IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

PLAINTIFFS A, B, C, D, E, F, and OTHERS) SIMILARLY SITUATED, WEI YE, and HAO WANG, Plaintiffs, v. JIANG ZEMIN AND FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10), Defendants.	Civil Action No. 02C 7530 Judge Kennelly Magistrate Judge Levin

CORRECTED UNITED STATES' MOTION TO VACATE OCTOBER 21, 2002 ORDER AND STATEMENT OF INTEREST OR, IN THE ALTERNATIVE, SUGGESTION OF IMMUNITY[1]

[1] The United States' original submission, filed December 11, 2002, did not contain a Table of Contents and Table of Authorities due to a lack of support staff resulting from adverse weather conditions in Washington, D.C. on December 11, 2002.

CORRECTED UNITED STATES' MOTION TO VACATE OCTOBER 21, 2002 ORDER AND STATEMENT OF INTEREST OR, IN THE ALTERNATIVE, SUGGESTION OF IMMUNITY

The United States of America appears in this matter to move for vacatur of the October 21, 2002 Order directing federal officials to serve process on Defendant Jiang Zemin, President of the People's Republic of China, during his October 22-23, 2002 visit to Chicago. In addition, pursuant to 28 U.S.C. § 517,[2] we further state the United States' interest with respect to the Order's provision for service on President Jiang through state and local security officials, note that service was not achieved under the Order's terms, and suggest, in the alternative, the immunity of President Jiang as head of the People's Republic of China.

INTRODUCTION

Fundamental, constitutionally based principles of sovereign immunity and separation of powers preclude Article III courts from ordering federal security personnel to serve process on a visiting head of state during the course of their duty to protect that foreign leader. Separation of powers principles are likewise offended by an order that compels federal security personnel to serve process on a foreign head of state whom they are charged with guarding. Such a method of service directly interferes with the Executive Branch's conduct of foreign relations, causing diplomatic problems of the greatest magnitude at the highest levels of our government. Indeed, the Court's October 21 Order has had direct impacts on foreign relations between the United States Government and the People's Republic of China, nations that have an important yet delicate relationship. The harm to foreign relations of an alternate service order such as the October 21 Order flows whether the officials charged to effect service are federal, state, or local law enforcement security personnel responsible for guarding the visiting dignitary. It is, therefore, the United States' position that the October 21 Order is invalid and that it should be vacated.

Even if the October 21 Order had been validly entered, its premise that the security officials it identifies would be in President Jiang's physical proximity and thus able personally to deliver a copy of the summons and complaint to him was inapplicable with regard to Chicago Police

[2] Pursuant to 28 U.S.C. § 517, the United States may appear in any court in the United States "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Commander Joseph P. Griffin, who was not responsible for guarding President Jiang. Additionally, Plaintiffs have presented no evidence that service of the summons and complaint on President Jiang was effected under the October 21 Order's terms. Plaintiffs offer no evidence that they delivered a copy of the summons and complaint to a security official helping to guard President Jiang, or that any such security official delivered a copy of the summons and complaint to President Jiang.

Finally, in the alternative, the United States suggests that, as head of the People's Republic of China, President Jiang enjoys immunity from this lawsuit. The personal inviolability that derives from head-of-state immunity in addition renders him immune from service of process, and thus also from the jurisdiction of this Court.

FACTUAL BACKGROUND

On October 21, 2002, the Court by the Honorable William J. Hibbler, entered an Order, ex parte, allowing alternate means of serving the summons and complaint in this action on President Jiang while he visited Chicago. President Jiang was in Chicago between October 22 and 23, 2002 on his way to the October 25, 2002 Crawford, Texas summit hosted by President George W. Bush. (Decl. of Donald W. Keyser ¶ 6 [Attach. A].)

The Order permitted service to be accomplished by delivery of a copy of the summons and complaint to any of several security agents responsible for guarding President Jiang in Chicago. It further directed any agent receiving a copy of the summons and complaint to serve it on President Jiang during his Chicago stay. Specifically, the Order provided:

> FURTHER ORDERED, that service shall be accomplished by the delivery of a copy of the summons and complaint to
>
> 1. any of the security agents helping to guard Defendant Jiang Zemin during his stay in Chicago, Illinois, including State Department Detail, Special Agents of the Secret Service, Special Agents of the Federal Bureau of Investigation, Officers of the Illinois State Police Detailed to the Motorcade, Commander Joseph Griffin, Commander of 18th District Chicago Police Department, []
>
> 2. hotel staff security helping to guard Defendant Jiang Zemin during his stay in Chicago, Illinois, []
>
> 3. Chinese staff security instructed in Chinese to provide a copy of the enclosed order, summons, and complaint to the defendant Jiang Zemin, and it is
>
> FURTHER ORDERED that said security agent is to forthwith serve said defendant with the said copy of the summons and complaint during Defendant's stay in Chicago, and it is

> FURTHER ORDERED, that the enclosed order is predicated on plaintiffs' good faith effort to attempt first to serve the defendant personally . . .

