No. 12-5087

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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 A Final Order of the United States District Court for the District of Columbia Dismissing The Case For Lack Of Jurisdiction

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STATEMENT IN LIEU OF BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici:

The Plaintiff-Appellants in this Court are Kasippillai Manoharan, Kalaiselvi Lavan, and Jeyakumar Aiyathurai.

The Defendant-Appellee in this Court is H.E. Mahinda Rajapaksa, the sitting President of the Democratic Socialist Republic of Sri Lanka.

The United States of America is amicus curiae in this Court, and appeared in the District Court pursuant to 28 U.S.C. § 517.

Rulings Under Review:

The ruling under review is the United States District Court for the District of Columbia's (Hon. Colleen Kollar-Kotelly) February 29, 2012 Memorandum Opinion and Order, *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012).

Related Cases:

Counsel is not aware of any related cases before this or any other Court. However, a case against President Rajapaksa that raises similar issues is pending in the United States Court of Appeals for the Second Circuit, *Devi v. Rajapaksa*, No. 12-4081.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

App.	Appellants' Deferred Appendix
FSIA	Foreign Sovereign Immunities Act
Sri Lanka	Democratic Socialist Republic of Sri Lanka
TVPA	Torture Victim Protection Act of 1991

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellants.

STATEMENT OF FACTS

Plaintiffs filed a complaint under the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350, against H.E. Mahinda Rajapaksa (sued as Percy Mahendra Rajapaksa), who as all parties and amici concede is the sitting President and Head of State of the Democratic Socialist Republic of Sri Lanka ("Sri Lanka"). Compl. ¶ 6 (App. 13); Suggestion of Immunity at 1 (App. 42).

Plaintiffs failed to serve President Rajapaksa with process. *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260, 261-62 (D.D.C. 2012); Mem. in Support of Mot. to Solicit Views at 4-5. Following Plaintiffs' attempt to serve process on President Rajapaksa through a Hague Convention request to Sri Lanka and in an effort to achieve clarity, counsel for President Rajapaksa appeared in the District Court solely to ask the court to exercise its inherent authority to obtain the views of the United States regarding President Rajapaksa's Head of State immunity and foreign official immunity, as well as other jurisdictional issues. Mot. to Solicit Views at 1. In making this limited request, counsel emphasized that President Rajapaksa did so "without waiving his immunity from the jurisdiction and process of the United

States courts, and expressly reserving all defenses available to him under FED. R. CIV. P. 12 and otherwise." Mem. in Support of Mot. to Solicit Views at 1.

The District Court subsequently solicited the United States' views on the immunity issues. Order Dated Dec. 30, 2011. In response, and pursuant to 28 U.S.C. § 517, the United States submitted a Suggestion of Immunity, confirming that President Rajapaksa is "the President and sitting head of state of the Democratic Socialist Republic of Sri Lanka," and "suggest[ing] to the Court the immunity of President Rajapaksa from this suit." Suggestion of Immunity at 1 (App. 42). The Suggestion of Immunity was based upon a letter from the Legal Adviser of the U.S. Department of State, providing that "[t]he Department of State 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," and "recogniz[ing] the particular importance attached by the United States to obtaining the prompt dismissal of the proceedings against President Rajapaksa in view of the significant foreign policy implications of such an action." *Id.* at Exh. 1 (App. 49-50).

After reviewing the United States' position, the District Court held "that the United States' Suggestion of Immunity is binding on the Court and dispositive of the Court's jurisdiction" and, accordingly, dismissed Plaintiffs' civil action for lack

of jurisdiction. *Manoharan*, 845 F. Supp. 2d at 261. Plaintiff-Appellants now bring this appeal.

In light of the above, President Rajapaksa need not assume the mantel of "Appellee" before this Court. As recognized by the United States, President Rajapaksa is not subject to—and is immune from—the jurisdiction and process of the United States courts. Counsel appeared only for the limited purpose of asking the District Court to solicit the United States' views, and the court ultimately relied upon the United States' dispositive Suggestion of Immunity to dismiss the case for lack of jurisdiction. Any attempt by Appellants to embroil President Rajapaksa in this matter further would undermine the very immunity recognized by both the District Court and the United States. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."). We submit this Statement in lieu of a Brief solely to clarify President Rajapaksa's position, anticipating that the United States as Amicus Curiae and will advocate affirmance of the judgment of dismissal based on its Suggestion of Immunity.

