No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,
v.
BASHE ABDI YOUSUF, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR ARLEN SPECTER, SENATOR RUSSELL D. FEINGOLD AND REPRESENTATIVE SHEILA JACKSON LEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SENATOR ARLEN SPECTER *
MEMBER
SENATE JUDICIARY COMMITTEE
711 Hart Senate Off. Bldg.
Washington, D.C. 20510
(202) 224-4254

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE* [1]

Amicus curiae, Arlen Specter, is serving his fifth term as a United States Senator from the Commonwealth of Pennsylvania. First elected in 1980, he is the longest serving United States Senator in Pennsylvania history. Senator Specter is a former Chairman and former Ranking Member of the Senate Committee on the Judiciary, of which he has been a member since assuming his duties in the Senate. He has long supported the rights of victims of torture, and the heirs of those subjected to extrajudicial killing, to seek redress in the courts of the United States.

From 1986 through 1989, Senator Specter introduced a series of bills to protect the victims of torture, none of which were enacted into law. On January 31, 1991, he introduced the Torture Victim Protection Act of 1991 (S. 313), which was considered by the full Committee on the Judiciary, favorably reported as amended, and complemented by a comprehensive committee report. *See* S. REP. NO. 102-249, 102d Cong., 1st Sess. (1991) [hereinafter Senate Report]. The House Committee on the Judiciary favorably reported a bill bearing the same title on November 25, 1991, and likewise issued a committee report. *See* H.R. REP. NO. 102-367, Pt. 1, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 84 [hereinaf-

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici* also represent that all parties have received timely notice of this brief and consented to its filing, and letters reflecting their consent have been filed with the Clerk.

ter House Report]. The full House of Representatives then passed the bill that, in 1992, was enacted into law. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1992) [hereinafter TVPA]. [ ] Senator Specter was instrumental in the passage of that bill. *See* 138 CONG. REC. S2667-04 (1992) (statements of Sen. Specter).

Amicus curiae, Russell D. Feingold, is serving his third term as a United States Senator from the state of Wisconsin. Senator Feingold is Chairman of the Subcommittee on the Constitution of the Senate Committee on the Judiciary, and is a member of the Human Rights Subcommittee. He is also the Chairman of the Subcommittee on African Affairs of the Senate Committee on Foreign Relations, on which he has served since first coming to the Senate in 1993. On the Subcommittee, Senator Feingold has worked tirelessly to raise awareness about human rights violations in Africa and has focused on conflict and human rights abuses in the Horn of Africa, particularly Somalia. He has visited the region multiple times, chaired several relevant hearings, and authored legislation on Somalia. The *New York Times* has labeled him "the Senate's leading expert on Somalia." Senator Feingold has argued throughout his time in the Senate that the United States needs to do more to ensure that human rights abusers are held accountable for their crimes and that our country does not become a safe haven for individuals guilty of torture, genocide, or other human rights violations.

Amicus curiae, Congresswoman Shelia Jackson Lee (Texas), is a member of Congress who also supports the TVPA. Representative Jackson Lee participated among the *amici* supporting respondents when this

case was before the United States Court of Appeals for the Fourth Circuit. As an outspoken supporter of the Torture Victims Protection Act, Congresswoman Sheila Jackson Lee has consistently voted in favor of legislation that would support the victims of torture in the United States in addition to condemning the aggressors of such horrible crimes against humanity. During the 105th Congress, Congresswoman Jackson Lee helped lead the effort to pass H.R. 4309, a bill to authorize the creation of numerous torture victim rehabilitation and treatment centers across the United States, as well as across the world. These centers have been instrumental in helping victims of torture to reintegrate into society and return to a normal life. Congresswoman Jackson Lee also offered her support to foreign victims of torture by requiring all Foreign Service Officers with the State Department to identify and assist the foreign victims of torture.

Being intimately familiar with the purpose, text and legislative history of the TVPA, *amici* urge this Court to interpret the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2000) [hereinafter FSIA], so as to ensure that, as Congress intended, former foreign officials who engaged in torture and extrajudicial killing remain liable for damages under the TVPA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This civil human rights case arises out of catastrophic events of torture, rape, and extrajudicial killing, which occurred in the former Democratic Republic of Somalia [hereinafter Somalia] from 1969 to 1991. These events were precipitated by a 1969 "coup led by Major General Mohamed Siad Barre,"

who "overthrew the first and only democratic government of the new nation of Somalia." J.A. 60.