(Order of 10/21/02.)

On November 1, 2002, Plaintiffs' process servers Corey Fertel and Jason Bobor filed affidavits describing their efforts to effect service on President Jiang under the terms of the October 21 Order. Mr. Fertel asserts that he completed service by temporarily placing copies of the Order and the summons and complaint on the floor in front of an individual, who he asserts was a Secret Service agent but does not name or otherwise identify, at the Ritz-Carlton Hotel, where President Jiang was staying. (Aff. of Corey Fertel ¶ 5 [filed Nov. 1, 2002].) Specifically, Mr. Fertel states:

> At 1:15 [on October 22, 2002], I approached a Secret Service agent at the security office of the hotel . . . I told him I had legal papers to drop off with him and with hotel security as part of process service upon Jiang Zemin. He said he couldn't accept any legal papers or documents. He told me to leave and place the papers on the ground. I placed the papers (which consisted of Judge Hibbler's order authorizing special service of process, two copies of the complaint, the summons to Jiang Zemin, and the summons to the Falun Gong Control Office (a.k.a. Office 6/10)) on the ground. Service was completed . . . [The Secret Service agent] said, "No, pick them up. You are not leaving any legal documents here." I left afraid that if I didn't pick them up and leave, I'd be arrested.

(Id.) Mr. Bobor asserts that he left copies of the October 21 Order and the summons and complaint on a podium outside the Ritz-Carlton Hotel. Mr. Bobor asserts that an individual, who he asserts was a Secret Service agent but does not name or otherwise identify, told him that he could leave the documents on the podium. (Aff. of Jason Bobor ¶ 8 [filed Nov. 1, 2002].) Mr. Bobor asserts:

> As [two Chinese security guards and an alleged Secret Service agent] were walking toward the door [to exit the hotel], the Secret Service agent told me that I could leave the legal papers outside the door on the hotel property on the podium/desk for hotel employees directly in front of the hotel. I again attempted to explain to them that I was serving legal documents to them as substitute service for the defendants and that it would be incumbent upon them to deliver the papers to the defendant Jiang Zemin. But they would not let me explain this to them. I told them that they were served, and I walked to the podium outside the hotel and left the papers on the podium, aware that the same information was contained within the court order.

(Id.)

In addition, Mr. Fertel states that he left copies of the documents with a Chicago Police Officer who represented that she was authorized to accept legal documents on behalf of Joseph Griffin, Commander of the Chicago Police 18th District. (Fertel Aff. ¶ 6.) He does not state that he told the officer that the documents were time-sensitive or that Commander Griffin must read them within any time frame. Mr. Bobor asserts that he also handed copies of the documents to Commander Griffin and that Commander Griffin accepted the documents. (Id. ¶ 9.)

Commander Griffin's attached declaration explains that, during President Jiang's Chicago visit, he was responsible for maintaining control of public demonstrations that occurred outside the Ritz-Carlton Hotel. (Decl. of Commander Joseph P. Griffin ¶ 3 [Attach. B].) Those demonstrations involved up to 1000 individuals protesting President Jiang's visit and approximately 400-500 individuals demonstrating in support of President Jiang. (Id. ¶ 3.) Commander Griffin's principal concern was maintaining separation between the demonstrators opposing President Jiang and the demonstrators supporting him so as to avoid potentially violent confrontations. (Id.) Commander Griffin had no responsibility for guarding or protecting President Jiang, and never came into the physical proximity of President Jiang. (Id. ¶¶ 4-5.)

Commander Griffin's declaration further explains that on October 22 a process server handed him documents and told him that he had been served. (Id. ¶ 6.) The process server did not tell Commander Griffin that the documents were time-sensitive or that he must read them within any time frame. (Id. ¶ 7.) Commander Griffin did not read the documents – copies of the Court's October 21 Order, and the summons and complaint – until President Jiang had departed from Chicago. (Id. ¶ 8.) He did not deliver the documents to President Jiang. (Id. ¶ 10.)

ARGUMENT

1. The October 21, 2002 Order is Invalid as Unauthorized by a Waiver of Sovereign Immunity and Violates Separation of Powers Principles

The Court lacked jurisdiction to require federal security personnel to serve process on a visiting head of state because no waiver of the sovereign immunity of the United States allows such

an order.[3] Moreover, enlisting federal and local officials to serve process on a visiting foreign dignitary whom they are charged with protecting would so impair the Executive Branch's ability to conduct foreign relations that it would conflict with the constitutional principle of separation of powers.[4]

[3] As Plaintiffs' memorandum in support of their ex parte motion for alternate means of service relates, the district courts in Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), and Zhou v. Li Peng, No. 00-CIV-6446, 2002 WL 1835608 (Aug. 8, 2002), issued orders authorizing alternate service that are similar in certain respects to the October 21 Order. The United States considers that those orders were improper for the reasons explained herein, and is pursuing further review of the August 8, 2002 ruling in Li Peng.

