

[ARGUMENT NOT YET SCHEDULED]
No. 12-5087

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

KASIPPILLAI MANOHARAN, DR., ET AL.

Plaintiffs-Appellants,

v.

PERCY MAHENDRA RAJAPAKSA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLEE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The plaintiffs-appellants are Kasippillai Manoharan, Kalaiselvi Lavan, and Jeyakumar Aiyathurai. The defendant-appellee is President Percy Mahendra Rajapaksa, the sitting head of state of Sri Lanka. The United States is participating as amicus curiae.

B. Rulings Under Review

Plaintiffs are appealing from the February 29, 2012 order entered by Judge Colleen Kollar-Kotelly in Case No. 11-cv-235 (D.D.C.). The district court's opinion is reproduced in the Joint Appendix at JA84. The official citation is 845 F. Supp. 2d 260.

C. Related Cases

Several related cases are currently pending in the Second Circuit. See *Devi v. Rajapaksa*, No. 12-4081 (2d Cir.); *Tawfik v. Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah*, No. 12-3828 (2d Cir.). On November 2, 2012, the Fourth Circuit issued a decision in *Yousuf v. Samantar*, No. 11-1479, 2012 WL 5378056, but the mandate has not yet issued. On October 10, 2012, the Tenth Circuit issued a decision in *Habyarimana v. Kagame*, 696 F.3d 1029, but the mandate has not yet issued.

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GLOSSARY

Br.	Brief for Plaintiffs-Appellants
FSIA	Foreign Sovereign Immunities Act
TVPA	Torture Victim Protection Act of 1991

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**BRIEF FOR THE UNITED STATES
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INTRODUCTION AND INTERESTS OF THE UNITED STATES

This is an appeal from a district court decision dismissing plaintiffs' lawsuit against President Percy Mahendra Rajapaksa, the sitting head of state of Sri Lanka. The United States filed a Suggestion of Immunity to inform the district court that the State Department recognizes President Rajapaksa's immunity as a sitting head of state. The district court correctly deferred to the Executive Branch's Suggestion of Immunity.

It is well established that the Executive Branch may submit determinations concerning foreign sovereign immunity. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146-47 (1812); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945). The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, “transfer[red] primary responsibility for immunity determinations” regarding foreign states “from the Executive to the Judicial Branch.” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). Congress did not, however, “eliminate[] the State Department’s role in determinations regarding individual official immunity.” *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010). Accordingly, a determination concerning foreign head of state immunity remains vested with the Executive Branch. See, e.g., *Habyarimana v. Kagame*, 696 F.3d 1029, No. 11-6135, slip op. at 5-6 (10th Cir. Oct. 10, 2012); *Ye v. Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004).

For the reasons set out in our Suggestion of Immunity and discussed below, we respectfully ask that this Court affirm the district court’s decision dismissing the lawsuit against President Rajapaksa.

STATEMENT OF THE ISSUES

The defendant, President Percy Mahendra Rajapaksa, is the sitting head of state of Sri Lanka. The United States submitted a Suggestion of Immunity to the district court, and the court accordingly dismissed the case. This appeal raises the following questions:

1. Whether the district court erred in deferring to the Executive Branch's Suggestion of Immunity.
2. Whether the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. § 1350 note), displaces the traditionally binding effect of the Executive Branch's Suggestions of Immunity.

PERTINENT STATUTES AND REGULATIONS

Pertinent provisions are reproduced in the appellants' brief.

STATEMENT OF FACTS

1. The defendant in this case is Percy Mahendra Rajapaksa, President of Sri Lanka. JA10, 13. The plaintiffs in this case sued President Rajapaksa under the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, note following 28 U.S.C. § 1350, alleging that he is liable under a theory of command responsibility for extrajudicial killing by the Sri Lankan military and security services. JA10, 13-37.

2. The district court asked the United States to file a statement of interest. ECF No. 10. Based on the State Department's determination, JA43, 49-50, the United States informed the district court that it "recognizes and allows the immunity of President Rajapaksa as a sitting head of state from the jurisdiction of the United States District Court in this suit." JA43; see also JA49.

