UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION



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

## NOTICE OF MOTION

TO: See attached Service List

PLEASE TAKE NOTICE that on June 12, 2003, at 9:30 a.m., we will appear before the Honorable Matthew F. Kennelly, in Room 1719 at 219 South Dearborn Street, Chicago, Illinois, and shall then and there present MOTION FOR LEAVE TO FILE APPEARANCE AND TO FILE BRIEF OF AMICUS CURIAE, a copy of which is attached hereto.

Terrence Buehler

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the aforementioned document upon the above addressee on June 9, 2003, before the hour of 5:00 p.m., by the methods stated in the attached Service List.

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**MOTION FOR LEAVE TO FILE APPEARANCE**
**AND TO FILE BRIEF OF AMICUS CURIAE**

The members of the United States House of Representatives who have signed the accompanying brief hereby move for leave to appear and to file a brief as an amicus curiae in response to certain views expressed by the U.S. Department of Justice in its motion to vacate the court's October 21, 2002 order, statement of interest, and, in the alternative, suggestion of immunity.

These members of the House, and particularly those members who serve on the House Committee on International Relations, are actively engaged in monitoring human rights developments abroad and have had long-standing concerns regarding mistreatment and human rights abuses perpetrated by the government of the People's Republic of China against Falun Gong practitioners in China and overseas. The Committee on International Relations, on which many of them serve, also has responsibility for oversight of the U.S. Department of State and its role in protecting foreign officials. They are also engaged in overseeing and reviewing various provisions of law relevant to the litigation Plaintiffs claims, including the Alien Torts Claim Act,

the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act. They also believe that their detailed knowledge of matters relevant to this litigation would assist this Court in its assessment of the issues raised by the Department of Justice in its motion.

They also believe they have good cause for filing this brief at this late stage. They only recently learned of the scope of this litigation and the arguments being asserted by the Department of Justice. They prepared this brief as soon as possible after giving careful review of the arguments being made by the plaintiffs and the United States, and they hope that the gravity and relevance of our views will outweigh the inconvenience that may be caused by the late filing of the enclosed brief. For the reasons stated herein, they respectfully move for leave to appear and to file the accompanying amicus curiae brief attached hereto as Exhibit A.

Date: June 9, 2003

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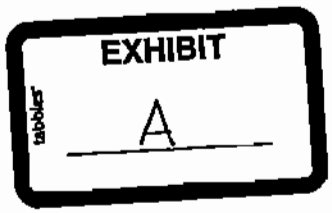
**BRIEF OF AMICUS CURIAE RELATING TO ISSUES RAISED BY THE UNITED STATES IN ITS MOTION TO VACATE OCTOBER 21, 2002, MATTERS AND STATEMENT OF INTEREST OR, IN THE ALTERNATIVE SUGGESTION OF IMMUNITY**



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## INTEREST OF AMICI CURIAE

Amici Curiae are a number of members of Congress who have a long-standing interest in foreign affairs and are concerned about human rights and human rights conditions in the People's Republic of China. The Amici have a long-standing interest in the protection and advancement of human rights around the world and have been involved in the oversight and enactment of the various provisions of law involved in the civil action here, including the Foreign Sovereign Immunities Act, the Alien Tort Claims Act, and the Torture Victims Protection Act.

## SUMMARY OF ARGUMENT

Amici Curiae are concerned that the executive branch has gone beyond asserting the legitimate interests of the United States in the above-entitled case and have been instead acting to undermine the various provisions of law cited above and are, in part, acting as an advocate of the Government of the People's Republic of China. Issues involving interests of foreign states must be adjudicated before U.S. courts pursuant to the arguments of the parties themselves, and not through the intermediaries of the U.S. Government. The Torture Victims Protection Act and the Alien Torts Claims Act have been recognized by Congress as creating civil actions against potentially high level officials, despite the political risks entailed in such an approach. In addition, the amici believe that the use of U.S. officials to facilitate service of process in compliance with a U.S. court order should not be wholly obviated because of foreign policy concerns. Finally, Amici believe that questions regarding the immunity of a head of state that are decided after the individual is no longer a head of state and was from a non-democratic regime raises novel questions that should be carefully considered by this Court.

## ARGUMENT

### I. Background

In October of 2002, a lawsuit was filed in the U.S. District Court of the Northern District of Illinois against Jiang Zemin, the former President of China for, among others, genocide, crimes against humanity, and torture. The lawsuit also named Office 6/10 as a defendant in the case because of their role in the persecution of Falun Gong in China and in the United States.