[4] In addition to warranting vacatur as void, the lack of an applicable waiver of sovereign immunity and the conflict with separation of powers principles renders the October 21 Order not "reasonably calculated" to afford notice, and thus not in accord with due process requirements for service of process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (recognizing that in order to satisfy due process requirements, service must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

a. No Waiver of Sovereign Immunity Permits the Court to Compel Officers of the United States to Serve Process

The United States and its officers are immune from judicial proceedings unless there is an applicable congressional waiver of sovereign immunity. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992); Block v. North Dakota, 461 U.S. 273, 287 (1983); Berman v. Schweiker, 713 F.2d 1290, 1300 (7th Cir. 1983). Only Congress may waive the United States' sovereign immunity, and any waiver, "to be effective, must be 'unequivocally expressed,'" Nordic Village, Inc., 503 U.S. at 33-34 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 [1990]), and "will not be implied," Lane v. Pena, 518 U.S. 187, 192 (1996). Absent a clear waiver of sovereign immunity by Congress, courts are without jurisdiction to exercise judicial authority as to the United States or its officers. E.g., United States v. Mitchell, 445 U.S. 535, 538 (1980).

A judicial proceeding is considered against the sovereign if its outcome would either require monetary payment, "interfere with the public administration," Land v. Dollar, 330 U.S. 731, 738 (1947), "restrain the Government from acting, or [] compel it to act," Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) (emphasis supplied). Accord, e.g., Dugan v. Rank, 372 U.S. 609, 620 (1963); see also Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) ("[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.").

The October 21 Order expressly compels United States officials both to accept delivery of a copy of the summons and complaint and to serve the copy on President Jiang: "[S]ervice shall be accomplished by the delivery of a copy of the summons and complaint to [] any of the security agents helping to guard Defendant Jiang Zemin . . . [S]aid security agent is to forthwith serve said defendant with the said copy of the summons and complaint . . ." However, neither the Order nor Plaintiffs' ex parte motion for the Order identifies an express waiver of sovereign immunity that permits U.S. courts to compel officials of the United States to accept a summons and complaint or to serve process.[5] Rather, Plaintiffs sought, and the Court evidently issued, the October 21 Order on

[5] By contrast, U.S. Marshals are commanded by statute to execute and enforce orders of, inter alia, U.S. District Courts. 28 U.S.C. § 566(a). No similar statutory mandate exists for FBI agents, Secret Service officers, or Department of State Diplomatic Security officers. See 18 U.S.C. § 3052 (FBI); 18 U.S.C. § 3056 (Secret Service); 22 U.S.C. §§ 2709, 4802 (Department of State). It should be noted that 22 U.S.C. § 2709(a)'s provision for State Department special agents to "obtain and serve subpoenas and summonses issued under the authority of the United States" authorizes the agents to take steps necessary to aid the State Department in investigating offenses that come within its jurisdiction, and should not be construed to authorize courts to command State Department special agents to serve in the same capacity

the purported authority of Federal Rule of Civil Procedure 4(e)(1) and, by incorporation, Illinois law regarding service, 735 Ill. Comp. Stat. 5/2-203.1.

Despite this seeming reliance on the Federal Rules of Civil Procedure, neither those Rules nor anything in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, waives the United States' sovereign immunity. Indeed, the Rules Enabling Act provides that the Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); see also United States v. Waksberg, 881 F. Supp. 36, 40 (D.D.C. 1995) (Rules Enabling Act does not waive sovereign immunity).[6]

No waiver of the United States' sovereign immunity authorized the Court to direct officials of the State Department, the Secret Service, and the FBI to serve process on President Jiang, and thus the Court was without jurisdiction to enter the October 21 Order. See, e.g., Mitchell, 445 U.S. at 538. The October 21 Order is therefore invalid as entered in violation of the United States' sovereign immunity and without a jurisdictional basis.

b. Compelling Federal, State, and Municipal Security Officials to Serve Process on a Visiting Head of State Offends Separation of Powers Principles

as U.S. Marshals. See H.R. Conf. Rep. 107-671 at 120, 2002 WL 31233475 (Sept. 23, 2002).

[6] Nor does the All Writs Act, 28 U.S.C. § 1651, authorize the compulsion contained in the October 21 Order. See, e.g., Syngenta Crop Protection, Inc. v. Henson, __ U.S. __, 2002 WL 31453983, *2 (Nov. 5, 2002) (All Writs Act "authorizes writs 'in aid of [the courts'] respective jurisdictions' without providing any federal subject-matter jurisdiction in its own right"); Benvenuti v. Department of Defense, 587 F. Supp. 348, 352 (D.D.C. 1984) (All Writs Act does not waive sovereign immunity).