The Suggestion of Immunity explained that the Executive Branch had made "a determination * * * in consideration of the relevant principles of customary

international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Rajapaksa's immunity from this suit while in office." JA43. The Suggestion further explained that while "the Executive Branch has the constitutional power to suggest the immunity of a sitting head of state," it "does not mean that [the Executive Branch] will do so in every case." JA43 n.3. Rather, "[t]he Executive Branch's decision in each case is guided, inter alia, by consideration of international norms and the implications of the litigation for the Nation's foreign relations." *Ibid.*

3. The district court dismissed the case for lack of jurisdiction, concluding that the Suggestion of Immunity "is binding" and "dispositive of the Court's jurisdiction." JA84; see also JA88 (noting that the Suggestion of Immunity "is conclusive and not subject to judicial review") (citing *e.g.*, *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004), and *Ex parte Peru*, 318 U.S. 578, 589-90 (1943)).

The district court rejected plaintiffs' contention that "head of state immunity does not apply to claims brought under the TVPA." JA89. The court reasoned that the TVPA must be read in light of the "well established common law principle" of head of state immunity, JA90, and found no evidence that Congress intended to displace that background rule. JA90-92. To the contrary, the court found that "it is clear" that "Congress intended to maintain head of state immunity to suit under the TVPA." JA90; see JA90-91 (citing H.R. Rep. No. 102-367, at 5 (1991) ("nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity") and S.

Rep. No. 102-249, at 8 (1991) (“Nor should visiting heads of state be subject to suit under the TVPA.”)). The court further rejected plaintiff’s contention that the TVPA limited head of state immunity to instances in which heads of state are served with process while visiting the United States. JA91-93. The court noted that statements in the legislative history expressed particular concern that foreign heads of state should not expose themselves to the jurisdiction of American courts by visiting the United States. The court observed, however, that plaintiffs cannot “explain how immunity differs for heads of state served with process in the United States versus those served in their home countries.” JA91-92. “[R]eferences in the legislative history” to visiting heads of state, the court explained, may “simply reflect the logical assumption that, given the difficulty in effecting foreign service of process, most foreign leaders would be served with complaints under the TVPA while visiting the United States.” JA92.

ARGUMENT

THE DISTRICT COURT PROPERLY DEFERRED TO THE UNITED STATES’S SUGGESTION OF IMMUNITY

A. The Executive Branch’s Suggestions of Immunity are controlling.

The district court correctly deferred to the Executive Branch’s determination that President Rajapaksa is immune from this suit as a sitting head of state.

The Supreme Court has long recognized that Executive Branch determinations concerning foreign sovereign immunity are binding on the courts and not subject to review. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945) (“It is * * * not for

the courts to deny an immunity which our government has seen fit to allow.”); see also *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146-47 (1812).¹

Courts of appeals have thus deferred to Executive Branch Suggestions of Immunity, including in suits against foreign heads of state. See, e.g., *Habyarimana v. Kagame*, 696 F.3d 1029, ___, slip op. at 6 (10th Cir. Oct. 10, 2012) (“We must accept the United States’ suggestion that a foreign head of state is immune from suit * * * ‘as a conclusive determination by the political arm of the Government * * * ’”) (quoting *Ex Parte Peru*, 318 U.S. at 589); *Ye v. Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) (“[T]he Executive Branch’s suggestion of immunity is conclusive and not subject to judicial inquiry. * * * We are no more free to ignore the Executive Branch’s determination than we are free to ignore a legislative determination concerning a foreign state.”); *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court “erred * * * in accepting the executive suggestion of immunity without conducting an independent judicial

¹ Although the Foreign Sovereign Immunities Act (FSIA), enacted in 1976, “transfer[red] primary responsibility for immunity determinations” regarding foreign states “from the Executive to the Judicial Branch,” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004), the Supreme Court has made clear that the FSIA has no bearing on immunity for individuals, and the traditional framework of deferring to Suggestions of Immunity continues to apply. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284-85, 2291 (2010).