Neither Defendant has made any appearances in court; both have instead attempted to get the lawsuit dismissed via diplomatic rather than legal channels.

The United States government filed a "Motion to Vacate October 21, 2002 Order and Statement of Interest or, in the Alternative, Suggestion of Immunity, arguing, that the case be dismissed on jurisdictional and preliminary grounds"

### II. Congressional Interest in Action

It is our position as members of the U.S. Congress that we have a significant and abiding interest in this lawsuit for a number of reasons. First of all, human rights concerns, such as those raised by this case, have long been considered a key aspect of U.S. foreign policy, and in ways which particularly involve the United States Congress. Not only did the U.S. Congress pass the Torture Victim Protection Act to protect citizens around the world from human rights abuses and violations, but in the legislative history of the bill, Congress further expressed its support of the ways in which the Courts have permitted the Alien Tort Claim Act to provide analogous human rights protection both here and abroad. It is also the mandate of the U.S. Congress to ensure that U.S. foreign assistance is not provided to governments that engage in a consistent pattern of gross violations of internationally recognized human rights. The Country Reports on Human Rights Practices are compiled by the U.S. Department of State for submission to Congress

because concerns about human rights abuses in other countries are and continue to be an important aspect of U.S. foreign policy.

Second, we have an abiding interest in appropriate interpretation of the Foreign Sovereign Immunities Act (FSIA) ( 28 U.S.C. 1602 et. seq. ) The FSIA changed significantly the jurisprudential approach the U.S. Department of State is seeking to invoke, by raising a variety of political and foreign policy concerns, and by attempting to represent the interests of the Government of China through diplomatic channels. The principle that the FSIA established is that these types of claim should no longer be resolved through diplomatic channels that are subject to intense political pressures, but rather by courts based on legal standards instead. We believe that the U.S. Congress must ensure that the Executive Branch fully abides by this principle.

The members of Congress signing this brief are: Tom Lantos (D-CA), Sherrod Brown (D-OH), Elijah E. Cummings (D-MD); William Lacy Clay (D-MO); Rosa L. DeLauro(D-CT), Mark Green (R-WI), Marcy Kaptur (D-OH), Barbara Lee (D-CA), Carolyn Maloney (D-NY), Michael R. McNulty (D-NY), Dana Rohrabacher (R-CA), Eni F. H. Faleomavaega (D-AS), Robert E. Andrews (D-NJ), Betty McCollum (D-MN), Ciro D. Rodriguez(D-TX) , Frank Pallone, Jr. (D-NJ), Grace F. Napolitano (D-CA), Chris Bell (D-TX), Barney Frank (D-MA), James P. McGovern (D-MA&), Stephen F. Lynch (D-MA), Ellen O. Tauscher (D-CA), and Lynn C. Woolsey (D-CA).

## III. The FSIA Expresses the Jurisprudential Principle that Disputes between Private Claimants and States should be Litigated Directly and not through Intermediaries Such as the U.S. Government

The FSIA was passed by the United States Congress in 1976 and provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of

the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. Specifically, the FSIA sets forth procedures for service of process. We believe that it is clear that disputes regarding such service of process must likewise be resolved between the parties, and not through intervention of the U.S. Government.

In the case at bar, the United States makes a variety or arguments regarding service of process. Some of these arguments do not appear to be arguments on behalf of U.S. interests but on behalf of the Peoples' Republic of China. For example, the Government has argued that the plaintiffs cannot demonstrate that they carried out service of process in accordance with the terms of the district court's order of October 21, 2002. This assertion does not seem in any way to appertain to the U.S. Government's interests in this case, which are discussed elsewhere in their briefs. Such arguments by the U.S. Government in favor of a position that should have been asserted by the country which is party to the suit is precisely the type of assertion that the FSIA was intended to circumvent. This is of particular concern to us given the assertion by the plaintiffs that it was the Government of the People's Republic of China that asked for the Department's intercession in this case.

This approach to litigation against the Government of the People's Republic of China is also troubling in light of the character of the government and Mr. Jiang's manner of reaching the head of it. The People's Republic of China is not a democracy in any sense of the word, and Mr. Jiang did not come to power through any sort of popular electoral process. To the contrary, Mr. Jiang rose to power for his hard-line approach to crushing the democracy movement of 1989. Throughout his rule – one that the U.S. State Department itself calls an "authoritarian rule" – reputable sources such as Amnesty International, Human Rights Watch and the U.S. State

Department's own Country Report on Human Rights have documented severe and systematic human rights abuses by Jiang's government against his own people.