The ability of the Executive Branch to conduct foreign relations is significantly compromised by an order compelling federal and municipal security officials to serve process on a visiting head of state whom they are responsible for guarding. Such an infringement directly conflicts with the constitutional principle of separation of powers.[7]

It is well-established that the conduct of foreign relations is a sensitive political function that the Constitution vests in the Executive Branch or, in certain instances, the Executive Branch in conjunction with the Legislative Branch. E.g., Department of the Navy v. Egan, 484 U.S. 518, 529 (1988); Haig v. Agee, 453 U.S. 280, 293-94 (1981); Chicago & Southern Airlines, 333 U.S. 103, 111 (1948); United States v. Pink, 315 U.S. 203, 222-23 (1942); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir. 2001); Flynn v. Shultz, 748 F.2d 1186, 1190 (7th Cir. 1984). Article II, § 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," and "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . ." Article II, § 3 provides that the President "shall receive Ambassadors and other public ministers . . ."

> Taken together with the command of article II, § 3 that the President "shall take Care that the Laws be faithfully executed," these constitutional provisions have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate in any autonomous sense, the foreign policy of the United States.

Laurence H. Tribe, American Const. Law § 4-3 at 638 (3d ed. 2000). "'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.'" Egan, 484 U.S. at 529-30 (quoting United States v. Nixon, 418 U.S. 683, 710 [1974]). Accordingly, matters "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be

[7] Generally, the separation of powers doctrine does not define the existence or limits of the Court's subject matter jurisdiction, but rather affects when and how the Court may exercise such jurisdiction. See, e.g., Powell v. McCormack, 395 U.S. 486, 512, 518-19 (1969) (separation of powers principles go to justiciability, not jurisdiction).

largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); see also INS v. Chadha, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate [b]ranches to exceed the outer limits of power, even to accomplish desirable objectives, must be resisted."); Adams v. Vance, 570 F.2d 950, 955 (D.C. Cir. 1978) ("This country's interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters.").

i. Alternative Service Orders Such as the October 21 Order Have a Chilling Impact on the Executive Branch's Conduct of Foreign Relations

As explained in the attached Declaration of Donald W. Keyser, Deputy Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs, the October 21 Order and orders like it interfere substantially with the Executive Branch's ability to foster an environment that encourages heads of state and other foreign dignitaries to visit the United States and that is conducive to productive bilateral relations. (Decl. of Donald W. Keyser.) There is a real risk that a foreign government whose leader is served with process by host state protective personnel (e.g., State Department Diplomatic Security, FBI, Secret Service, and local police) will take offense at the service, viewing it at a minimum as "incompatible with the proper role of security personnel to ensure the safety and tranquility of the foreign dignitary during his or her visit" or at worst as "acts of calculated duplicity to ensnare the foreign leader." (Id. ¶ 3.) "The foreign government may also interpret such service as official United States Government support for the underlying lawsuit." (Id.)

Mr. Keyser's declaration explains that these concerns are magnified when the foreign dignitary identified in an alternate service order is a head of state such as President Jiang. (Id. ¶ 6.) Indeed in this case, media reports that President Jiang had been served with process through U.S. security personnel threatened to impede the Crawford, Texas summit between President Bush and President Jiang and to jeopardize U.S.-China relations. (Id. ¶ 7.) Mr. Keyser explains that senior Chinese officials protested the suit repeatedly and "emphasized . . . particular dissatisfaction that U.S. security personnel had reportedly accepted documents relating to the suit, and had failed to ensure that President Jiang's visit was free of disruption." (Id.) These concerns were considered so serious that Chinese officials warned that there could be "a most deleterious impact on the atmosphere surrounding the Crawford summit and on the bilateral relationship." (Id.)

Not only did the October 21 Order risk a direct effect on a presidential summit, but it and similar orders would have the potential to cause foreign dignitaries to think twice before agreeing to travel to and attend meetings in the United States. Mr. Keyser describes the recent refusal of the Chinese government to send representatives to the United States to participate in an important anti-narcotics training course due to concerns about possible service of process. (Id. ¶ 4.) The consequences of a reluctance among foreign leaders to come to the United States to engage in diplomacy are potentially serious for the government's ability to conduct foreign relations. (Id.)

Mr. Keyser further explains that on recent occasions Chinese officials have refused to accept official United States Government communications from State Department officers because of stated concerns that those officers might have been designated as process servers by United States courts. (Id. ¶ 5.) For example, on August 8, 2002, the political counselor at China's Embassy in Washington, D.C. refused to accept documentation from the State Department's China desk director except by facsimile, for fear of unwittingly accepting a court order or subpoena. (Id.) The exchange of diplomatic notes and written positions "is the essence of diplomacy." (Id.) A reluctance among foreign diplomats to accept such diplomatic correspondence because of orders such as the October 21 Order poses yet another serious obstacle to the United States' conduct of foreign affairs.

ii. Alternative Service Orders Such as the October 21 Order Increase the Risk that Senior U.S. Officials Will Be Subjected to Service and Legal Proceedings Abroad

