[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Court of Appeals Docket #: 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
AND UNITED STATES OF AMERICA,
Defendants-Appellees.

On Appeal From A Final Order Dismissing the Complaint for Lack of Jurisdiction Based on a Suggestion of Immunity filed by the Department of Justice on behalf of the Department of State.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. APPELLANT'S REPLY[1]

1. **Neither the Constitution, nor the Torture Victim Protection Act ("TVPA"), nor customary international law ("CIL") crowns the Executive with exclusive authority to determine whether a sitting head of state is immune from a TVPA suit founded on the grisly and universally abhorred crimes of torture or extrajudicial killing under color of foreign law.** The Amicus relies on a series of cases addressing both foreign sovereign immunity (now governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 (1976)) and head of state immunity for the proposition that Executive suggestions of immunity in Article III Torture Victim Protection Act litigation are binding on the judiciary. Torture Victim

[1] Appellee's Statement in Lieu of Brief adds nothing to the Amicus Brief of the United States. The Statement addresses jurisdictional arguments not raised in this appeal (Statement 4-7). The Statement ignores the Supreme Court's meticulous analysis in *Mohamad v. Palestinian Authority*, 566 U.S. ___ (2012) of the meaning of "an individual" in the Torture Victim Protection Act. The Statement otherwise echoes the Amicus theory of immunity for the Defendant, i.e., that this Court must echo the Executive's unelaborated assertion that the Constitution, the TVPA, customary international law, federal common law, or some permutation or combination of all three ousts the judicial branch from an independent adjudication of whether the Defendant, the sitting head of state of Sri Lanka, is immune from a civil TVPA damage suit for grisly, extrajudicial killings under color of foreign law—a universal crime under international law.

Protection Act, Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 (1991). According to the Amicus, when the Executive speaks on immunity, the judiciary is ousted of jurisdiction to interpret the law. Adjudication of the case moves from Article III courts to the Article II President. No United States Supreme Court decision supports such a startling usurpation by the Executive of the customary duty of the judiciary to interpret the law under the Constitution's separation of powers. Chief Justice John Marshall emphasized in *Marbury v. Madison*: "It is emphatically the province and *duty* of the judicial department to say what the law is." 5 U.S. 137, 177 (1803) (emphasis added). Adumbrating the political question doctrine, the Chief Justice recognized that there may be a category of political acts "the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy." *Id.* at 164. The Supreme Court recently explained in *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2011), the narrowness of the political question doctrine:

> In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). Our precedents have

> identified a narrow exception to that rule, known as the "political question" doctrine. *See, e.g.*, *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). We have explained that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In such a case, we have held that a court lacks the authority to decide the dispute before it.

Id. The Amicus does not, however, contend that head of state immunity for TVPA suits is a political question which the Constitution has assigned to the President. Indeed, the Amicus fails to cite any source of statutory or customary international law authority (or penumbras or emanations from such authorities) for the claimed power of the Executive to make conclusive head of state immunity determinations for the judiciary in TVPA litigation. So what is the source of the Executive's asserted right to order Article III courts to dismiss TVPA suits against sitting heads of state? Article I, section 8, clause 10, specifically authorizes Congress, not the Executive, "to define and punish . . . offenses against the law of nations," such as torture or

extrajudicial killing under color of foreign law. U.S. Const. art. I, § 8, cl. 10. And *Marbury* instructs that it is the duty of the judiciary to say what the law is, including head of state immunity *vel non* in TVPA cases. Executive power to supersede or displace the constitutional roles of Congress and the judiciary in defining and interpreting international or domestic law cannot be conferred by the ether. As Justice Oliver Wendell Holmes observed in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 222 (1917) (dissenting), "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." *Id.*

The judiciary routinely decides questions that impact foreign policy or national security despite Executive arguments that a decision might wreak havoc in the foreign relations of the United States. *See, e.g.*, *Leal Garcia v. Texas*, 564 U.S. ___ (2011); *New York Times v. United States*, 403 U.S. 713 (1971). Thus, the Executive's claim in this case that TVPA immunity for Defendant Rajapaksa, allegedly complicit in stomach-wrenching universal human rights crimes, would further the foreign policy of the Executive (but not Congress), *simpliciter*, is no justification for this Court to flee from its constitutional duty to make

an independent assessment of the sitting head of state immunity claim.