Petitioner Mohamed Samantar "served as First Vice President and Minister of Defense" in Somalia "[f]rom about January 1980 to December 1986 . . . ." J.A. 58. Beginning around January 1987, Petitioner Samantar "was appointed Prime Minister of Somalia, a position he held until approximately 1990." *Id*. In his capacity as Prime Minister, Samantar commanded the National Security Service, the Red Berets, and the military police known as Hangash. J.A. 62. These intelligence gathering forces, in conjunction with Somali Armed Forces, were "responsible for the widespread and systematic use of torture, arbitrary and prolonged detention, and extrajudicial killing against the civilian population of Somalia." J.A. 62.

Toward the end of the Barre regime, in the late 1980s and early 1990s, the Somali human rights abuses sanctioned by Petitioner Samantar came to the attention of the United States Senate Committee on Foreign Relations and the United States House of Representatives Committee on Foreign Affairs, both of which received several reports from the United States Department of State chronicling human rights abuses, torture, and extrajudicial killing in Somalia under the Barre regime. *See*, *e.g*., U.S. Dept. of State, Country Reports on Human Rights Practices for 1990, Submitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 102nd Cong., 1st Sess., at 344-345 (Joint Comm. Print 1991) (recounting the extrajudicial killing of approximately sixty to one hundred civilians at a soccer match by army units and presidential guards, or Red Berets, and the torture of "prisoners held by

security forces"); U.S. Dept. of State, Country Reports on Human Rights Practices for 1989, Submitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 101st Cong., 2nd Sess., at 322 (Joint Comm. Print 1990) (noting the summary execution of "at least 46 young men, mainly Isaaks," at a beach, and complaints of the "Mig" torture[2] being implemented against detainees).

In part, these reports led Congress to pass the TVPA. *See* House Report, *supra*, at 3 ("Despite universal condemnation [of torture and extrajudicial killing], many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years."); Senate Report, *supra*, at 3 (similar). Congress intended the TVPA "to provide a Federal cause of action against any *individual* who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing." House Report, *supra*, at 2 (emphasis added); *see also* Senate Report, *supra*, at 3 (same). Congress drafted the TVPA to apply to individuals, not states, in order to avoid the assertion that claims based on torture and extrajudicial killing are barred by the FSIA. 28 U.S.C. §§ 1602-1611. By alluding to "actual or apparent authority, or under color of law," Congress anticipated and rebutted

---

[2] This form of torture involves forcing the victim "down on the ground where the interrogators . . . tie[] his hands and feet together behind his back so that his body [is] arched backward in a slightly-tilted 'U' shape, with his arms and legs in the air." *See Yousuf v. Samantar*, 2007 WL 2220579, at *3 (E.D.Va. 2007). It was called the "'Mig' because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft." *Id.* at *3 n. 6.

attempts to circumvent its intent by application of the FSIA to TVPA claims against individuals. Extending the FSIA to allow individuals to claim an immunity expressly reserved for sovereigns would completely undermine the TVPA, which Congress drafted with the purpose of imposing liability on individuals who engage in torture or extrajudicial killing abroad, under color of law or, with the actual or implied authority of a foreign state.

In enacting the TVPA, 28 U.S.C. § 1350 note (2000),[3] Congress made a calibrated decision to enforce the law of nations while balancing foreign policy, national security, and domestic interests, including ensuring that those who avail themselves of the protections and privileges of residency in the United States also bear responsibility for their actions, especially actions as significant as torture. To construe the FSIA as a jurisdictional bar to the application of the TVPA to individuals is contrary to Congress's intent to provide redress for egregious acts that infringe human rights and is an affront to human dignity. Indeed, extending FSIA immunity to foreign government officials responsible for torture would effectively nullify the TVPA.

---

[3] Sec. 2. Establishment of civil action.

(a) Liability.—An *individual* who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture *shall*, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing *shall*, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note (emphasis added).

The text, structure, and legislative history of the FSIA establish that sovereigns, not individuals, are entitled to its limited immunity. If Congress had intended the FSIA to apply to individuals, it would have said so explicitly. Instead, the FSIA grants immunity to "a foreign state," including "an agency or instrumentality of a foreign state." 28 U.S.C. § 1604. "An agency or instrumentality," in turn, is defined in reference to corporate or business enterprises only; no statutory language suggests an individual official may invoke the FSIA immunity.[4] A review of the legislative history likewise refers to "a variety of [corporate] forms," or entities, none of which include an individual. H.R. REP. NO. 94-1487 (1976), at 15-16, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613-6615.

