

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

United States Courts
Southern District of Texas
FILED

SEP 20 2005

BL

Michael N. Milby, Clerk

JOHN DOE I, JOHN DOE II, and
JOHN DOE III,

Plaintiffs,

v.

ROMAN CATHOLIC DIOCESE OF
GALVESTON-HOUSTON, et al.,

Defendants.

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CIVIL ACTION NO. H-05-1047

SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

The undersigned attorneys of the United States Department of Justice, at the direction of the Attorney General of the United States, pursuant to 28 U.S.C. § 517,¹ respectfully inform this Honorable Court of the interest of the United States in the pending lawsuit against defendant Joseph Ratzinger, now Pope Benedict XVI, the sitting head of state of the Holy See, and suggest to the Court the immunity of the Pope. In support of its interest and suggestion, the United States sets forth as follows:

1. The United States has an interest in this action against the Pope insofar as it raises the question of immunity from the Court's jurisdiction of the head of state of a foreign state. The interest of the United States arises from a determination by the Executive Branch of the

¹ 28 U.S.C. § 517 provides, in relevant part, 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. . ."

Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against the Pope would be incompatible with the United States' foreign policy interests. As discussed below, this determination should be given effect by this Court.

2. The Legal Adviser of the United States Department of State has informed the Department of Justice that the Apostolic Nunciature has formally requested the Government of the United States to suggest the immunity of the Pope from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of Pope Benedict XVI from this suit." Letter from John B. Bellinger III to Peter D. Keisler, dated August 2, 2005 (copy attached as Exhibit 1).

3. The doctrine of head of state immunity is applied in the United States as a matter of customary international law and an incident of the Executive Branch's authority in the field of foreign affairs. Unlike sovereign and diplomatic immunity, head of state immunity has not been codified in U.S. law either by statute or by treaty. As a matter of U.S. law, the doctrine is rooted in the Supreme Court's decision in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Although this case held merely that an armed ship of a friendly state was exempt from U.S. jurisdiction, the decision "came to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). Over time, the absolute immunity of the state itself was diminished through the widespread acceptance by states of the restrictive theory of sovereign immunity, a theory reflected in the passage in 1976 of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§

1602 et seq. Nevertheless, U.S. courts have held that limitations on immunity contained in the FSIA do not apply to heads of state. As the Seventh Circuit recently explained in Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004):

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. 28 U.S.C. § 1603(a). 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. (citations and footnotes omitted).

Thus, under customary international law and pursuant to this Suggestion of Immunity, Pope Benedict XVI, as the head of a foreign state, is immune from the Court’s jurisdiction in this case. See, e.g., Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (court is bound by Executive Branch’s suggestion of immunity), aff’d, 79 F.3d 1145 (5th Cir. 1996); Ye, 383 F.3d at 626 n.8 (noting the “conclusive nature of the Executive Branch’s determination of immunity with regard to heads of state”); Leutwyler v. Queen Rania Al Abdullah, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (the Executive Branch’s Suggestion of Immunity “is entitled to conclusive deference”); First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (court bound by Executive Branch’s suggestion of immunity); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y.) (“the courts must defer to the Executive determination”), appeal dismissed, No. 94-6026 (2d Cir. 1994).

4. The Supreme Court of the United States 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. 578, 588-89 (1943). In Ex parte Peru, the Supreme Court, without further review of the Executive Branch's determination regarding immunity, 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 courts' retention of jurisdiction would jeopardize the conduct of foreign relations. Ex parte Peru, 318 U.S. at 589; see also Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974) ("[O]nce the State Department has concluded that immunity is warranted, and has submitted that ruling to the court through a suggestion, the matter is for diplomatic rather than judicial resolution."). Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity is 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 35.²

5. The courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch.

² The conclusive effect of the Executive Branch's suggestion of immunity in this case is not affected by enactment of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 et seq. Prior to passage of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred the determination of the immunity of foreign states from the Executive Branch to the courts. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610. However, the FSIA did not alter Executive Branch authority to suggest head of state immunity for foreign leaders, or affect the binding nature of such suggestions of immunity. See, e.g., Ye, 383 F.3d at 625 ("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."); Abiola v. Abubakar, 267 F. Supp. 2d 907, 915-16 (N.D. Ill. 2003); First American Corp., 948 F. Supp. at 1119; Gerritsen v. De la Madrid, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 21, 1986) (copy attached as Exhibit 2); Estate of Domingo v. Marcos, No. C82-1055V, slip op. at 3-4 (W.D. Wash. July 14, 1983) (copy attached as Exhibit 3).