Were U.S. courts to permit service upon foreign heads of state and other dignitaries in the fashion contemplated by the October 21 Order, foreign courts and authorities will be more likely to issue similar orders regarding service on the President of the United States and senior U.S. officials during their travels abroad. Mr. Keyser explains this concern regarding reciprocity:

> To the extent that United States courts issue orders authorizing alternate service of process on high-level visiting foreign dignitaries -- especially via our protective services -- it is increasingly likely that foreign governments and judicial authorities will be inclined to permit service and legal proceedings that may be detrimental and embarrassing to high-level United States officials visiting abroad. Indeed, allowing such methods of service here would provide foreign interests with ready-made grounds for initiating retaliatory service and lawsuits against United States officials overseas -- actions that we might regard as offensive, politically-motivated, and disruptive to the conduct of our foreign relations.

(Id. ¶ 9.) Service of foreign lawsuits on the U.S. President or high-level U.S. officials while they are conducting the nation's business abroad would further disrupt the Executive Branch's conduct of foreign affairs, and is thus another potential harmful effect of orders like the October 21 Order.

iii. Alternative Service Orders Such as the October 21 Order Interfere with the Protection of Visiting Foreign Dignitaries

The Declaration of Peter E. Bergin, Principal Deputy Assistant Secretary of State for the Bureau of Diplomatic Security ("DS") and Director of the Diplomatic Security Service, United States Department of State, explains that the primary duty of DS protective detail officers is to insulate their charges from potential dangers. (Decl. of Peter E. Bergin ¶ 4 [Attach. C].) Accomplishment of this task "depends upon the ability of DS protective personnel to operate in close physical proximity and with full access to the protected foreign official," and "in close coordination with other security officers, including those provided by the foreign government." (Id. ¶ 2). For the United States to provide optimal security, the protective detail must be provided unfettered information, including a detailed itinerary, and must "enjoy the trust and confidence of the protectee." (Id.)

DS officers' protective duties do not encompass serving process on foreign officials at a court's behest. (Id. ¶ 4) Mr. Bergin explains that "should foreign dignitaries come to view their United States Government and other protective personnel (including local police and private security) as potential process servers, they would likely withdraw from and otherwise limit cooperation with such personnel." (Id. ¶ 5.) Such withdrawal and limitation of cooperation could profoundly compromise the foundation of the protective process. (Id.) Moreover, the prospect that security personnel might be charged to act as process servers could "undermine the critical element of trust and confidence between protector and protectee that is essential to the effective operation of the security function." (Id.) Were the trust and confidence between protective personnel and foreign dignitaries so undermined, the results could be "catastrophic" – not only to the United States' ability to provide security to visiting dignitaries, but also to its relations with foreign nations. (Id. ¶ 6.) "Should death or injury occur to a foreign leader during a visit to the United States, there would likely be severe and lasting damage to our relations with that leader's government." (Id.) These concerns are heightened in the current climate of increased terrorist threats. (Id.)

The attached Declaration of Donald A. Flynn, Assistant Director of the United States Secret Service for the Office of Protective Operations, likewise explains that orders for alternate service through Secret Service agents is inconsistent with and could distract the agents from their mission to protect visiting heads of state in accordance with 18 U.S.C. § 3056. Indeed, if Secret Service agents

or other security personnel were expected to deliver service of process to visiting heads of state whom they are guarding, they would have to inspect the documents, an obvious distraction from their job of observing the environment around their protectee in order to identify potential threats. (See id. ¶ 6.) Mr. Flynn further explains that "[i]f a foreign head of state were to perceive his or her Secret Service protective detail as having any function other than protection, he or she may push away the Secret Service's 'protective envelope' thereby making [the individual] more vulnerable to assassination or other physical harm." (Decl. of Donald A. Flynn ¶ 5 [Attach. D].) Mr. Flynn also underscores Mr. Bergin's warning about the possibly grave consequences of a breach in security during a head of state's visit to the United States: "For obvious reasons, if the assassination of a foreign head of state were ever to occur on American soil, the results could be catastrophic from a foreign relations and national security standpoint." (Id. ¶ 7.)

The concerns related above are similar if the security official directed to effect service on a visiting dignitary is a municipal official charged with guarding the dignitary. It is reasonable to anticipate that the foreign dignitary's government may not distinguish between federal security personnel and state or municipal security personnel and instead view service effected through a state or municipal security official as attributable to the United States. In addition, the risk of compromised security if a foreign dignitary were to withdraw from municipal security personnel or limit cooperation with them are the same as the risks described by Messrs. Bergin and Flynn in the case of federal protective personnel. Again, were a foreign dignitary killed or injured during a visit to the United States, the reaction of the dignitary's government and the harm to the United States' relations with that government likely would not differ if the security personnel involved were municipal officers rather than federal officers.