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Plaintiffs' suit against President Rajapaksa because the United States' binding Suggestion of Immunity divested the

court of jurisdiction. Under longstanding and well-established common law, when the United States submits a Suggestion of Head of State immunity, that Suggestion is binding and unreviewable, and the district court surrenders its jurisdiction. Congress did not abrogate common law Head of State immunity for claims brought under the TVPA; rather, the TVPA's plain language and legislative history establish that Congress maintained Head of State immunity to suit under the TVPA. This Court should, therefore, affirm the District Court's decision.

ARGUMENT

I. President Rajapaksa Did Not Appear on the Merits in the District Court and Expressly Reserved All Jurisdictional and Other Defenses.

Counsel for President Rajapaksa appeared in the District Court only for the limited purpose of requesting that the court solicit the views of the United States regarding President Rajapaksa's Head of State immunity and other threshold jurisdictional issues. The Supreme Court recently endorsed this exact procedure for resolving questions of immunity of foreign officials. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (recognizing that longstanding and appropriate procedure is for "representative of the sovereign [to] request a 'suggestion of immunity' from the State Department"); *accord Giraldo v. Drummond Co.*, 808 F. Supp.2d 247, 248 (D.D.C. 2011) ("At this Court's request, the United States has submitted a Statement of Interest in this matter and suggests that respondent is immune from testifying . . . ."); *Weixum v. Xilai*, 568 F.Supp.2d 35, 36 (D.D.C.

2008) (noting that court "forwarded a letter to the Department of State seeking its views on the applicability of various doctrines to the jurisdiction of this Court to hear plaintiffs' case"). In making the request, counsel specifically invoked the court's inherent authority, rather than Federal Rule of Civil Procedure ("Rule") 12, and emphasized that President Rajapaksa filed no Rule 12 motion or responsive pleading. Importantly, counsel stated expressly that the request was made "without waiving [President Rajapaksa's] immunity from the jurisdiction and process of the United States courts, and expressly reserving all defenses available to him under FED. R. CIV. P. 12 and otherwise." Mem. in Support of Mot. to Solicit Views at 1.

Plaintiffs nevertheless assert, without any supporting citation, that President Rajapaksa "waived any deficiencies of service" and "submitted to the Court's personal jurisdiction." Appellant's Brief at 16-17. Though wholly irrelevant to the District Court's jurisdictional dismissal based on the Executive Branch's Suggestion of Head of State immunity, Plaintiffs' baseless assertion warrants a brief response.

Rule 12(h) governs the waiver of jurisdictional and other defenses, providing that a litigant waives a defense only if he (1) fails to raise it in a motion under Rule 12; or (2) fails to raise it before litigating the substantive relief sought by plaintiff. FED. R. CIV. P. 12(h)(1). Courts have had little trouble affirming the plain text of the rule. *See, e.g.*, *Argentine Republic v. Nat'l Grid PLC*, 637 F.3d 365, 367 (D.C.

Cir. 2011) (per curiam) (defense only waived if not "raised through a Rule 12(b) motion or in the first responsive pleading"); *Lane v. XYZ Venture Partners, LLC*, 322 F. App'x 675, 678 (11th Cir. 2009) ("[W]aiver is only accomplished if the defense is not asserted in the first motion made under Rule 12 or responsive pleading." (citing FED. R. CIV. P. 12(h)(1)(B))); *Majhor v. Kempthorne*, 518 F. Supp.2d 221, 238 (D.D.C. 2007) (same).

President Rajapaksa filed no Rule 12 motion or responsive pleading, nor was he required to do so in light of Appellants' failure to serve process upon him. Instead, he simply requested that the District Court seek the United States' views on immunity and extend the time to respond to the complaint until after the United States government responded. Mem. in Support of Mot. to Solicit Views at 1. Because President Rajapaksa neither made a motion under Rule 12 nor filed a responsive pleading, Plaintiffs' waiver argument is meritless. *See Mann v. Castiel*, 681 F.3d 368, 374 (D.C. Cir. 2012) (holding that motion to stay and motion to extend time to answer complaint cannot waive a defense because they are "neither a responsive pleading . . . nor a dispositive motion raising a defense listed in Rule 12(b)" (internal citations omitted)); *accord Lane*, 322 F. App'x at 678 (holding that, because motion to stay proceedings is not motion under Rule 12 or a responsive pleading, no waiver occurred).

