

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

_____)	
JANE DOE, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. <u>3:11-cv-01433-AWT</u>
)	
ERNESTO ZEDILLO PONCE)	
DE LEON,)	
)	
Defendant.)	
_____)	

**SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA**

Pursuant to 28 U.S.C. § 517,¹ the United States respectfully informs this Honorable Court of the interest of the United States in the pending lawsuit against Ernesto Zedillo Ponce de Leon, former President of Mexico, and hereby suggests to the Court the immunity of former President Zedillo from this suit.² In support of its interest and suggestion, the United States sets forth as follows:

1. The United States has an interest in this action because it raises the question whether the sole defendant, the former President and head of state of Mexico, enjoys immunity from this Court’s jurisdiction with respect to the conduct alleged in the Complaint. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its

¹ 28 U.S.C. § 517 provides that “any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States.”

² In this Suggestion of Immunity, the United States expresses no view on the merits of Plaintiffs’ claims.

foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of former foreign officials. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, 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 former President Zedillo's immunity from this suit. As discussed below, this determination is controlling and is not subject to judicial review.

2. The Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Government of Mexico has formally requested the Government of the United States to suggest the immunity of President Zedillo from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State has determined that former President Zedillo enjoys immunity from suit with respect to this action." Letter from Harold Hongju Koh to Stuart F. Delery (copy attached as Exhibit 1).

3. The immunity of foreign states and foreign officials from suit in our courts has different sources. For many years, such immunity was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore 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."). In the years following *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), which first announced the doctrine of foreign sovereign immunity in U.S. courts, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (citing *Hoffman*, 342 U.S. at 34–36; *Ex parte Peru*, 318 U.S. 578, 587–89 (1943);

Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74–75 (1938)). Under this regime, a foreign state sued in a U.S. court could request a “suggestion of immunity” from the Department of State. *Id.* (quotation marks omitted). If the Department of State accepted the request and filed a Suggestion of Immunity, the district court “surrendered its jurisdiction.” *Id.* If the Department of State took no position in the suit, “a district court had authority to decide for itself whether all the requisites for such immunity existed,” applying “the established policy of the [Department of State].” *Id.* (quotation marks omitted). As the Supreme Court explained in *Samantar*, “[a]lthough cases involving individual foreign officials were rare, the same two-step procedure was typically followed when a foreign official asserted immunity.” *Id.* at 2284–85 (citing cases).

4. In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act (“FSIA”), transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; *see id.* § 1602 (“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.”); *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). The FSIA thus “supersede[d] the common-law regime for claims against foreign states.” *Samantar*, 130 S. Ct. at 2292.

5. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar*, 130 S. Ct. at 2292 (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place

the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* 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.”). Thus, the Executive Branch retains its historic authority to determine a foreign official’s immunity from suit, including the immunity of heads of state. *See id.* at 2284–85 & n.6. Courts should thus apply the same two-step framework discussed above when presented with claims of foreign official immunity.

6. In the absence of a controlling statute, the common law governing foreign official immunity is a “rule of substantive law” requiring courts to “accept and follow the executive determination” concerning a foreign official’s immunity from suit. *Hoffman*, 324 U.S. at 36; *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question.”). This deferential judicial posture is compelled by the separation of powers. *See, e.g., Wei Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004); *Spacil*, 489 F.2d at 618–19.³ The Supreme Court has thus held that the courts of the United States are bound by suggestions of immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. at 588–89. In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch’s immunity determination, declared that the Executive Branch’s

³ As other courts have explained, the Executive Branch possesses substantial institutional resources and extensive experience with which to conduct the country’s foreign affairs. *See, e.g., Spacil*, 489 F.2d at 619; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913–14 (4th Cir. 1980). Furthermore, “in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.” *Spacil*, 489 F.2d at 619.

suggestion of immunity “must be accepted by the courts as a conclusive determination by the political arm of the Government.” 318 U.S. at 589. After a suggestion of immunity is filed, it is the “court’s duty” to surrender jurisdiction. *Id.* at 588. As *Samantar* makes clear, that same judicial deference continues to apply to the Executive Branch’s determinations of foreign official immunity.