The Amicus argues that "the common law" is the source of absolute Executive power to immunize a sitting head of state from civil suit under the TVPA. Br. 12-13. But there has been no general Article III power to fashion federal common law at least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). *See also United States v. Hudson and Goodwin*, 11 U.S. 32 (1812) (denying federal common law power to create crimes). In addition, the FSIA established that foreign immunity from suit in United States courts is a policy question for the legislative branch. Foreign immunity questions have not been delegated by Congress to the Executive with limitless discretion to decide. Nowhere does the Amicus indicate a constitutional or statutory source for Article III courts to decree a federal common law governing foreign sovereign immunity. And a brooding omnipresence in the sky cannot fill the gap.

In 1952, Jack B. Tate wrote a letter to the attorney general suggesting a new "restrictive" theory of immunity that distinguished between private and official actions. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney Gen. Philip B.

Perlman (May 19, 1952), reprinted in 26 Dep't of State Bulletin 984-985 (1952). Chief Justice Burger later elaborated:

> The restrictive theory was not initially enacted into law, however, and its application proved troublesome. As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory . . .
>
> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H. R. Rep. No. 94-1487, p. 7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.

Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1980) (footnotes omitted). The Chief Justice, speaking for a unanimous Court, explained that Congress intended to remove the Executive from the process of making determinations of immunity because it wished to "clarify standards" and insure "decisions [be] made on purely legal grounds and under procedures that insure due process." *Id.* (internal quotations omitted).

Sitting head of state immunity is first cousin of foreign sovereign immunity. Both doctrines balance the dignity interests of foreign states, United States foreign policy charted by Congress and the Executive, and the demands of justice as legislated by Congress. The two doctrines are regularly conflated, as they are in the Amicus Brief.

It seems implausible that in enacting the TVPA to create private causes of action for the horrific universal crimes of torture and extrajudicial killing under color of foreign law perpetrated by "an individual" Congress intended (by silence) to reject the Foreign Sovereign Immunity Act ("FSIA") policy of purging the international or domestic politics of the Executive from the evaluation of foreign immunity claims to safeguard due process and an evenhanded

application of the law. The State Department's sitting head of state immunity determinations, however, flout due process. There are no written standards for granting or withholding immunity. The parties involved in the litigation are denied an opportunity to be heard. Decisions are conclusory and uninformative. There is no system of precedents to constrain the Department's discretion. The Department lacks subpoena power and its decisions are not subject to appellate review. And the decision-maker is biased in favor of the foreign policy and political needs of the President. The law—including CIL—is an afterthought.

Accordingly, the District Court erred in holding that the Executive's interpretation of the TVPA to confer immunity on Defendant Rajapaksa sued in his individual capacity for homicidal atrocities was conclusive as a matter of federal common law.

2. **The TVPA Creates a Cause of Action Against Sitting Heads of State for the Universal Crimes of Torture or Extrajudicial Killing Under Color of Foreign Law.** The Amicus does not dispute that the plain meaning of "an individual" in the TVPA includes sitting

heads of state. Nor does the Amicus deny that Justice Sotomayor's meticulous opinion in *Mohamad* refrains from even hinting at a head of state exception. Neither does the Amicus deny that the TVPA policy of deterrence and compensation to victims of torture and extrajudicial killing would be advanced by the plain meaning of the TVPA. The Amicus also does not suggest that a plain meaning interpretation of the TVPA would yield absurd results. Further, the Amicus does not maintain that CIL endows the Executive with plenary authority to invoke or withhold immunity for sitting heads of state in suits brought to enforce the TVPA. Indeed, the Amicus argues that the Executive is not bound by CIL in deciding whether to invoke immunity for sitting heads of state. The Amicus maintains that the Executive is crowned with limitless discretion in granting or withholding immunity under federal common law untethered to the Constitution or federal statute. Br. 12-13. As noted above, the plain language and purposes of the TVPA do not support such an extravagant grant of Executive power. Neither does the legislative history.

Contrary to the position of the Amicus and the District Court, there was good reason for Congress to distinguish between immunity

for sitting heads of state when visiting the United States as opposed to immunity for gruesome TVPA violations perpetrated abroad. Face-to-face diplomacy is furthered by recognizing immunity in the first case, but not in the latter, which is barren of any diplomatic element.

