos in grand jury proceedings where Philippines waived immunity).
8. *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988) (declining to dismiss suit against former Philippine President Marcos on basis of head of state immunity where neither United States nor Philippine government requested immunity).
9. *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108 (4th Cir. 1987) (declining to recognize head of state immunity for former Philippine President Marcos in grand jury proceedings where Philippines waived immunity).
10. *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) (refusing to recognize head of state immunity for former Philippine President Marcos, where Executive Branch repudiated claimed immunity).

#### **E. Executive Branch Suggestion of Head of State Immunity Not Accepted**

1. *In re Wilson*, 94 B.R. 886 (Bankr. E.D. Va. 1989) (declining to accept executive branch suggestion of immunity for Egyptian President Mubarak and another official because suggestion could be asserted in any subsequent litigation against the officials).

APPENDIX B: THE TAFT LETTER

THE LEGAL ADVISER  
DEPARTMENT OF STATE  
WASHINGTON

By fax and US mail

December 6, 2002

Robert D. McCallum, Jr.  
Assistant Attorney General  
Civil Division  
U.S. Department of Justice  
Washington, D.C. 20530

Dear Mr. ~~McCallum~~: *Robert* .

Plaintiffs A, B, C et al. v. Jiang Zemin, et al., Civil Action No. 02C 7530, is a civil action pending in the United States District Court for the Northern District of Illinois. The suit names Jiang Zemin, the President of the People's Republic of China, as a defendant.

President Jiang is the sitting Head of State of the People's Republic of China. In light of this status, the Government of the PRC has formally requested that the Government of the United States take all steps necessary to have this action against President Jiang dismissed.

The Department of State recognizes and allows the immunity of President Jiang from this suit. Under customary rules of international law, recognized and applied in the United States, President Jiang is immune from the jurisdiction of the United States courts in this case. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate Suggestion of Immunity in this case.

This letter recognizes the particular importance attached by the United States to obtaining the prompt dismissal of the present proceedings against President Jiang in view of the significant foreign policy implications of such an action against the President of a friendly foreign State.

Sincerely,



William H. Taft, IV

cc: Vincent Garvey, Esq.  
Federal Programs Branch



\*\*\*