7. As a general matter, under customary international law principles accepted by the Executive Branch, a sitting head of state’s immunity is based on his *status* as the incumbent office holder and extends to all his actions. *See* 1 *Oppenheim’s International Law* 1038 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). After a head of state leaves office, however, that individual’s residual immunity depends on the *conduct* at issue and generally applies only to acts taken in an official capacity while in that position. *See id.* at 1043–44. In determining whether certain acts were taken in an official capacity, the Department of State generally presumes that allegations relating to the official’s exercise of the powers of his or her office fall into that category. This preliminary assessment is particularly apt for former heads of state, who typically have wide-ranging responsibilities. The Department of State also considers a foreign government’s request for a suggestion of immunity, averring that the acts of its former official that are the subject of a lawsuit were taken (if at all) in an official capacity, to further strengthen that preliminary assessment. In such cases, unless the plaintiff provides the Department of State⁴

⁴ It is for the Executive Branch, not the courts, to determine whether plaintiffs have demonstrated that particular conduct was not taken in a foreign official’s official capacity. *See 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.”).

with a basis for questioning the preliminary assessment, the Department of State will generally determine that the former official is immune.⁵

8. Upon consideration of the facts and circumstances of this case, the Department of State has determined that former President Zedillo is entitled to immunity from suit in this action. *See Ex. 1.* The alleged actions as set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office. Accordingly, the Department of State presumes that those actions, if taken at all, were taken in his official capacity. The Department of State has not found a sufficient reason to question that preliminary assessment. Plaintiffs' allegations that former President Zedillo should be held liable for lower level officials' tortious conduct simply by virtue of his position as President at the time do not provide a sufficient reason to question that initial assessment. The Department of State has further determined that those allegations in the Complaint that allege particular conduct of former President Zedillo himself do not provide a sufficient reason to question whether that conduct was taken in his official capacity. Accordingly, the United States has determined that former President Zedillo enjoys immunity from this lawsuit.

CONCLUSION

For the foregoing reasons, former President Zedillo enjoys immunity from suit in this action.

Dated: September 7, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

⁵ Such a basis might arise, for example, in a suit challenging a former official's personal financial dealings, which generally would not be considered to constitute acts taken in an official capacity.

DAVID B. FEIN
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VINCENT M. GARVEY
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/s/ Judson O. Littleton

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, a copy of the foregoing Suggestion of Immunity Submitted by the United States of America was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Judson O. Littleton
JUDSON O. LITTLETON

Exhibit 1

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

September 7, 2012

The Honorable Stuart F. Delery, Esq.
Acting Assistant Attorney General
Civil Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington D.C. 20530

Re: *Doe et al. v. Zedillo*, Civil Action No. 3:11-cv-01433-AWT (D. Conn.)

Dear Stuart:

I write to request that the Department of Justice convey to the United States District Court for the District of Connecticut in the above-referenced case the determination of the Department of State that Ernesto Zedillo Ponce de Leon, the former President of Mexico, is immune from suit in this action by ten anonymous Mexican plaintiffs brought under the Alien Tort Claims Act and the Torture Victim Protection Act. The Complaint alleges claims of legal responsibility of former President Zedillo in connection with a massacre in Acteal, Chiapas, Mexico on December 22, 1997, carried out against local villagers by paramilitary groups allegedly trained or assisted by the Mexican army. The Mexican Government has requested a determination of immunity, stating that "any actions that former President Ernesto Zedillo carried out in connection with the events alleged in the complaint were taken in the course of his official duties as head of state."

Taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that former President Zedillo enjoys immunity from suit with respect to this action.

Under immunity principles recognized by the Executive Branch, a sitting head of state's immunity is based on his status as the incumbent office holder and extends to all his actions. The residual immunity of a former official, by contrast, is based upon the character of that official's conduct and extends only to acts taken in an official capacity. In a case involving conduct-based immunity, as here, the Department of State generally presumes that actions taken by a foreign official exercising the powers of his office were taken in his official capacity. This preliminary assessment is particularly appropriate when a former head of state is sued, because

holders of a country's highest office may be expected to be on duty at all times and to have wide-ranging responsibilities. And that initial assessment gains further support where, as here, the foreign government itself has asserted that the actions of its official were taken in an official capacity. In such cases, the Department then generally determines that immunity is appropriate, unless plaintiff has provided a basis for questioning that preliminary assessment.

Particularly in light of the generalized allegations in the instant complaint, the Department has determined that the plaintiffs have not supplied a sufficient reason for the Department to question its preliminary assessment in this case that former President Zedillo's alleged actions were taken in an official capacity. The complaint is predicated on former President Zedillo's actions as President, not private conduct. Plaintiffs' allegations seeking to hold former President Zedillo liable simply because he was serving as President when lower level officials allegedly committed tortious acts do not provide the Department with a sufficient reason to question its preliminary assessment described above. To the extent the Complaint contains any particularized allegations of specific actions allegedly taken by former President Zedillo himself, the Department finds that they also do not provide a sufficient reason to question its initial assessment. For these reasons, the Department has determined that former President Zedillo's alleged actions were taken in an official capacity, and he enjoys immunity from this lawsuit.

Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate filing setting forth its determination that former President Zedillo is immune from suit in this action.

Sincerely,

A handwritten signature in black ink, appearing to read 'Harold Koh', written in a cursive style.

Harold Hongju Koh
Legal Adviser