Plaintiffs' argument also ignores the express reservations in President Rajapaksa's motion. Even though a motion to extend the time to respond does not constitute a responsive pleading, *see Mann*, 681 F.3d at 374, counsel for President Rajapaksa took the precautionary step of identifying and reserving appropriate defenses. Specifically, President Rajapaksa asserted that, should the United States not respond to the district court's request, he *would* argue that Head of State immunity, foreign official immunity, the political question and Act of State doctrines, improper service, and a lack of personal jurisdiction all precluded the district court from exercising jurisdiction over him and hearing Plaintiffs' claims. *See* Mem. in Support of Mot. to Solicit Views at 4-5, 7-10. President Rajapaksa could not have waived defenses that he expressly reserved for a potential future Rule 12 motion. *See* FED. R. CIV. P. 12(h) (litigant only waives defense if he fails to raise it in Rule 12 motion or responsive pleading); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 730 (2d Cir. 1998) (holding that including footnote preserving jurisdictional defenses for future motion suffices to prevent any waiver under Rule 12(h)). Because the motion put Plaintiffs on actual notice of the defenses President Rajapaksa would assert *if* the United States had not suggested immunity, there was no waiver.

II. The United States' Suggestion of Immunity Bound the District Court and Divested it of Jurisdiction.

The District Court dismissed Plaintiffs' lawsuit because the United States' Suggestion of Immunity divested it of jurisdiction. *Manoharan*, 845 F. Supp. 2d at 261 ("The Court finds that the United States' Suggestion of Immunity is binding on the Court and dispositive of the Court's jurisdiction. Therefore, . . . this case is DISMISSED for lack of jurisdiction."). The District Court's decision was legally correct and, as noted therein, followed centuries of well-established precedent.

A. The Suggestion of Immunity Divests the Court of Jurisdiction.

In a 2010 decision involving similar TVPA claims of command and control responsibility for torture and extrajudicial killings, the Supreme Court held that common law governed the defendant's foreign official immunity, not the FSIA. *Samantar*, 130 S. Ct. at 2292-93. The Court also recognized that, under governing common law—dating back two hundred years—if the United States issued a suggestion of immunity, "the district court surrendered its jurisdiction." *Id.* at 2284 (citing *Ex parte Peru*, 318 U.S. 578, 581, 588 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945)).[1] The Court explained that this common law

[1] In *Samantar*, the Supreme Court recognized a "two-step procedure" for determining foreign official immunity under the common law. 130 S. Ct. at 2284. However, a court only reaches the second step "in the absence of recognition of the immunity by the Department of State," a circumstance not applicable here. *Id.* (quoting *Ex parte Peru*, 318 U.S. at 587).

process, depriving the district court of jurisdiction when the United States submits a suggestion of immunity, governs all forms of individual foreign official immunity, including Head of State immunity. *Id.* at 2284-85 (foreign official immunity), 2285 n. 6 (head of state immunity) (citing *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812)). *See also Devi v. Rajapaksa*, No. 11 Civ. 6634 (NRB), 2012 WL 3866495, at *3 (S.D.N.Y. Sept. 4, 2012) ("*Samantar* therefore in no way altered the established doctrine of head of state immunity.")

This Court recently affirmed a decision denying a motion to compel deposition testimony from the former President of Columbia on the basis of Head of State immunity (there, the more limited immunity of former heads of state). *Giraldo*, 808 F. Supp. 2d at 251, *aff'd*, No. 11-7118, 2012 U.S. App. LEXIS 22087 (D.C. Cir. Oct. 23, 2012) (per curiam). The United States had granted former President Alvaro Uribe's request for a suggestion of immunity and, citing *Samantar*, the district court held that when "the State Department grants the request, the 'district court surrenders its jurisdiction.'" 808 F. Supp. 2d at 249 (quoting *Samantar*, 130 S. Ct. at 2284).

The District Court's Order here—like the Court's decision in *Giraldo*—joins the unanimous body of authority holding that Executive Branch suggestions of immunity divest United States courts of jurisdiction and are not subject to judicial review. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("The Executive

Branch's determination that a foreign leader should be immune from suit . . . is established by a suggestion of immunity." (citation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("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."); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110-11 (D.D.C. 2005) ("When the Executive Branch concludes that a recognized leader of a foreign sovereign should be immune from the jurisdiction of American courts, that conclusion is determinative. . . . When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996) ("The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive."); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989) ("[T]he United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state. The Department of State has made the requisite certification and determination to allow the immunity. The Court must accept them as conclusive."); *see also Devi*, 2012

WL 3866495, at *4 ("[W]e hold that President Rajapaksa is immune from suit in light of the Government's Suggestion of Immunity. Accordingly, the action is dismissed."). The District Court correctly determined that it lacked jurisdiction in accordance with the United States' Suggestion of Immunity and correctly dismissed the case.