Even if the Court holds that FSIA immunity extends to individuals who are presently an "agency or instrumentality of a foreign state," it should nonetheless decline to extend such coverage to former government officials. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court interpreted the text of the FSIA's "agency or instrumentality" language to

---

[4] "An 'agency or instrumentality of a foreign state' means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country."

28 U.S.C. § 1603(b).

cover only agencies or instrumentalities in existence at the time of suit, not at the time that the alleged tort arose. The statutory text and legislative history of the TVPA evidence a Congressional intent to hold human rights violators who commit torture and extrajudicial killing accountable through a civil remedy. Finally, in passing the TVPA, Congress sought to preclude human rights violators from seeking a safe haven in the United States long after they have been deposed from office and have fled the country in which the acts occurred.[5]

ARGUMENT

I. THE TEXT AND LEGISLATIVE HISTORY OF THE TVPA DEMONSTRATE THAT CONGRESS INTENDED TO CODIFY A CAUSE OF ACTION AGAINST INDIVIDUALS WHO TORTURED OR ENGAGED IN EXTRAJUDICIAL KILLING UNDER COLOR OF LAW

1. This Court determines a statute's legislative objective by beginning with an examination of whether the text is plain and unambiguous. *See Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 1063 (2009); *Smith v. Doe*, 538 U.S. 84, 92 (2003);

---

[5] Petitoner Samantar's *amicus*, Kingdom of Saudi Arabia, argues that if FSIA immunity does not apply, common law immunity should prevail in Samantar's favor. Kingdom of Saudi Arabia Br. at 23-27. This brief will not address the applicability of common law immunity because it is not a question for which *certiorari* was granted. Moreover, the issue was not squarely decided by the Fourth Circuit, but was, instead, among the issues to be considered upon remand in the district court. *See Yousuf v. Samantar,* 552 F.3d 371, 383 (4th Cir. 2009) (concluding that questions of common law immunity, statute of limitations expiry, and failure to exhaust should be addressed in the first instance by the district court).

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). The text of Section 2 of the TVPA clearly provides a cause of action against individuals who subject others to torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. Congress intended to target the conduct of foreign officials acting with an apparent imprimatur of state authority. Hence the Senate report noted, "this legislation does not cover purely private criminal acts by individuals or nongovernmental organizations." Senate Report at 8. Instead, "the phrase 'actual or apparent authority or under color of law' is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of authority." *Id*. In the immediate aftermath of *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) (refusing to accept the "novel proposition" that a "color of state law" requirement "insulates" the defendant from a personal capacity suit), Congress explicitly urged courts to "look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law'. . . ." *Id*.

Importantly, the text of the TVPA does not contain any exemption for individuals who are or were government officials of a foreign state. While Congress could have excluded these individuals from the TVPA's reach when drafting the statute, it declined to do so. *Cf. United States v. Fausto*, 484 U.S. 439, 447 (1988) (noting that exclusion of certain employees from the Civil Service Reform Act of 1978 "displays a clear congressional intent to deny the excluded employees the protections" of a provision providing for judicial review). Instead, Congress

imposed liability on any individual who subjects others to torture or extrajudicial killing without exclusions for those who occupy or occupied official governmental positions.

2. Beyond the statutory language, the legislative history of the TVPA also supports its application to foreign government officials. In *Sosa v. Alvarez-Machain*, this Court described the TVPA as "a clear mandate . . . providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." 542 U.S. 692, 728 (2004) (quoting H.R. Rep. No. 102-367, pt. 1, p.3 (1991)). The outcome in this case will determine whether that clear mandate is eviscerated by an application of the FSIA that Congress never intended and that this Court has never endorsed. To find that the FSIA precludes a cause of action against any individual who claims to have acted as an agent or instrument of a foreign state would undermine the TVPA's mandate and frustrate legislative intent with respect to both statutes.

The TVPA serves the twin purposes of denying torturers refuge from accountability for their conduct and providing victims a measure of relief for the harm that they suffered. As Congress recognized, "[t]orture poses a pervasive threat to the well-being of humankind. We must take a strong stand against this heinous practice." *Torture Victim Protection Act: Hearing on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the H. Comm. on Foreign Affairs*, 100th Cong. 2nd Sess. (1988) (statement of Rep. Yatron, Chairman, H. Subcomm. on Human Rights and International Organizations). Congress crafted the TVPA so "that in the United States, the individuals who have

tortured will be held accountable, and the victims will be compensated in part for what they have endured." *Id.* *See also* 137 CONG. REC. H11244-04, at H11244 (1991) (statement of Rep. Mazzoli) ("[The TVPA] puts torturers on notice that they will find no safe haven in the United States.").