inquiry”); *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.”); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (“[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry.”). As the Tenth Circuit recently stated, “[t]he precedents are overwhelming.” *Habyarimana*, 696 F.3d at ___, slip op. at 5 (quoting *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974)); see also *Yousuf v. Samantar*, __ F.3d __, __, No. 11-1479, 2012 WL 5378056, at *7-*8 (4th Cir. Nov. 2, 2012) (holding that court must give “absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity”).² Indeed, we are not aware of any case in which a court has subjected a sitting head of state to suit after the Executive Branch issued a Suggestion of Immunity. See, e.g., *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Kendall v. Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965), reported in *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977*, 1977 Digest of U.S. Practice in International Law app. 1017, 1053.

² The Fourth Circuit also held that the Executive Branch’s determination with respect to conduct-based immunity was entitled to “substantial weight,” but disagreed with the government’s position that its determination was entitled to controlling weight. No. 11-1479, 2012 WL 5378056, at *7-*8.

B. The Torture Victim Protection Act does not displace this well-established rule.

The district court correctly held that the Torture Victim Protection Act of 1991 (“TVPA”), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. § 1350 note), does not displace the well-established rule of deference to the Executive Branch’s Suggestions of Immunity. The TVPA cause of action has no bearing on the Executive Branch’s authority to make immunity determinations.

Plaintiffs argue that the TVPA authorizes liability for “individual[s]” and makes no reference to limitations on liability created by other sources of law. Br. 27-31. Plaintiffs offer no basis for the assumption that Congress abrogated the traditional rule that courts must defer to the Executive Branch’s Suggestions of Immunity, a rule that acknowledges the Executive Branch’s exercise of its constitutional authority over foreign affairs. See generally *Midlantic Nat’l Bank v. New Jersey Dep’t of Emt’l Protection*, 474 U.S. 494, 501 (1986) (“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (“When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.”).

The mere creation of a statutory cause of action does not automatically override preexisting immunity rules. See *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (“Although [§ 1983] on its face admits of no immunities, we have read it ‘in harmony

with general principles of tort immunities and defenses rather than in derogation of them.’ ”) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Indeed, *Schooner Exchange* itself instructs that courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches “in a manner not to be misunderstood.” 11 U.S. at 146. The TVPA’s reference to liability for “individual[s]” must be read against the backdrop principle of deference to Suggestions of Immunity. See *Samantar*, 130 S. Ct. at 2289-90 & n.13; cf. *Malley*, 475 U.S. at 339. Thus, in *Matar v. Dichter*, the Second Circuit held that the TVPA’s right of action did not abrogate the traditional immunities recognized by the Executive Branch. 563 F.3d 9, 14-15 (2009). And in *Belbas v. Moshe Ya’Alon*, this Court, operating from the premise that individual immunity is governed by the FSIA, held that the TVPA does not create an exception to the FSIA’s rules of immunity. 515 F.3d 1279, 1289 (2008). See also *Ye*, 383 F.3d at 626 (treating Executive determinations as binding in TVPA actions); but cf. *Samantar*, No. 11-1479, 2012 WL 5378056, at *8-*13 (finding no conduct-based immunity in a TVPA action, but not on the theory that the TVPA abrogated pre-existing immunities).