The Amicus does not argue that CIL shields Defendant Rajapaksa from suit under the TVPA for extrajudicial killings under color of foreign law. In addition, the Amicus agrees that the TVPA creates a cause of action against sitting heads of state by asserting that the Executive may withhold an assertion of immunity and permit the litigation to proceed. Br. 4. The only issue in dispute before this Court is whether the Executive under putative federal common law is empowered arbitrarily to extinguish TVPA claims against sitting heads of state with nothing more than a conclusory explanation. Neither the plain language nor purposes nor legislative history of the TVPA supports an affirmative answer.

3. **Supreme Court foreign sovereign immunity decisions concerning in rem actions against foreign government vessels have been misinterpreted and misapplied to confer sitting head**

of state immunity for unspeakable extrajudicial killings in violation of CIL. The sovereign immunity cases decided by the Supreme Court cited by the Executive in its Suggestion of Immunity all involve issues of admiralty and foreign sovereign immunity. None involved head of state immunity or harrowing crimes in violation of CIL, such as torture or extrajudicial killing. The immunity cases relied on by the Amicus misinterpreted Chief Justice John Marshall's opinion in *The Schooner Exchange v. McFaddon* in 1812 far beyond its recognition that the judicial branch must accept the Executive's representation of *facts* pertinent to foreign sovereign immunity concerning foreign ships as opposed to the Executive's interpretation of the law, which is the task of Article III courts.

In *Schooner Exchange*, a ship seized by Napoleon's Navy, having anchored in distress at a Philadelphia port, could not be reclaimed by the ship's original owners, U.S. citizens. The ship had docked in friendly waters, and was held immune from suit in admiralty because the vessel was considered an extension of the foreign sovereign.

In *Schooner Exchange*, Mr. Dallas, attorney for the District of Pennsylvania, appeared and filed a suggestion, stating:

> That in as much as there exists between the United States of America and Napoleon, emperor of France and king of Italy, &c. &c. a state of peace and amity; the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 118 (1812). *Schooner Exchange*, though oft-cited as a watershed case for sovereign immunity, pivots on admiralty law and international treaty, not on the power of the Executive to interpret and apply the law of immunity in lieu of the judicial branch. While the U.S. was at war with Britain, certain treaties and practices allowed warships of friendly nations in distress to seek safe harbor in U.S. ports. Mr. Dallas, on behalf of the appellants**,** asserted that "[i]t [was] proved that [the *Exchange*] arrived [in Philadelphia] in distress." *Id.* at 122. Dallas noted that certain unfriendly acts of a foreign sovereign would forfeit immunity: If a ship; "[commits] an offense while [in the U.S.]"; or "[comes] to trade." *Id.*

Mr. Dallas conceded that any nation may alter the CIL of foreign

sovereign immunity by legislation or otherwise: "We do not, however, deny the right of a nation to change the public law as to foreign nations, upon giving notice." *Id.* at 123. Chief Justice Marshall observed:

> If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

Id. at 147. Chief Justice Warren Burger later emphasized in *Verlinden*, "[a]s *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden* at 486.

In *Schooner Exchange*, nowhere does Chief Justice Marshall even hint that the Supreme Court was bound to accept the Executive's interpretation or application of the Law of Nations, now known as CIL,

concerning foreign sovereign immunity. The Chief Justice confined the authoritative role of the Executive to representations of *facts* bearing on immunity, i.e., whether the seized vessel was:

> [A] public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, [that] entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, [and] that while necessarily within it, [she] [demeaned]herself in a friendly manner . . .

Schooner Exchange at 147. Chief Justice Melville Fuller understood *Schooner Exchange* in precisely that way in writing for the Court in *Stanley v. Schwalby*:

> Such was the leading case of *The Exchange,* 7 Cranch, 116, 147, where the public armed vessel of a foreign sovereign having been libelled in a court of admiralty by citizens of the United States to whom she had belonged and from whom she had been forcibly taken in a foreign port, by his order, the **District Attorney filed a suggestion stating the facts**, and the Circuit Court having entered a decree for the libellants, disregarding the suggestion, this court, upon an appeal taken by the attorney of the United States, reversed