B. The TVPA Does Not Preclude Head of State Immunity.

Appellants misleadingly argue that the TVPA does not "exclude" or "except" sitting heads of state from its coverage. Brief for Appellant at 29, 37. As the District Court correctly determined, the question is not whether the TVPA affirmatively shields all heads of state from liability, but rather whether it specifically forecloses the distinct and pre-existing common law Head of State immunity when, as here, it is expressly recognized by the Executive Branch. Relying on the Supreme Court's instruction that "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law," *Samantar*, 130 S. Ct. at 2289 n. 13, the District Court correctly concluded that Congress demonstrated no intent to abrogate nearly two centuries of common law head of state immunity jurisprudence. *Manoharan*, 845 F. Supp. 2d at 264; *see also Belhas v. Moshe Ya'Alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (pre-*Samantar* holding that TVPA did not eliminate foreign official immunity under the

FSIA even for alleged *jus cogens* violations); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (holding "the TVPA does not negate head-of-state immunity"); *Tawfik v. al-Sabah*, No. 11 Civ. 6455 (ALC)(JCF), 2012 WL 3542209, at *3 (S.D.N.Y. Aug. 16, 2012) (holding Head of State immunity applicable to claims under the TVPA).

Rather, reviewing the TVPA's plain language and legislative history, the District Court correctly concluded "it is clear Congress intended to maintain head of state immunity to suit under the TVPA." *Manoharan*, 845 F. Supp. 2d at 264 (citing H.R. Rep. No. 102-367(I), at 5 (1991) ("[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity."); S. Rep. No. 102-249, at 8 (1991) ("Nor should visiting heads of state be subject to suit under the TVPA.")); *Lafontant*, 844 F. Supp. at 138 ("The legislative history of the TVPA lends ample support for the proposition that the Act was not intended to trump diplomatic and head-of-state immunities."). In a similar suit against President Rajapaksa in the United States District Court for the Southern District of New York, the court rejected the plaintiff's argument that the TVPA precludes Head of State immunity, holding the "argument finds no support in the text or legislative history of the statute. In fact, as the district court noted in *Manoharan*, both the House and Senate Reports accompanying the TVPA expressly indicated that the statute would

not alter the applicability of head of state immunity." *Devi*, 2012 WL 3866495, at *3 (citing *Manoharan*, 845 F. Supp. 2d at 264).

Whether or not a sitting Head of State could be held liable under the TVPA *if* the Executive Branch does not confer immunity is a hypothetical the Court need not entertain. It is undisputed that the United States did, in fact, suggest Head of State immunity here, divesting the District Court of jurisdiction over President Rajapaksa under governing common law.

III. The United States, Expected to Participate as Amicus Curiae, Is the Proper Party to Advocate for Affirmance of the District Court Decision.

The United States has appeared in this appeal and obtained leave to support the judgment of dismissal as Amicus Curiae. The United States' Motion noted that "[t]he State Department's authority to make controlling foreign official immunity determinations is of considerable interest to the Executive Branch, as it is an exercise of the President's constitutional authority over foreign affairs and as it has significant implications for the foreign relations of the United States." Document #1373678. The brief of the United States as Amicus Curiae is due November 8, 2012. Document #1390165. As a matter of comity among nations, it is incumbent upon the United States to support the judgment of dismissal below based upon its Suggestion of Immunity. We expect that the United States will do so because it is the real party in interest in this appeal, having acknowledged "the particular

importance attached by the United States to obtaining the prompt dismissal of the proceedings against President Rajapaksa in view of the significant foreign policy implications of such an action." Suggestion of Immunity at Exh. 1 (App. 50). Accordingly, President Rajapaksa expects that the United States as Amicus Curiae will submit the principal brief seeking affirmance of the judgment of dismissal.

CONCLUSION

For all of the reasons mentioned above, and those expected to be raised by the United States as Amicus Curiae in support of the decision below, the judgment of dismissal for lack of jurisdiction should be affirmed.

Dated: November 1, 2012

Respectfully submitted.

/s/ Mitchell R. Berger

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B)(C). The foregoing brief contains 3,210 words of Times New Roman (14 point) proportional type, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(b)(iii). The word processing software used to prepare this brief was Microsoft Word 2003.

/s/ Benjamin D. Wood
Benjamin D. Wood

CERTIFICATE OF SERVICE

I hereby certify that I filed this document with the court on the Electronic Case Filing (ECF) System on November 1, 2012. I understand that the ECF system will transmit a copy of this document by e-mail to all counsel of record in this matter.

In addition, I served two paper copies of the foregoing Statement In Lieu of Brief for Appellee by Federal Express next-day service upon:

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