The legislative history of the TVPA makes clear that the Act does not abrogate traditional rules concerning immunity. The House Report stated that “nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity.” H.R. Rep. No. 102-367(I) at 5 (1991). It further noted that “[t]hese doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting

the United States on official business.” *Ibid.* Similarly, the Senate Report stated that “[n]or should visiting heads of state be subject to suit under the TVPA.” S. Rep. No. 102-249, at 8 (1991).³

The district court properly rejected plaintiffs’ suggestion that Congress meant to preserve immunity only for heads of state visiting the United States. The committee reports do not express any intent to abrogate the Executive’s established power to make Suggestions of Immunity. Nor do the reports even express an understanding of pre-existing immunity principles that only visiting heads of state are immune. References in the legislative history to visiting heads of state may simply reflect the salient concern that heads of state not be exposed to the jurisdiction of our courts when they visit this country. Or, as the district court recognized, those references “might simply reflect the logical assumption that, given the difficulty in effecting foreign service of process, most foreign leaders would be served with complaints * * * while visiting the United States.” JA92. As the court also recognized, there is no reason to think that Congress intended to preserve head of state immunity when service is made in the United States and to abrogate immunity when process is effected by other means.

³ Portions of the legislative history suggest that the committee members may have operated under the mistaken impression that foreign official immunity was governed by the FSIA. That they suggested the FSIA would govern questions of official immunity may reflect the fact that the only appellate decision that had addressed the issue at that time had held as much. See *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990).

Plaintiffs are similarly mistaken in asserting that head of state immunity must not apply in TVPA actions because recognition of immunity is inconsistent with the TVPA's goal of deterring and compensating for torture and extrajudicial killing, and with the broader goals of American human rights policy. See Br. 31-34, 42-44. The United States takes no position on the allegations in this lawsuit, and is steadfast in its commitment to accountability for human rights abuses. However, head of state immunity is based on a person's status as the current occupant of an office and is not based on the nature of the acts alleged. Head of state immunity, like other forms of immunity, e.g. absolute and qualified immunity in a suit under 42 U.S.C. § 1983, may apply to tortious and even criminal acts. "[N]o legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam) (emphasis omitted). Indeed, "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means," *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). And here, Congress appears to have been well aware that there are limits on the availability of the TVPA cause of action. See *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012).⁴

⁴ Plaintiffs additionally argue that their interpretation should be accepted under
Continued on next page.

C. Plaintiffs' arguments about customary international law have no bearing on this case.

Plaintiffs cite examples of criminal prosecutions of foreign leaders in international tribunals or of foreign leaders who are no longer in office, and argue that the district court therefore should have declined to accept the Executive Branch's Suggestion of Immunity. Br. 50-53.

This argument, however, offers no basis on which to set aside the Suggestion of Immunity. The United States takes principles of customary international law into account in considering a request for immunity, and the Suggestion of Immunity in this case is fully consistent with customary international law.⁵ But the common law governing foreign sovereign immunity is a “rule of substantive law” that requires courts to “accept and follow the executive determination” concerning a foreign official’s immunity from suit. *Hoffman*, 324 U.S. at 36; see *Habyarimana*, 693 F.3d at ___, slip op. at 5-6; *Ye*, 383 F.3d at 626-27; see also *Spacil*, 489 F.2d at 618 (“[W]e are analyzing here the proper allocation of functions of the branches of government in

the canon of “constitutional avoidance” because accepting the Suggestion of Immunity would result in a taking of property. Br. 34-36. This contention is insubstantial. Plaintiffs have no “vested property rights,” *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994), in pursuing a cause of action under the TVPA without regard to principles of immunity. Moreover, plaintiffs’ argument is not really one of constitutional avoidance. It is simply a (meritless) assertion that they may be entitled to just compensation because the Executive Branch has submitted and a court has accepted a Suggestion of Immunity.

⁵ See, e.g., *Arrest Warrant of 11 Apr. 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 54 (Feb. 14, 2002).

the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.”); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (holding that a Suggestion of Immunity “should be accepted by the court without further inquiry” because “the doctrine of the separation of powers under our Constitution requires [the court] to assume that all pertinent considerations have been taken into account”) (internal citations omitted).

It is in recognition of this fundamental principle that courts have unanimously accepted Executive Branch Suggestions of Immunity on behalf of sitting heads of state, and this Court should reject plaintiffs’ invitation to become the first Court to do otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3,071 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Adam Jed

Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Adam Jed

Adam C. Jed