

2. Under customary rules of international law, recognized and applied in the United States, the head of a foreign government is immune from the jurisdiction of United States courts under the doctrine of head-of-state immunity. See Lafontant v. Aristide, 844 F. Supp. 128, 133 (E.D.N.Y.), appeal dismissed, No. 94-6026 (2d Cir. 1994); 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). The head-of-state immunity doctrine serves to protect the dignity of foreign leaders and reflects the principle that conflicts with sovereign nations are often best handled through diplomacy rather than litigation. See Ex parte Peru, 318 U.S. 578, 588-89 (1943). The doctrine traces its roots to the Supreme Court's decision in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Although that case held merely that an armed ship of a friendly state is exempt from U.S. jurisdiction, it has come "to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983). Over time, the absolute immunity of the state itself has been diminished through the widespread acceptance of the restrictive theory of sovereign immunity, a theory reflected in the 1976 passage of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. Nevertheless, U.S. courts have held that the FSIA's limitations on immunity do not apply to heads of state. As the Seventh Circuit recently explained,

The FSIA does not . . . address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch.

Wei Ye v. Jiang Zemin, 383 F.3d 620, 625 (7th Cir. 2004) (citations and footnotes omitted); see also United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Because the FSIA addresses

neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach . . . only pursuant to the principles and procedures outlined in The Schooner Exchange and its progeny.”). Indeed, as another judge of this Court has concluded, the FSIA does not disturb the traditional procedures governing head-of-state immunity: “The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state.” Lafontant, 844 F. Supp. at 137.²

3. The Legal Adviser of the U.S. Department of State has informed the Department of Justice that the government of Grenada has requested that the United States Government suggest the immunity of Prime Minister Mitchell in this action. The Legal Adviser has further informed the Department of Justice that the Department of State recognizes Prime Minister Mitchell as the sitting head of government of Grenada and “allows the immunity of Prime Minister Mitchell from this suit.” Letter from John B. Bellinger, III, to Peter D. Keisler (Nov. 1, 2007) (copy attached as Ex. 1).

4. The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. See Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex parte Peru, 318 U.S. at 588-89. In Ex parte Peru,

² Although the Second Circuit has not squarely ruled on the issue, it has suggested in dicta that the FSIA does not displace traditional head-of-state immunity procedures. The court first noted the issue in In re Doe, 860 F.2d 40, 45 (2d Cir. 1988), where it remarked that the FSIA’s silence left the scope of head-of-state immunity uncertain; it repeated this comment in Kadic v. Karadzic, 70 F.3d 232, 248 (2d Cir. 1995). More recently, the court indicated that the FSIA’s text and legislative history create “some doubt as to whether the FSIA was meant to supplant the ‘common law’ of head-of-state immunity,” but ultimately declined to decide the question. Tachiona v. United States, 386 F.3d 205, 220-21 (2d Cir. 2004); see also Kensington Int’l v. Itoua, Nos. 06-1763 & 06-2216, 2007 U.S. App. LEXIS 24354, at *30-31 (2d Cir. Oct. 18, 2007) (explaining same); Matar v. Dichter, 500 F. Supp. 2d 284, 289-91 (S.D.N.Y. 2007) (same).

the Supreme Court, without further scrutinizing the Executive Branch’s immunity determination, declared that the Executive Branch’s suggestion of immunity “must be accepted by the courts as a conclusive determination by the political arm of the Government” that the retention of jurisdiction would jeopardize the conduct of foreign relations. Ex parte Peru, 318 U.S. at 589; see also Hoffman, 324 U.S. at 35 (“It is . . . not for the courts to deny an immunity which our government has seen fit to allow . . .”). Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity has been filed, it is the “court’s duty” to surrender jurisdiction. Ex parte Peru, 318 U.S. at 588; see also Hoffman, 324 U.S. at 35-36.³

5. The courts of the United States have applied these principles in numerous cases to dismiss actions against foreign heads of state upon the Executive Branch’s suggestion of immunity. See, e.g., Wei Ye, 383 F.3d at 625 (“[T]he Executive Branch’s suggestion of immunity is conclusive and not subject to judicial inquiry.”); Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974) (“For more than 160 years American courts have consistently applied the doctrine of sovereign immunity . . . with no further review of the executive’s determination.”); Doe v. Roman Catholic Diocese of Galveston-Houston, 408 F. Supp. 2d 272, 279 (S.D. Tex. 2005) (judicial review of the Executive Branch’s determination that Pope Benedict XVI is entitled to head-of-state immunity in sex-abuse case is “not appropriate”); A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875, 882 (N.D. Ill. 2003) (suggestion of immunity of former Chinese President Jiang Zemin is “dispositive”

³ Just as the FSIA does not disturb traditional head-of-state immunity procedures, neither does it alter the binding nature of the Executive Branch’s suggestion of immunity. Before enactment of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred responsibility for determining the immunity of foreign states from the Executive Branch to the Judicial Branch. It did not, however, alter the Executive Branch’s authority to suggest head-of-state immunity for foreign leaders or change the conclusive effect of such suggestions. See Wei Ye, 383 F.3d at 624-25; Noriega, 117 F.3d at 1212.

and requires dismissal), aff'd sub nom. Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Leutwyler v. Queen Rania Al Abdullah, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (suggestion of immunity of Jordan's Queen Rania is "entitled to conclusive deference" and requires dismissal of all claims against her); First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (court "bound to accept . . . as conclusive" the suggestion of immunity of Sheikh Zayed, President of the United Arab Emirates, in action alleging racketeering, fraud, and various other torts); Lafontant, 844 F. Supp. at 139 (suggestion of Haitian President Aristide's immunity is "controlling" and requires dismissal of action alleging that he ordered the murder of plaintiff's husband); Saltany, 702 F. Supp. at 320 (suggestion of Prime Minister Thatcher's immunity deemed "conclusive" in dismissing claims alleging British complicity in U.S. air strikes against Libya).

6. Judicial deference to the Executive Branch's suggestion of immunity is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. First, "[s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." Spacil, 489 F.2d at 619 (citing United States v. Lee, 106 U.S. 196, 209 (1882)); see also Ex parte Peru, 318 U.S. at 588; Rich, 295 F.2d at 26. Second, the Executive Branch's institutional resources and expertise in foreign affairs make it peculiarly well situated to weigh the implications of immunizing a foreign leader from suit. By comparison, "the judiciary is particularly ill-equipped to second-guess" how the Executive Branch's determinations may affect the Nation's interests. Spacil, 489 F.2d at 619; see also Wei Ye, 383 F.3d at 627. Finally, and "[p]erhaps more importantly, 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.

CONCLUSION

For the foregoing reasons, the United States respectfully suggests the immunity of Prime Minister Mitchell in this action.

Date: November 23, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2007, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

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