The legislative history of the TVPA confirms that successful cases pursued against torturers under the Alien Tort Statute [hereinafter ATS], 28 U.S.C. § 1350 (2000), reinforced Congress's determination that the TVPA must reach acts by individual government officials. In passing the TVPA, Congress explicitly endorsed two ATS cases, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and *Fortí v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). *See also* S. REP. NO. 102-249, *supra*, at 3-4 ("The *Filártiga* case has met with general approval."). In both cases, the respective courts held that claims against government officials arising from acts of torture were actionable under the ATS. *See Filártiga*, 630 F.2d at 878 (holding that torture claims under the ATS could go forward against the former Inspector General of Police for Asunción, Paraguay); *Fortí*, 672 F. Supp. at 1535 (denying a motion to dismiss an ATS action against a former Argentine general for torture, murder, and prolonged arbitrary detention).

In the face of disagreement among courts as to the depth and breadth of valid torture claims under the ATS, Congress passed the TVPA to ensure that the justice delivered to the victims in *Filártiga* and *Fortí* would be available to all victims of "torture committed under official authority." 135 CONG. REC. H6423-01, at H6426 (1989) (statement of Rep. Broomfield).

After passage of the TVPA, the Second Circuit acknowledged the statute as a Congressional endorsement of *Filártiga*. *See Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) ("Congress has made clear that its enactment of the [TVPA] was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens."). And this Court agreed in 2004. *See Sosa*, 542 U.S. at 731 (describing the TVPA as Congressional endorsement of, and supplement to, *Filártiga*).

3. Congress passed the TVPA with the purpose, in part, of implementing the terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the Senate had ratified nearly two years earlier in 1990 [hereinafter Convention Against Torture]. *See* 138 CONG. REC. S2667-04 (1992) (Senator Specter's colloquy statement that the TVPA accomplishes the purpose of the Convention Against Torture); S. REP. NO. 102-249, at 3 (1991) (stating that the TVPA will carry out the intent of the Convention Against Torture); H.R. REP. NO. 102-367, at 3 (1991) (noting that the Convention Against Torture requires signatories to "adopt measures to ensure that torturers are held legally accountable for their acts"). More specifically, the TVPA implements Article 14(1) of the Convention Against Torture, which provides:

> [e]ach State Party *shall* ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of

> an act of torture, his dependents shall be entitled to compensation.

108 Stat. 382, 1465 U.N.T.S. 85, art. 14(1) (emphasis added).

Congressional enactments and ratified treaties—to say nothing of customary international law—should not be set aside in favor of a strained reading of the FSIA to cover individual former foreign officials. Deference to the Congress and the Presidency is especially appropriate where, as here, the Constitution assigns the competency "to make Treaties," and "appoint Ambassadors, other public Ministers and Consuls" to the President—both with the advice and consent of the Senate—U.S. Const. Art. II, § 2, cl. 2, and where the Constitution assigns to Congress the power to "define and punish . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10.

II. APPLICATION OF FSIA IMMUNITY TO GOVERNMENT OFFICIALS WOULD NULLIFY THE TVPA

The statutory language and legislative history of the FSIA, as well as the legislative history of the TVPA, demonstrate that FSIA immunity should not apply so as to exempt private individuals from liability under the TVPA. Broadly speaking, this Court has long held that "private individuals of one nation" must be "amenable to the jurisdiction of the country" in which they are found. *The Schooner Exchange v. McFaddon & Others*, 11 U.S. (7 Cranch) 116, 144 (1812). In *The Schooner Exchange*, this Court concluded that "there are powerful motives for not exempting" private individuals "from the jurisdiction of the country in which they are found, and no one motive for requiring it." *Id*. Accordingly,

and in compliance with the holding of *The Schooner Exchange*, foreign officials who engaged in torture or extrajudicial killing under color of law are properly subject to suit under the TVPA when they are found within the jurisdiction of United States courts.