> the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

Stanley v. *Schwalby,* 147 U.S. 508, 513 (1893), citing *Schooner Exchange, supra* (emphasis added). Chief Justice Melville Fuller drew a clear distinction between judicial reliance on representations of fact by the Executive, as opposed to the legal conclusions that might follow from those facts, which are "emphatically the province and duty of the judicial branch." *Marbury, supra.*

Before its citation in *The Navemar*, *Schooner Exchange* was cited almost exclusively in cases involving foreign sovereign immunity and admiralty law. *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*, 303 U.S. 68 (1938). *See also United States v. Cornell Steamboat Co.*, 202 U.S. 184, 190 (1906) (which "[was] practically a libel *in personam* for the salvage of government property, viz., of $6,000 duties collected by the Government upon a cargo of sugar saved from loss by fire, while on board a lighter in the harbor of New York" (*Id.* at 189)); *Ex parte Muir*, 254 U.S. 522, 531 (1921) (involving competing

suits between the privately-owned British steamship the *Glenenden* (later alleged by counsel for the British Embassy to be in service of the Crown) and the *Giuseppe Verdi,* a privately-owned Italian steamship, over the collision between the ships in the Gulf of Lyons); *Ex parte New York*, 256 U.S. 503, 510 (1921) (New York II) (involving a libel in admiralty against the "Steam Tug *Queen City* . . . to recover damages alleged to have been sustained through the death of [Evelyn McGahan] by drowning, due to the negligent operation of the *Queen City* . . ." which the Attorney General for the State of New York stated, via suggestion, that the ship was the property of an employee in the service of the State of New York) (*Id.* at 508); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 124 (1923) (involving a dozen cases of ships carrying spirits during Prohibition of which the court dismissed the first ten that involved foreign ships and reversed the dismissal of the two that involved domestic ships)*; Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 571-574 (1926) (involving "a libel *in rem* against the steamship 'Pesaro' on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York" which was later alleged by the Italian Ambassador to have

been "owned, possessed, and controlled by the Italian Government") (*Id.* at 569-570).

Other cases citing *Schooner Exchange* include state sovereign immunity (*See Coleman v. Tennessee*, 97 U.S. 509, 515-516 (1879) and foreign sovereign immunity (*See United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201 (S.D.N.Y. 1929) (in which the court found "a French government-owned mining corporation was not entitled to immunity because the corporation was an entity distinct from its stockholders" as explained in *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 187 (2d Cir. 2003) (internal citations omitted)).

Schooner Exchange, cited in only a few dozen cases between 1812 and 1938, witnessed an explosion of popularity after *The Navemar*. Since 1943, after serving as the foundation for the Supreme Court's decision in *Ex parte Peru,* 318 U.S. 578 (1943), the citations of *Schooner Exchange* in federal opinions climbed to over 230. *Ex parte Peru* itself features in over 220 opinions since 1943.

How did the meaning of *Schooner Exchange* transform between 1812 and 1938-1943? In 1893, Chief Justice Melville Fuller's opinion in

Stanley v. Schwalby recounts that the precedent permits, nay, is bound to allow the Executive to file suggestions of fact but not law in cases implicating foreign sovereign immunity. In *The Navemar*, the Executive remained conspicuously silent regarding the foreign ship's immunity. The Spanish Acting Consul General suggested that she was property of the Republic of Spain. Writing for the Court, Justice Stone averred that "[t]he district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the 'Navemar' had been in the possession of the Spanish Government." *The Navemar* at 75. An otherwise uneventful case, stray comments in *The Navemar* gave birth to Executive supremacy over foreign sovereign immunity questions.

The Suggestion of Immunity in *Ex parte Peru* cites to a counter-conditional buried in *The Navemar*. While the Spanish Acting Consul General maintained the *Navemar* was entitled to the protections of a ship of the sovereign Republic of Spain, the Executive declined to opine as to whether or not the Court should continue to exercise jurisdiction over the case. The fifth bullet point in the Suggestion of Immunity in *Ex parte Peru* reads (and misquotes the opinion) in *The Navemar*:

> By reason of the premises it has been conclusively determined that the said Peruvian Steamship UCAYALI Proceded (sic) against herein, is immune from the jurisdiction and process of this Court and the claim of immunity having been "recognized and allowed by the Executive Branch of the Government, it is the duty of this Court to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction." *The Navemar,* 303 U. S. 68.