* * *

As the declarations of Messrs. Keyser, Bergin, and Flynn make clear, service of process on foreign dignitaries through the host state protective personnel assigned to guard them is a matter "vitally and intricately interwoven" with the Executive Branch's conduct of foreign relations. Harisiades, 342 U.S. at 588-89. Those declarations further establish that orders for alternate service such as the October 21 Order have a direct and detrimental impact on the United States' ability to conduct foreign relations. Such an interference with the conduct of foreign relations is incompatible with the respect for the separation of powers that the Constitution mandates. See, e.g., id. at 589. For all of these reasons, the October 21 Order does not withstand constitutional scrutiny.

2. The October 21 Order Improperly Includes Chicago Police Commander Griffin Among Security Agents Responsible for Guarding President Jiang

Even if the October 21 Order did not suffer from the fatal flaws described above, its provision for service to be accomplished through Chicago Police Commander Joseph Griffin is unsupported by the Order's premise. Commander Griffin was improperly listed in the Order, and Plaintiffs' having delivered copies of the October 21 Order and the summons and complaint to him should not be deemed to satisfy the Order's requirement of delivery on a security agent "helping to guard Defendant Jiang Zemin during his stay in Chicago, Illinois."

The premise of the October 21 Order is that the security officials it identifies would be guarding President Jiang and in his physical proximity, and thus able personally to deliver to him copies of the summons and complaint.[8] As described above, Commander Joseph Griffin was not responsible for guarding President Jiang. (Griffin Decl. ¶ 4.) Commander Griffin's duties concerned control of demonstrations outside of the hotel where President Jiang stayed and did not call for the commander to be in President Jiang's physical proximity. (Id. ¶ 3.) Indeed, Commander Griffin was never in President Jiang's physical proximity. (Id. ¶ 5.) Thus, insofar as the rationale behind the Order is that individuals who would be physically close to President Jiang could be utilized to serve process on him, that rationale did not apply with regard to Commander Griffin and he is improperly listed in the Order.

3. Service Was Not Effected Under the October 21 Order's Terms

Even if the Court were to find that the October 21 Order did not suffer from the sovereign immunity and separation of powers defects described in Section 1, above, it should conclude that service was not effected under the Order's terms.

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[8] The Order provides: "service shall be accomplished by the delivery of a copy of the summons and complaint to . . . any of the security agents helping to guard Defendant Jiang Zemin during his stay in Chicago, Illinois, including . . . Commander Joseph Griffin, Commander of 18th District Chicago Police Department . . . and it is FURTHER ORDERED that said security agent is to forthwith serve said defendant with the said copy of the summons and complaint during Defendant's stay in Chicago . . ." (Order of 10/21/02 [emphasis added]).

a. Plaintiffs Offer No Evidence that They Delivered a Copy of the Summons and Complaint to a Security Official Helping to Guard President Jiang

The first element of service under the alternate method set forth in the October 21 Order requires that Plaintiffs deliver a copy of the summons and complaint to any of the identified security officials.[9] (Order of 10/21/02 ["service shall be accomplished by the delivery of a copy of the summons and complaint to . . . "].) The affidavits of Plaintiffs' process servers do not demonstrate that they delivered a copy of the summons and complaint to any listed security official contemplated by the Order other than Commander Griffin.[10]

As set forth above, Plaintiffs' process servers assert that they temporarily placed copies of the October 21 Order and the summons and complaint on the floor in front of an individual asserted to be a Secret Service agent but not otherwise identified, (Fertel Aff. ¶ 5), and left copies of the documents on a podium outside the Ritz-Carlton Hotel, (Bobor Aff. ¶ 8). Neither action constitutes delivery of the summons and complaint under the plain meaning of the October 21 Order. "Delivery" as utilized in the Order is defined as "the carrying and turning over of letters, goods, etc., to a designated recipient or recipients" or "a giving up or handing over; surrender." The Random House Dict. of the English Language, Unabridged at 528 (2d ed. 1987).

Placing the summons and complaint temporarily on the floor in front of an alleged Secret Service agent and then picking the documents up and leaving with them does not constitute turning over the documents, giving them up, handing them over, or surrendering them. Similarly, leaving the summons and complaint outside the Ritz-Carlton Hotel on a podium that Plaintiffs do not allege was staffed by anyone does not constitute turning over the documents to a recipient designated by the October 21 Order. Indeed, Mr. Bobor does not assert that he observed anyone, let alone an individual identified in the October 21 Order, pick up or even examine the papers placed temporarily on the floor or those left at the podium.

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[9] In addition, the Order "is predicated on plaintiffs' good faith effort to attempt first to serve [President Jiang] personally." The affidavits of Plaintiffs' process servers describe no effort to serve President Jiang personally, nor have Plaintiffs introduced evidence of any good faith effort to achieve personal service as contemplated by the Order. The United States notes, however, that because President Jiang enjoyed personal inviolability he was thus immune from service as explained in section 4b herein.

[10] As explained in Section 2, above, Commander Griffin was improperly included in the Order's list of security officials helping to guard President Jiang.