1. If Congress had intended to immunize individuals in the FSIA, it would have done so explicitly. Congress has drafted statutory language explicitly specifying "individuals" in other foreign relations contexts, yet chose not to do so here. For example, Congress enacted the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1871 [hereinafter FISA] to establish the exclusive means of electronic surveillance for foreign intelligence. 18 U.S.C. § 2511(2)(f) (2009). FISA defines "[p]erson" as meaning "any *individual*, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. § 1801(m) (2009) (emphasis added). Similarly, when Congress enacted the Foreign Agents Registration Act of 1938, 22 U.S.C. § 611, *et seq*. (2009) [hereinafter FARA], it defined "person" to include "an *individual*, partnership, association, corporation, organization, or any other combination of individuals" to avoid any ambiguity about which foreign agents were required to register. 22 U.S.C. § 611(a) (2009) (emphasis added).

In contrast, the statutory language of the FSIA lacks any reference to "individuals." While FSIA immunity is granted to an "agency or instrumentality of a foreign state," this phrase is defined in terms of "entities." 28 U.S.C. § 1603. Consequently, in granting "a foreign state" immunity, the FSIA does not extend its immunity to individuals. A broad reading of FSIA immunity would effectively bar any

liability under the TVPA, rendering the statute meaningless and leaving victims without redress for atrocious acts of violence.

The TVPA provides a cause of action against any "individual" acting "under actual or apparent authority, or color of law, of any foreign nation," for torture or extrajudicial killing. 28 U.S.C. § 1350 note sec. 2. Thus, the defendant must: (1) be an individual; and (2) have some connection to the state in order to be liable for torture. The second requirement reflects the principle in international law, explicitly codified by Congress, that only torture by the state is actionable. *See* Convention Against Torture, art. 1 (limiting banned conduct to acts "inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.") (emphasis added); *see also*, 137 CONG. REC. S1369-01, at S1378 (1991) (statement of Sen. Specter) ("The definition of 'torture' contained in the [TVPA] is taken from the Torture Convention."). In other words, any individual engaging in torture as defined by the Act must be an individual government actor. If the TVPA cannot be used to sue government officials for torture, there is simply no purpose for it to exist.

2. Along with the statutory language of the FSIA, the legislative history of the phrase "agency or instrumentality of a foreign state" also evidences a Congressional intent at odds with granting individuals FSIA immunity. That legislative history omits any reference to individuals, and instead lays out a demonstrative list that includes "a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement

agency or a department or ministry which acts and is suable in its own name." H.R. Rep. 94-1487, at 15-16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604. In the face of that legislative history, this Court should decline any invitation to grant immunities where the political branches have not seen fit to provide them.

This interpretation of the FSIA's legislative history is bolstered by the legislative history of the TVPA, which reaffirms that Congress viewed the FSIA immunity as covering sovereigns, not individuals. Indeed, there are numerous references to the interplay between the two statutes in the legislative history of the TVPA. The House Report noted that "[s]ince few, if any foreign governments would admit to the use of torture, and would be immune from suit if they did so, the bill reaches only the individuals involved, not their governments." 134 CONG. REC. H9692-02, at H-9694 (1988) (statement of Rep. Mazzoli).

The Senate was even more explicit in its rationale for choosing to target individuals in the TVPA:

> The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

S. REP. NO. 102-249, at 7-8 (1991) (footnotes omitted). Indeed, immediately before the Senate passed the House version of the TVPA which ultimately became law, Counsel of Record explained:

> I do not believe that this act conflicts with the Foreign Sovereign Immunities Act. . . . [The TVPA] does not override the FSIA and allow a suit against the foreign state. It only allows a suit against the individual(s) responsible for the torture, either by performing it or ordering it.

138 CONG. REC. S2667-04, at S2668 (statement of Sen. Specter in response to Sen. Grassley) (1992). Thus, Congress was aware of the FSIA when it passed the TVPA and did not think that the former would be an impediment to lawsuits under the latter. As a result, Congress plainly understood the FSIA to provide immunity only to foreign governments and their institutional agencies, not to individuals, lest the TVPA be a dead letter upon enactment.

III. CONGRESS NEVER INTENDED FSIA IMMUNITY TO ATTACH TO FORMER FOREIGN OFFICIALS

Even assuming, *arguendo*, that the FSIA should extend immunity to current foreign officials, it should not be interpreted to cover former officials. The failure of the FSIA to address former foreign officials within its statutory text, this Court's own precedent, and the legislative history of the TVPA, combine to support the conclusion that FSIA immunity does not extend to former foreign officials.