Suggestion of Immunity, *The Ucayali,* 47 F.Supp. 203 (E.D.La. 1942) (error original). The Executive, slipshod and careless, omitted a word from Justice Stone's opinion ("If the claim is recognized and allowed by the executive branch of government, it is **then** the duty of the courts to release the vessel upon appropriate suggestion." *The Navemar* at 74 (emphasis added)), evidently overlooked a significant point made in *Schooner Exchange*: namely that it is appropriate to defer to the Executive to determine *facts* bearing on a claim of foreign sovereign immunity, for example, whether a foreign sovereign is friend or foe, who is ambassador, or who is sitting head of state; but that the legal question of whether the facts justify a claim of foreign sovereign immunity under customary international law or otherwise is

"emphatically the province and duty of the judicial department." *Marbury v. Madison,* 1 Cranch 137, 177 (1803). Chief Justice John Marshall authored both *Marbury* and *Schooner Exchange,* which strengthens the conviction that the latter did not abandon the former's insistence that authoritative interpretations of the *law* in Article III case or controversies are entrusted to the judicial branch. The Supreme Court has echoed Chief Justice Marshall's words dozens of times. *See Fairbank v. United States*, 181 U.S. 283, 286 (1901); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Mackey v. United States*, 401 U.S. 667, 678 (1971) (Harlan, J., concurring); *United States v. Nixon*, 418 U.S. 683, 703 (1974) ; *Nixon v. Adm'r of Gen. Servs*, 433 U.S. 425, 503 (1977) (Powell, J., concurring); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 512 (1977) fn. 7 (Burger, C.J., dissenting); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 744 (1979) (Powell, J., dissenting); *Carlson v. Green*, 446 U.S. 14, 51 (1980) (Rehnquist, J., dissenting); *United States v. Will*, 449 U.S. 200, 217 (1980); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Allen v. Wright*, 468 U.S. 737, 794 (1984) (Stevens, J. dissenting); *Thompson v. Okla.,* 487 U.S. 815, 834 (1988) fn. 40; *Harmelin v. Mich.*, 501 U.S. 957, 1017 (1991) (White,

J., dissenting); *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 922 (1995); *Clinton v. Jones*, 520 U.S. 681, 703 (1997); *Bush v. Gore*, 531 U.S. 98, 128 (2000) fn. 7 (Stevens, J., dissenting); *Miller v. French*, 530 U.S. 327, 352 (2000) fn. 3 (Souter, J., concurring); *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting); *Vieth v. Jubelirer* 514 U.S. 267, 277 (2004); *J. E. M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.* 534 U.S. 124, 130 (2004); *Sanchez-Llamas v. Or.*, 548 U.S. 331, 534 (2006); *Zivotovsky v. Clinton*, supra, 1427-1428.

The Supreme Court misapprehended *Schooner Exchange* again in 1945 in *Republic of Mexico v Hoffman*, 324 U.S. 30 (1945). There a suit was brought in rem in admiralty involving a merchant ship arising out of a collision between the American fishing vessel *Lottie Carlson* and the vessel *Baja California.* The latter was claimed by the Mexican Ambassador to the United States to be owned by the Republic of Mexico at the time of her libel and seizure. Speaking through then Chief Justice Stone, the Court struggled to define the role of the Executive in confronting the question of foreign sovereign immunity. There were concerns respecting our alliance with Mexico provoked by the

Zimmerman note. The Chief Justice thus refrained from extending to the Republic of Mexico either grace or comity. Since the Executive declined to support the assertion of Mexican ownership and foreign sovereign immunity advanced by the Mexican ambassador, the Court proceeded with the suit.

In doing so, Chief Justice Stone referenced *Schooner Exchange*:

> And in *The Exchange,* Chief Justice Marshall introduced the practice, since followed in the federal courts, **that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government**, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General. *United States v. Lee*, 106 U.S. 196, 209; *Ex parte Muir, supra*, 533; *The Pesaro, supra*, 217; *Compania Espanola v. The Navemar, supra*, 74; *Ex parte Peru, supra*, 588. This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings. *Compania Espanola v. The Navemar*,

supra; *Ex parte Peru*, *supra*.

> In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations. *See Ex parte Peru*, *supra*, 588.

