UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KASIPPILLAI MANOHARAN, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 11-235 (CKK)
PERCY MAHENDRA RAJAPAKSA,	)	
Defendant.	)	

REPLY OF THE UNITED STATES IN SUPPORT OF ITS SUGGESTION OF IMMUNITY

On January 13, 2012, the United States submitted a Suggestion of Immunity in this case to inform the Court of its determination that Defendant President Rajapaksa, as the sitting head of state of the Democratic Socialist Republic of Sri Lanka, enjoys immunity from this suit. *See* Dkt. No. 12. That determination noted "the particular importance attached by the United States to obtaining the prompt dismissal of the proceedings against President Rajapaksa in view of the significant policy implications of such an action." Letter from Harold Hongju Koh to Tony West, Dkt. No. 12, Exhibit 1. As explained in the Suggestion of Immunity, that determination is controlling in this matter and is not subject to judicial review. Plaintiffs nonetheless have filed an "opposition" to the United States' Suggestion of Immunity, contending for a number of reasons that this Court should ignore the substantial and unanimous body of authority recognizing the controlling nature of the Executive's head of state immunity determinations and become the *first court* to allow a suit against a sitting head of state to proceed after the Executive Branch has submitted a suggestion of immunity. While the United States' principal submission

fully and adequately explains why this Court must recognize President Rajapaksa's immunity from this suit, Plaintiffs' Opposition warrants only a few brief points in response.

1. The President's foreign relations power is constitutionally derived. *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 [in its dealings with foreign states]."). The Executive's authority to determine head of state immunity is an incident of that power. *See, e.g.*, *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284–85 & n.6, 2291, 2292 (2010); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) ("[T]he decision concerning the immunity of foreign heads of states remains vested . . . with the Executive Branch."). Accordingly, courts must not interpret a statute as attempting to limit the constitutionally derived authority of the Executive to recognize and define the immunity of foreign heads of state when neither the text nor the legislative history of the statute expresses an intent to do so. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); *see also Public Citizen v. DOJ*, 491 U.S. 440, 466 (1989) ("[W]e are loathe to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."). There is *no* indication that Congress intended to interfere with the Executive's authority to determine head of state immunity when it enacted the Torture Victim Protection Act ("TVPA"), so there is no reason for this Court to even engage the question whether the TVPA did so.

2. Contrary to the flawed premise underlying Plaintiffs' entire argument, the mere creation of a statutory right of action does not automatically override preexisting immunity rules. *Cf. 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.") (internal quotation marks and citation omitted). This is

particularly true where those preexisting immunity rules are articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs. In fact, in contrast with Plaintiffs' selective quotation of the TVPA's legislative history, *see* Pls.' Opp. at 7–8, that history affirmatively demonstrates that Congress did not intend to abrogate the Executive's authority to make head of state immunity determinations. *See* H.R. Rep. No. 102-367, at 5 (1991) ("While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business."); S. Rep. No. 102-249, at 8 ("Nor should visiting heads of state be subject to suit under the TVPA."); *see also Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) ("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 light of this legislative history, and in view of the well-established background of absolute judicial deference to Executive Branch immunity determinations for heads of state, Congress cannot be said to have sought to effect a sweeping change to that immunity practice in the TVPA without even mentioning immunity in the statute.

3. In view of the principles elaborated above, this Court should join the unanimous body of authority recognizing the Executive Branch's unreviewable authority to make immunity determinations for foreign heads of state, even in suits brought under the TVPA. *See, e.g.*, *Wei Ye*, 383 F.3d at 626;[1] *Habyarimana v. Kagame*, --- F. Supp. 2d ----, 2011 WL 5170243, *19

[1] Although the Seventh Circuit in *Wei Ye* did not explicitly address the TVPA, the suit asserted claims under the TVPA. *See* Pls.'-Appellants' Opening Br., *Wei Ye v. Jiang Zemin*, 2004 WL 587433, No. 03-3989 (7th Cir. Jan. 20, 2004). Thus, the Seventh Circuit's decision, holding that Executive Branch head of state immunity determinations are binding, necessarily applied to plaintiffs' claims under the TVPA.

(W.D. Okla. Oct. 28, 2011); *Al Hassan v. Al Nahyan*, No. 09-01106, Dkt. 53, at 7–8 (C.D. Cal. Sept. 17, 2010); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110 (D.D.C. 2005); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001), *aff'd on other grounds sub nom.*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *Lafontant*, 844 F. Supp. at 132. To accept Plaintiffs' invitation to depart from this authority would make this Court the *first* ever to permit a suit against a sitting head of state to go forward after the Executive Branch has determined that the head of state is immune.

CONCLUSION

For the foregoing reasons and those set forth in its Suggestion of Immunity, the United States respectfully suggests the immunity of President Rajapaksa in this action. Further, the United States respectfully submits that oral argument is unnecessary to resolve this matter, in light of the clear principles of law articulated in its Suggestion of Immunity and above.

Dated: February 13, 2012

Respectfully submitted,

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