1. If Congress had intended to bestow immunity on former foreign officials under the FSIA, it could have done so, as illustrated by existing federal statutes that extend special privileges to former domestic and foreign government officials. For example, in the domestic sphere, Congress has codified certain privi-

leges for former Speakers of the House, Presidents, and Vice Presidents.[6]

Likewise, in the international context, Congress enacted 18 U.S.C. § 1116(a), which makes it a federal crime to "kill[] or attempt[] to kill a foreign official, official guest, or internationally protected person . . . ." The law, in turn, defines "[f]oreign official" to include "a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister" and others "*or any person who has previously served in such capacity* . . . ." 18 U.S.C. § 1116(b)(3)(A) (2009) (emphasis added). Under the text of this law, anyone who killed or attempted to kill a former prime minister would be unambiguously guilty of a federal crime. Congress left no room for doubt that the provision it enacted served to protect those who had "previously served" as high-level officials. *Id.* Yet, the statutory language of the FSIA omits any reference to former officials of a foreign state. In short, "Congress clearly intended the TVPA to extend to former officials of foreign countries if they choose to come to the United States after leaving their positions of authority. Congress also stated that the FSIA does not extend immunity to such

---

[6] *See, e.g.,* 2 U.S.C. §§ 31b-1 to 31b-7 (2009) (providing former Speakers of the House with an office, administrative allowance, mailing privileges, and staff assistance); 3 U.S.C. § 102 note sec. 4 (2009) (providing former Presidents with office space, staff compensation, communication services. and printing and postage privileges); 18 U.S.C. § 3056 (2009) (providing former Presidents, who entered office before January 1, 1997, and their spouses with Secret Service protection); Former Vice President Protection Act, Pub. L. No. 110-326, 122 Stat. 3560 (2008) (codified as amended in scattered sections of 18 U.S.C.) (providing Secret Service protection to former Vice Presidents and their family members).

individuals." 155 CONG. REC. S13869-01 (Statement of Senate Judiciary Committee Chairman Leahy) (2009).

2. The FSIA's application to current, but not former, foreign entities is further supported by this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). *Dole Food* held that the FSIA's "agency or instrumentality language" limits the grant of immunity to those agencies or instrumentalities in existence at the time suit is filed, not those agencies or instrumentalities in existence at the time that the tort was committed. *Id*. at 478. Accordingly, if a former foreign official is not a foreign agent at the time the suit is filed, then he is not entitled to immunity, even if he was a foreign agent at the time that he committed the actionable conduct. What matters, for purposes of FSIA immunity, is the former foreign entity's status at the time of the lawsuit.

3. If the Court were to allow FSIA immunity to extend to former, as well as current, foreign officials, it would render the TVPA practically meaningless. If foreign states, current foreign officials, and former foreign officials were all found to be beneficiaries of FSIA immunity, then the TVPA would be devoid of its strength as a civil liability statute and FSIA immunity would protect from liability nearly all conceivable TVPA defendants. This would be contrary to the TVPA's statutory language and legislative history, both of which demonstrate a Congressional intent to hold human rights violators, torturers and extrajudicial murderers civilly liable. *See* 28 U.S.C. § 1350 note; Senate Report, at 3-4.

In passing the TVPA, Congress did more than demonstrate its intent to hold human rights violators

and torturers civilly liable; it also sought to prevent them from seeking refuge in the United States after they flee the countries in which they committed acts of torture. During debate on the TVPA, Counsel of Record stated that "the [TVPA] is intended to deny torturers a safe haven in this country . . . [and] to discourage torturers from ever entering this country." 138 CONG. REC. S2667-04, at S2668 (1992). Representative Leach separately concurred, noting that "[i]t would be . . . revolting, however, if a torturer was physically present in the United States but could not be sued by the victim because of inadequacies or ambiguity in our present law." 135 CONG. REC. H6423-01, at H6426 (1989). Applying FSIA immunity to former foreign officials who commit torture would completely undermine the legislative intent of the TVPA and would, ironically, provide torturers with the same safe haven in the United States that Congress sought to deny them.

CONCLUSION

This Court should affirm the judgment below because foreign officials are not entitled to sovereign immunity under the FSIA.

Respectfully submitted,

SENATOR ARLEN SPECTER *
MEMBER
SENATE JUDICIARY COMMITTEE
711 Hart Senate Off. Bldg.
Washington, D.C. 20510
(202) 224-4254

* Counsel of Record