Id. at 34-35 (emphasis added). Here, the Chief Justice provides the narrowest interpretations of the practice of Executive intervention as to facts binding on the judiciary: in circumstances involving "jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government." *Id.* at 34. Seeking to transform an acorn into a mighty oak, the Executive maintains that Chief Justice Stone's understanding of *Schooner Exchange* inexorably leads to the stunning conclusion that Executive suggestions of immunity for a sitting head of state sued under the congressionally enacted TVPA for the odious universal crimes of extrajudicial killings, whose perpetrators Judge Kaufman condemns as "*hostis humani generis,* an enemy of all mankind," are binding on the

judicial branch, making judges morally complicit in the human carnage. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir.1980) (emphasis original). According to the Executive, the most savage sitting heads of state may commit the most reprehensible universal crimes with impunity, which creates a perverse incentive to persist in butcheries to remain in power free from the reach of the law. Under that Executive theory, Adolph Hitler could not have been sued under the TVPA for the extrajudicial killing of six million Jews! Every canon of justice should be strained to avoid such judicial wickedness.

Justice Felix Frankfurter, a champion of judicial restraint, in his concurrence spotted a contradiction in the foreign sovereign immunity decisions of the Supreme Court. He wrote in reference to *The Pesaro:*

> Thus, in *Berizzi Bros. Co.* v. *The Pesaro, supra,* this Court felt free to reject the State Department's views on international policy and to formulate its own judgment on what wise international relations demanded. The Court now seems to indicate, however, that when, upon the seizure of a vessel of a foreign government, sovereign immunity is claimed, the issue is whether the vessel 'was of a character and operated under conditions entitling it to the immunity in conformity with the principles accepted by the department of the government charged with the conduct of our foreign

relations.'

Republic of Mexico v Hoffman, supra, at 39 (concurring) (internal citations omitted)

In any event, to recognize foreign sovereign immunity in in rem litigation against a foreign government vessel is a far cry from bestowing head of state immunity in TVPA litigation founded on chilling extrajudicial killings in violation of CIL.

4. **CIL Rejects the Executive's Optional Sitting Head of State Immunity Power for TVPA Suits Resting on the Universal Crimes of Torture or Extrajudicial Killing.** The Executive maintains that it will not suggest the immunity of a sitting head of state in every TVPA case, and its decision to do so will depend on the implications of the litigation for the Nation's foreign relations. Indeed, the Executive does not deny it could change its mind on immunity at any time, and thus confer subject matter jurisdiction over a case on appeal after it had been dismissed for lack of subject matter jurisdiction by the trial court following an initial suggestion of immunity by the Executive. The Amicus does not explain how an optional view of sitting

head of state immunity is compatible with CIL, nor can it. Courts and treaties have repeatedly and emphatically stated that CIL is not optional. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.CJ. 4, 44 (Feb. 20); Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14, 97-98 (June 27); Statute of the International Court of Justice art. 38(I)(b), June 26, 1945 59 Stat. 1055. That the Executive asserts it enjoys the right to suggest sitting head of state immunity on a case-by-case basis dependent upon its foreign policy considerations implies that sitting head of state immunity is not legally binding on the Executive and therefore is not CIL. Indeed, the Amicus explicitly states the Executive's suggestion of immunity in this case is not dictated by CIL.

If sitting head of state immunity is CIL, then once the Executive states as fact that an individual is the recognized sitting head of state, immunity would flow automatically and compulsorily from that assertion unless either the individual later lost his position, immunity was waived by the sovereign state of which he is head, or CIL evolved to no longer allow sitting head of state immunity in the litigation at issue. It is far from clear the first circumstance would abrogate immunity, as

the sole case law the Executive proffers for CIL principles states that it would not, while the latter implies a level of dynamism and impermanence in CIL that questions the value of the precedents the Amicus relies upon. *Arrest Warrant of 11 Apr. 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 32 (Feb 14, 2002).