See, e.g., Alicog, 860 F. Supp. at 382 (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of complaint against King Fahd for false imprisonment and abuse); Guardian F. v. Archdiocese of San Antonio, slip op., Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (copy attached as Exhibit 4) (suggestion of immunity required dismissal of suit against Pope John Paul II); Tachiona v. Mugabe, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001) (dismissing suit against President and Foreign Minister of Zimbabwe based upon Suggestion of Immunity filed by the Executive Branch), aff'd in relevant part sub nom. Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004); Leutwyler, 184 F. Supp. 2d at 280 (Executive Branch's Suggestion of Immunity on behalf of Queen of Jordan "is entitled to conclusive deference from the courts"); First American Corp., 948 F. Supp. at 1119 (suggestion by Executive Branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); Lafontant, 844 F. Supp. at 132 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), aff'd in part and rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989); Gerritsen, slip op. at 7-9 (suit against Mexican President De la Madrid and others for conspiracy to deprive plaintiff of constitutional rights dismissed as against President De la Madrid pursuant to suggestion of immunity); Estate of Domingo, slip op. at 2-4 (action alleging political conspiracy by, among others, then-president

Ferdinand Marcos and then-First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity); Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce suit against head of state dismissed pursuant to suggestion of immunity).

6. As the Fifth Circuit has explained, judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. Spacil, 489 F.2d at 619. First, as the Fifth Circuit explained in Spacil, "[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." Id. (citing United States v. Lee, 106 U.S. 196, 209 (1882)); see also Ex parte Peru, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. See Spacil, 489 U.S. at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. Id. Finally, and "[p]erhaps most 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." Id.

CONCLUSION

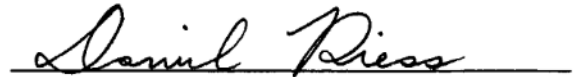
For the foregoing reasons, the United States respectfully suggests the immunity of Pope Benedict XVI in this action.

Dated: September 19, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

CHUCK ROSENBERG
United States Attorney

A handwritten signature in cursive script, reading "Daniel Riess", is written over a horizontal line.

VINCENT M. GARVEY
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THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

Peter D. Keisler
Assistant Attorney General
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U.S. Department of Justice
Washington, D.C. 20530

AUG 2 2005

Re: *Doe et al. v. Roman Catholic Diocese of Galveston-Houston et al.*,
S.D.Tex., No. 4:05-cv-1047

Dear Mr. Keisler:

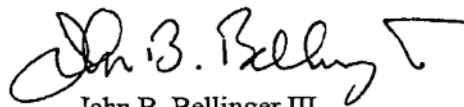
The above captioned proceeding is a civil action pending in the United States District Court for the Southern District of Texas. The suit names Joseph Cardinal Ratzinger, now Pope Benedict XVI, as a defendant.

Pope Benedict XVI is the sitting Head of State of the Holy See. In light of this status, the Apostolic Nunciature has formally requested that the Government of the United States take all steps necessary to have this action against Pope Benedict XVI dismissed. A copy of the Nunciature's diplomatic note is enclosed.

The Department of State recognizes and allows the immunity of Pope Benedict XVI from this suit. Under customary rules of international law, recognized and applied in the United States, the Pope, as the Head of a foreign State, is immune from the jurisdiction of the United States courts in this case. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate Suggestion of Immunity in this case.

This letter recognizes the particular importance attached by the United States to obtaining the prompt dismissal of the present proceedings against Pope Benedict XVI in view of the significant foreign policy implications of such an action against the Head of a foreign State.

Sincerely,



John B. Bellinger III

Enclosure

cc: Vincent Garvey
Federal Programs Branch, U.S. Department of Justice