Because Plaintiffs offer no evidence that they delivered a copy of the summons and complaint to a security official responsible for guarding President Jiang, service was not accomplished under the plain terms of the October 21 Order.

b. Plaintiffs Offer No Evidence that the Summons and Complaint Were Ever Delivered to President Jiang

While the October 21 Order states that service shall be accomplished by, inter alia, delivery of the summons and complaint to federal and other officials helping to guard President Jiang during his Chicago stay, it further orders that an official to whom a copy of the summons and complaint is delivered "is to forthwith serve [President Jiang] with the said copy of the summons and complaint during [his] stay in Chicago." (Order of 10/21/02 [emphasis supplied].) There is no evidence of such service.

The Order's intent was for service to be accomplished through an identified security official's delivery of copies of the summons and complaint to President Jiang.[11] Indeed, the United States' submits that given the extensive security that surrounded President Jiang, absent a requirement that the papers actually be delivered to him in order for service to be accomplished, the order would fail to satisfy basic due process requirements. To satisfy due process requirements, service must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In light of the multiple layers of security that surround a visiting head of state, (see Flynn Decl. ¶ 4), the United States submits that it would be inappropriate to assume that an individual security official positioned on the outer layer of President Jiang's security detail who received a copy of service papers would have been able to leave his/her assigned post and deliver the papers through the inner layers of the detail to President Jiang.

Plaintiffs' process servers do not assert that any security official listed in the October 21 Order besides Commander Griffin received copies of the Order, summons and complaint, let alone delivered the documents to President Jiang. As set forth in Section 2, above, Commander Griffin was improperly included in the Order. In any event, he explains in his declaration that he did not serve President Jiang with the summons and complaint.[12] (Griffin Decl. ¶ 10.)

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[11] To the extent that Zhou v. Li Peng reaches a contrary interpretation of a similar order, the United States disputes that interpretation and, as noted above, is pursuing further review of Zhou.

[12] Indeed, Plaintiffs' process server did not inform Commander Griffin that the papers were time sensitive or that he should read them immediately, (id. ¶ 7), and the commander did not read the documents until

That Mr. Bobor left copies of the summons and complaint on an unstaffed podium outside President Jiang's hotel hardly suggests that President Jiang ever received them. (See Bobor Aff. ¶ 8.) Indeed, Mr. Bobor does not state that he observed any individual identified in the Order take the papers from the podium or even examine them. Likewise, Mr. Fertel's placing copies of the documents on the floor in front of an alleged Secret Service agent but then picking them up and leaving with them could not have led to President Jiang's receipt of the papers. (Fertel Aff. ¶ 6.)

Because Plaintiffs offer no evidence that President Jiang was ever delivered the summons and complaint, service was not accomplished under the plain terms of the Order or its intent.

4. Alternatively, the United States Suggests the Immunity of President Jiang as Head of State

a. President Jiang Enjoys Head of State Immunity

The United States has an additional interest in this action insofar as it involves the question of a head of state's immunity from the Court's jurisdiction. This interest arises from a determination by the Executive Branch of the U.S. Government, in its implementation of foreign policy and conduct of international relations, that permitting this action to proceed against President Jiang would be incompatible with the United States' foreign policy interests. The Court should give effect to this determination if it rejects the arguments set forth above.

The Legal Adviser of the Department of State has informed the Department of Justice that "[t]he Department of State recognizes and allows the immunity of President Jiang from this suit." (Letter from William H. Taft, IV to Robert D. McCallum, Jr. of Dec. 6, 2002 [copy attached at Tab E].) Under customary rules of international law recognized and applied in the United States, and pursuant to this Suggestion of Immunity, President Jiang, as the head of a foreign state, is immune from the Court's jurisdiction in this case. See, e.g., Leutwyler v. Queen Rania Al Abdullah, No. 00 Civ. 5485, 2001 WL 893343, at *1 (S.D.N.Y. Aug. 8, 2001); First Am. Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994), aff'd 79 F.3d 1145 (5th Cir. 1996); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994), appeal dismissed, No. 94-6026 (2d Cir. 1994).

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after President Jiang had left Chicago, (id. ¶ 8). Moreover, the commander was never in President Jiang's physical proximity so as to be in a position to deliver the documents even if he had known that they were time sensitive and had reviewed them before President Jiang left Chicago. (Id. ¶ 5.)

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, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex parte Peru, 318 U.S. 578, 588-589 (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 retention of jurisdiction by the courts would jeopardize the conduct of foreign relations. Ex parte Peru, 318 U.S. at 589; accord Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974). 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.[13] Ex parte Peru, 318 U.S. at 589; accord Hoffman, 324 U.S. at 35. Indeed, 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.[14]

Judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. Spacil, 489 F.2d at 619. First, as the Spacil court explained:

[13] 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. The FSIA, however, 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., First Am. Corp., 948 F. Supp. at 1119; Lafontant, 844 F. Supp. at 132-33.