While we may not be in the best position to judge the validity of other claims made by the Department of Justice where it claims a direct U.S. interest in service of process issues under the October 21 order, we are concerned that the assertion of interests on behalf of the Beijing regime, as described above, calls into question the full scope of these contentions.

## IV. The Torture Victims Protection Act and the Alien Torts Claims Act have been recognized by Congress as Creating Civil Actions Against Potentially High Level Officials

We do believe that nothing in the Alien Torts Claims Act (28 U.S.C. 1350) ("ATCA") or the Torture Victim Protection Act (Public Law 102-256; 28 U.S.C. 1350 note) ("TVPA") provides a basis for an opportunity by the executive branch to assert its constitutional role over foreign affairs to block private litigation against a former head of state charged with violations of internationally recognized human rights, especially where the legal standards themselves have been established and confirmed by the United States Congress. It is the judicial branch of government that has been vested with the power to interpret statutes in disputes between litigants, and this responsibility should not be shirked merely because the court's ruling may have significant political overtones.

This clearly pertains to cases brought under the ACTA and TVPA, which directly confirm the authority of the U.S. courts to consider cases such as the one at bar. Congress specifically passed the TVPA to "make sure that torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 249, 102nd Cong., 1st Sess., 1991 WL 258662. The legislative history also expresses strong support for the ATCA, noting "section 1350" has important uses and should not be replaced." H.R. Rep. No. 367, Part 1, 102nd Cong., 1st Sess. at

3. The argument proffered by the Department of Justice – that the lawsuit risks provoking retaliatory lawsuits against U.S. officials – has been addressed and dismissed by Congress. At the time of the passage of the TVPA, the Bush administration initially opposed the TVPA's passage, stating among other concerns that the statute risked provoking retaliatory lawsuits against U.S. officials. The concerns expressed anew by the Department of Justice in this case were considered and rejected by Congress, and later even by President Bush, when the law was enacted. As he signed the TVPA into law, he acknowledged the "danger the U.S. courts may become embroiled in difficult and sensitive disputes in other countries," but continued, "These potential dangers, however, do not concern the fundamental goals that this legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." *Statement upon Signing the Torture Victim Protection Act of 1991*, Compilation of Presidential Documents (March 16 1992).

Moreover, even the United States Department of State has taken the position in the past that enforcing customary human rights norms under the ATCA does not contravene U.S. foreign policy. In its *Memorandum for the United States as Amicus Curiae in the case of Filartiga v. Pena-Irala*, 19 I.L.M. 585 (May 1980), the State Department stated its view that when an international consensus exists about a an internationally-recognized human right "there is little danger that judicial enforcement will impair our foreign policy." *Id* at 604. Although acknowledging that such cases may implicate foreign policy, the Memorandum concludes: "the protection of fundamental human rights is not committed exclusively to the political branches of government." *Id.* at 603

## V. The Use of U.S. Officials to Facilitate Service of Process in Compliance with a U.S. Court Order Should Not Be Wholly Obviated Because of Foreign Policy Concerns

The Department of Justice asserts on behalf of the Department of State that using federal protective personnel as a conduit for service of process will cause potentially serious effects on U.S. foreign policy, and that in the case at bar representatives of Mr. Jiang threatened to disrupt the planned meeting with President Bush at Crawford, Texas, if the State Department did not protect Mr. Jiang's delegation from service of process relating to the case at bar. However, one principle of U.S. foreign policy that has been recognized since the beginning of the republic is that the United States can serve as an example to the rest of the world with respect to the adoption of more democratic models of government based on the rule of law. In this instance, providing service of process by U.S. personnel pursuant to a court order represents a demonstration of the need of the executive branch to follow the orders of U.S. courts. Explaining the need for compliance with such judicial directives is indeed an opportunity to explain to authoritarian regimes with no rule of law the need to follow court orders and other similar directives.