The Amicus asserts that sitting head of state immunity in civil suits for the universal crimes of torture or extrajudicial killings is fully consistent with CIL and cites to *Arrest Warrant* for this position. Yet *Arrest Warrant* is solely concerned with the assertion of sitting head of state immunity in **criminal** proceedings. *Id.* It makes absolutely no determination on such immunity's applicability in a civil context where, as here, only damages are sought that may be covered by liability insurance. Furthermore, it explicitly states that any recognition of sitting head of state immunity (in any context) must be balanced against the "interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members." *Arrest Warrant Case* (Joint Separate Opinion of Higgins, Kooijmans and Buergenthal), 2002 I.C.J. ¶ 75. It also explicitly rejects the suggestion that national courts have no competence in holding the perpetrators of

international crimes accountable, or that such matters should only be left to international treaties and tribunals. *Id.* at ¶ 51. This balancing test is continually evolving with a clearly discernible trend towards rejecting impunity for the most repugnant offenses, attribution of responsibility and accountability and the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. *Id.* In the criminal context, immunity is compelling in some circumstances because an arrest or detention of a sitting head of state would cripple the ability of the sovereign state to function. *Arrest Warrant* (Judgment) at ¶¶ *53, 55.* Such consequences simply do not obtain in civil litigation, which does not even require the Defendant to appear. The Supreme Court recognized the tolerable burden civil litigation imposes on sitting heads of state in denying immunity to the President of the United States in *Clinton v. Jones,* 520 U.S. 681 (1997). The balancing test the Amicus asserts is required by CIL comes down firmly on the side of accountability for the perpetrators of crimes universally condemned by the international community, which makes them enemies of mankind.

That a rule is established as CIL does not mean that all states

follow that rule. CIL, while legally obligatory (not optional), only requires the "general practice" of states or that a rule "not [be] rejected by a significant number of important states." Statute of the International Court of Justice art. 38, *supra*; Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987). It does not require unanimity, a unity in their practice or a complete agreement amongst states. *See* Restatement (Third), *supra*, cmt. (b) ("A practice can be general even if it is not universally followed.") In other words, CIL recognizes that there will be states that are outliers and exceptions to the general rule, and in the field of human rights law, the United States has long been recognized as not only an outlier to the general practice of states, but as pushing CIL towards greater recognition of human rights and greater accountability for those who violate them. (Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity,* 2010 Sup. Ct. Rev. 213, 256 (2010): "U.S. courts have been contributing . . . to the erosion of CIL immunity principles for more than three decades."). International courts have recognized that the U.S. Congress is at the forefront of these efforts, expanding civil litigation jurisdiction over torture and

extrajudicial killings beyond the traditional limits of CIL. The joint separate opinion in *Arrest Warrant* notes that civil jurisdiction over human rights violations pursuant to the Alien Tort Statute (forerunner of the TVPA) is a "unilateral exercise of the function of guardian of international values [that] has not attracted the approbation of States generally," while the United Kingdom's House of Lords has described the TVPA itself as not "express[ing] principles widely shared and observed among other nations." *Id.* at ¶ 48; *Jones v. Ministry of Interior*, [2006] UKHL 26, ¶ 20 (U.K. House of Lords 2006). In other words, the TVPA is pioneering human rights law, and refusing to indulge a head of state immunity would be harmonious with its pioneering spirit.

5. **Unconstitutional Takings. The Supreme Court indicated in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that an executive order of the President that extinguished pending legal claims in federal court required payment of just compensation under the Takings Clause of the Fifth Amendment.** In this case, the Amicus maintains that the Executive may extinguish legal claims under the

TVPA by issuing a suggestion of immunity indistinguishable from the executive orders at issue in *Dames & Moore*, both of which must be automatically followed by federal courts. If the Amicus' legal theory is correct, the United States must pay just compensation to Appellants. That steep financial cost is an additional reason to reject the theory as an Executive invention at variance with congressional intent in enacting the TVPA. The Amicus makes no attempt to distinguish this case from *Dames & Moore*. Br. at 11 n.4.

II. CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed and the case remanded for further proceedings.

DATED: DECEMBER 7, 2012

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III. CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(A)(7)(C)

I hereby certify that the foregoing REPLY BRIEF FOR APPELLANTS KASIPPILLAI MANOHARAN, DR., ET AL., contains no more than 7,000 words and fully complies with Circuit Rule 32(a)(7)(C).

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2012, a true and correct copy of foregoing REPLY BRIEF FOR APPELLANTS KASIPPILLAI MANOHARAN, DR., ET AL, was served upon Defendant's counsel of record and Interested Parties via Electronic Claims File (ECF):

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