[14] See, e.g., Leutwyler, 2001 WL 893343 at *1 (Executive Branch Suggestion of Immunity "is entitled to conclusive deference from the courts"); First Am. 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); 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); Lafontant, 844 F. Supp. at 132-33 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging that 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, 441 (D.C. Cir. 1989).

> Separation-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]); accord 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 F.2d 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 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." Id.

Thus, as a foreign head of state, and pursuant to the United states' suggestion of immunity, President Jiang is immune from the jurisdiction of this Court.[15]

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[15] Contrary to Plaintiffs' assertion in paragraph 10 of their Complaint, no exception to the head of state immunity doctrine applies to this civil proceeding in a United States court. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, United States accession, Feb. 23, 1989, T.I.A.S.No. 1021, 78 U.N.T.S. 277, cited by Plaintiffs, provides no relevant exception to head-of-state immunity. Rather, that instrument concerns potential criminal prosecution for acts of genocide, and states that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . .." Genocide Convention, article VI. Plaintiffs also cite the Torture Victim Protection Act ("TVPA"), but the legislative history to that Act expressly states that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business." H.R. Rep. No. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88. In the end, the United States recognizes no applicable exception to head-of-state immunity in this case, and thus recognizes and allows President Jiang's immunity from it.

b. Head-of-State Immunity Renders President Jiang Immune from Service of Process

The immunity of the person of a foreign head of state, i.e., his or her personal inviolability, is considered a core diplomatic immunity. As a leading treatise recognizes:

> Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized. . . . The inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorized or condoned by the Government which received him.

Lord Gore-Bush, Satow's Guide to Diplomatic Practice 120 (5th ed. 1979).[16] "When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as . . . an accredited diplomat." Restatement (Third) of Foreign Relations Law § 464 reporters' note 14; see also Sir Arthur Watts, The Legal Position in Int'l Law of Heads of State, Heads of Governments and Foreign Ministers, 51-52 (1994) ("In determining the meaning of this 'inviolability' [for heads of state], it is natural to have regard to the equivalent inviolability which is enjoyed by foreign ambassadors – but always bearing in mind that a Head of State's position is even more demanding of respect and protection than is that of an ambassador"). The Vienna Convention on Diplomatic Relations provides full personal inviolability for diplomatic agents, stating simply that "[t]he person of a diplomatic agent shall be inviolable." Vienna Convention on Diplomatic Relations art. 29, done Apr. 18, 1961, United States accession, Dec. 13, 1972, 23 U.S.T. 3227.[17]

Persons who are "inviolable" may not be personally served with legal process. E.g., Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 980-81 (D.C. Cir. 1965) (holding that "the purposes of diplomatic immunity forbid service" of a summons addressed to the Republic of Tunisia on the Tunisian Ambassador to the United States).[18] As a leading commentator on diplomatic law states,

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[16] Accord B. Sen, A Diplomat's Handbook of Int'l Law and Practice 107 (3d ed. 1988) (it is "essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials or even private persons").

[17] In 1978, Congress enacted the Diplomatic Relations Act, 22 U.S.C. § 254a et seq., to implement the Vienna Convention.

[18] See also, e.g., Lafontant, 844 F. Supp. at 130 (upon finding defendant enjoyed head-of-state immunity from action, a judgment "quashing service of process . . . and dismissing the action was promptly entered"); Aidi v. Yaron, 672 F. Supp. 516, 517 (D.D.C. 1987) (diplomat enjoying immunity from suit

"serving process on the diplomat . . . cannot be done by the authorities of the receiving State because of his inviolability." Eileen Denza, Diplomatic Law 265-66 (2d ed 1998).

CONCLUSION

For the foregoing reasons, the Court should vacate the October 21, 2002 Order ordering federal officials to serve process on Defendant Jiang Zemin. The United States further expresses its interest that the Order be vacated insofar as it provides for service through state and municipal officers, that the Court find that Commander Joseph P. Griffin was improperly referenced in the Order, and that service was not effected under the Order's terms. In the alternative, the United States respectfully suggests the immunity of President Jiang in this action.

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was entitled not only to dismissal of complaint, but also to have service of process quashed); Vulcan Iron Works v. Polish Am. Mach. Corp., 472 F. Supp. 77, 78 (S.D.N.Y. 1979) (Vienna Convention and Diplomatic Relations Act provide protection from "the jurisdiction and compulsory process of this court"); Greenspan v. Crosbie, 1976 WL 841 at *6 (S.D.N.Y. Nov. 23, 1976) (recognizing that service on entity through immune officials "while on a visit to the United States is patently improper") (citing Hellenic Lines). But cf. Tachiona v. Mugabe, 169 F.Supp.2d 259, 306-09 (S.D.N.Y. 2001) (holding that, although president of Zimbabwe was immune from service in his own capacity, he could be served as agent for political party) (the United States disagrees with this ruling and is pursuing additional review).

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