

The Lost History of Foreign Official Immunity
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The immunity of foreign officials from legal proceedings in U.S. courts has drawn significant attention from scholars, advocates, and judges in the wake of the Supreme Court's decision in *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010), which held that foreign official immunity is governed by the common law rather than the Foreign Sovereign Immunities Act (FSIA). The common law of foreign official immunity, which the *Samantar* Court did not define, operates at the intersection of international law and domestic law, and it implicates the constitutional separation of powers between the executive and judicial branches. Conflicting visions of the substance and process of common law immunity have already emerged in the wake of the *Samantar* opinion, and will continue to compete until the Supreme Court revisits this issue in a future case. At stake is not only the ability of suits to proceed against foreign officials, but also the relationship between the executive branch and the judiciary in matters affecting foreign affairs.

The original research presented in this Article yields two striking observations. First, a claim that the defendant acted in his official capacity did not operate as an automatic barrier to adjudication on the merits; foreign officials who were neither diplomatic officials nor heads of state were "on the same footing" as any other foreigner with respect to their "suability." Second, the Executive believed that it did not have constitutional authority to instruct a court to dismiss a private suit on immunity grounds. Although twenty-first century advocates might make policy arguments for blanket immunity or absolute Executive discretion, such choices are not consistent with-let alone compelled by-the eighteenth-century practices and understandings recovered here.

The Politics of Defining “The Political”: The Political Offense Exception in International Extradition

Katherine Unterman

Historically, the United States has refused to extradite anyone accused of a political crime in a foreign country, but the definition of “political” has been vague and contested. This paper examines extradition cases at the turn of the twentieth century, exploring how judges struggled to classify public acts of violence, and tracing how issues of political asylum shifted from extradition courts to the Bureau of Immigration.

In the late nineteenth century, growing numbers of revolutionaries from Russia, Ireland, and Mexico sought protection in the United States after committing acts of bloodshed in the name of social transformation. In highly publicized extradition hearings, the courts attempted to devise criteria to distinguish protected political offenses from extraditable criminal ones. However, as public fears of foreign violence heightened—especially after President McKinley’s assassination by an anarchist in 1901—the courts lost public legitimacy, their rulings seen as arbitrary, inconsistent, and excessively lenient. By the 1910s, decisions about political offenders shifted from the judiciary to the Bureau of Immigration, as the bureaucratic process of deportation became a substitute for extradition. The United States largely closed itself off as an asylum for foreign revolutionaries, as their technical immigration status trumped an assessment of the political nature of their acts.

Two narratives run through this paper. The first shows how extradition helped usher an end to revolutionary enthusiasm in an age of violence and global mobility. Public debates about extradition provided a transition, as the United States left behind the idealism of an earlier age and came to treat asylum as something more limited and exclusive. The second narrative chronicles a shift in state power. During the nineteenth century, questions of asylum and expulsion were decided exclusively by judges. As deportation replaced extradition, executive power expanded at the expense of the judiciary.

Head of State Immunity as Sole Executive Lawmaking
Lewis Yelin

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. It is generally accepted that all executive officials, including the President, can affect preexisting private rights only when exercising lawmaking authority delegated by Congress. But that conception of Executive lawmaking sits uneasily with the courts' practice of dismissing private lawsuits against foreign heads of state at the Executive Branch's direction. No statute authorizes the Executive Branch to require the dismissal of such suits. Thus, if the Executive Branch has authority to determine the immunity of a foreign head of state, that power must derive from the Constitution.

This article argues that the Executive Branch's suggestions of head of state immunity are an exercise of a specific constitutional power assigned exclusively to the President — the power to conduct the nation's diplomacy with foreign states. 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. The article accordingly focuses on the courts' understanding of the Executive's role at two key periods: at the emergence of the foreign sovereign immunity doctrine in the Supreme Court's 1812 *Schooner Exchange* decision; and again around the First World War, a period in which prevailing international norms were becoming uncertain and in which courts increasingly looked to the Executive Branch for the governing principles.

Head of state immunity emerged from the more general doctrine of foreign sovereign immunity when the latter was codified. Understanding the separation of powers concerns informing 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.

See Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L LAW 911 (2011).

Extravagant Pretense: How John Marshall Invented International Law in the United States
Joel Paul

Chief Justice John Marshall is surely among the most famous and least known figures of the revolutionary generation. He is remembered as the greatest American jurist who transformed the provisions of our constitution into an organic whole and elevated the Supreme Court to the stature of a co-equal branch of the federal government. His opinions gave life to the abstract principles of separation of power, judicial review, and federalism. Yet, little attention is paid to his engagement in foreign affairs.

Marshall, a rough-hewn frontiersman with little formal education rose from nothing by dint of his capacity to re-invent himself. He became a diplomat, statesman, and the greatest chief justice in American history. His adventures as a soldier, diplomat, and secretary of state shaped his world view, and he in turn shaped the foundation of both the Supreme Court and American foreign relations. John Marshall's self-invention became the engine for inventing a nation.

As a diplomat and secretary of state Marshall squared off against the dual threat posed by France and Britain at a time when the United States had only a skeletal navy. As Chief Justice, Marshall confronted cases of first impression concerning slave traders, pirates, and Indians. Against these unprecedented challenges Marshall relied on his own capacity of self-invention to imagine new legal principles to govern our relations to foreign powers.

This paper will focus on Marshall's negotiations with the French Directory during the XYZ Affair, and will speculate on how this experience may have contributed to his subsequent ideas about diplomacy and international law.

ASLH 2011 Paper Proposal:

Daniel S. Margolies (Professor, Virginia Wesleyan College): “Controlling the ‘Arabs of Arizona,’ and Other Aspects of Extraterritoriality and Sovereign Exception in Late Nineteenth Century U.S. Foreign Relations”

Paper Description:

Extraterritoriality in late nineteenth century U.S. foreign relations outside of the often studied consular court system was a crucial policy tool despite the general presumption against it. To illuminate the functionality of extraterritoriality during the formative period before the turn to formal overseas empire in 1898, this paper presents two case studies: American extraterritoriality along the U.S.-Mexican border during the period of General E.O.C. Ord’s command of the U.S. Army’s Department of Texas in the 1870s and the diplomatic and naval responses to issues of extraterritorial asylum in the western hemisphere in the 1880s and 1890s. This paper argues that three main points link the cases: an emphasis on unilateralism, a reliance on a robust state, and a significant invocation of sovereign exception.

The first component of the argument is that studying extraterritoriality in foreign policy offers an unusually effective way of gauging the United States’ ongoing pursuit of unilateral governance of transnational concerns. This was a key legal and policy approach in U.S. foreign relations before the adoption of explicitly imperial modes of governance. This unilateralism clearly signals the existence of key legal continuities in U.S. foreign relations which carried over into the period of formal overseas empire (and after). Secondly, the record of extraterritoriality in American foreign relations reveals how active and interventionist the late nineteenth century state was despite its common historical mischaracterization as indistinct, weak, or reactive. State

capabilities were directly articulated and realized at the intersection of law and policy through jurisdictional claims beyond national borders. Finally, this paper argues that sovereign exception played a key role in the consideration of jurisdictional questions in American foreign relations and that it is critical to introduce this conceptual frame into discussions of late nineteenth century extraterritoriality and foreign relations.