Indeed, it is unwarranted and unwise for the U.S. Department of State to accept at face value statements from foreign governments (including notably China) that exaggerate opportunistically their incomprehension of U.S. separation of powers law, that express shock and offense at judicial decision, and that purport to construe them as expressions of the foreign policy positions of the American government. Jacques Delisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DePaul L.Rev. 473, 484, 487, 496-97 (2002). It is of course clearly in the interest of the Government of the People's Republic of China to threaten retaliation against the United States as a means of ensuring that they do not need to defend themselves in U.S. court

against allegation of human rights abuses and atrocities. Surely, the United States can explain to China that the rules that govern our legal system are themselves the product of our system of separation of powers. Applying principles of due process, interrelating rules of procedure, and applying state statutory regimes, our judicial system has developed fair and just rules governing service of process and standards of personal jurisdiction is a sine qua non of our system.

Moreover, U.S. courts have ruled against officials in a wide array of political circumstances and in many cases concerning officials from both friendly countries and countries with which we have no relations. No less important a consideration to share with China is the fact that human rights concerns have long been considered a key aspect of U.S. foreign policy, and that this lawsuit was filed not to embarrass China, but to persuade the defendants to end their persecution of Falun Gong and respect the rights of all persons in China. In fact, this lawsuit should be supported by the U.S. Department of State insofar as it is highly consistent with the goals set forth in their annual review of human rights around the world. These reports are compiled by the U.S. Department of State for the Committee on Foreign Relations of the United States Senate and the Committee on International Relations of the U.S. House of Representatives to allow these Congressional Committees pursuant to law to ensure that foreign assistance is not provided to countries who like China have engaged in a consistent pattern of gross violations of internationally recognized human rights against their own citizen population.

## VI. Questions Regarding the Immunity of A Head of State That Are Decided After the Individual Is No Longer a Head of State From A Non-Democratic Regime Raises Novel Questions that Should be Carefully Considered by this Court

The Department of Justice appears to argue in the alternative that their intervention represents a suggestion of immunity for Mr. Jiang by the executive branch. To the extent that the Court takes note of this assertion and had the Court decided this case while the Mr. Jiang was

President of the People's Republic of China, the Court may have had no choice but to recognize the suggestion of immunity and dismiss the case before it. However, this is not the case before the Court. Rather, Mr. Jiang is no longer head of state and acceptance by the Court of a suggestion for immunity for a former head of state of an undemocratic regime for abuses of internationally recognized human rights may not be prudentially required.

Granting immunity to a sitting head of state of any regime has been a long recognized approach to the conduct of the foreign affairs because of the interference that such suits may impose on the President's constitutional responsibilities to receive ministers of foreign states and has been recognized as part of traditional concepts of diplomatic immunity. However, the principles underlying these concerns and the U.S. interest in them are diminished significantly once the individual is no longer the head of state. Head of State immunity seeks to assure that the highest-level officials of our country will not be necessarily subjected to litigation in the courts of foreign states by making their counterpart heads of state immune from jurisdiction of courts in this country **while they are in office.** U.S. interests in conducting its foreign policy and protecting the President no longer hold, since the United States no longer needs to confer with the individual at the state-to-state level and the exercise of a sitting President's responsibilities will not be affected because of expectations of assertions of immunity on the President's behalf with respect to foreign states.

Moreover, we also recognize the value of an assertion of head of state immunity to a former head of state of a democratic country that has its own internal process for resolving disputes against such a head of state for injuries allegedly caused by such individual. In such cases, we can see that assertions of immunity would be justified because of the ability of the

foreign state to resolve the dispute and the dangers it would pose in our foreign policy with democratic friends and allies.

However, we see no policy or prudential reason to accept a suggestion of immunity by the executive branch with respect to a former head of a country that is a totalitarian regime and that does not afford the opportunity for its citizens to petition its government for grievances or to make claims against the governments for wrongdoing, particularly where the alleged wrongful acts Indeed, international law makes clear that individuals that are responsible for gross violations of human rights may be subject to prosecution even if they were heads of state at the time that the offenses occurred. See, e.g.,, the Convention on the Prevention and Punishment of the Crime of Genocide (specifying that "persons committing genocide" are subject to punishment, "whether they are constitutionally responsible rulers, public officials or private individuals")

Moreover, there are a number of cases where suits have been successfully brought against former heads of state. See, e.g., *Hilao v Estate of Marcos*, 25 F. 3d 1467 (1994); 103 F.3d 767 (9th Cir. 1996). Here the court faces the unusual situation where the suit was filed while Mr. Jiang was in office but has not made its decision regarding immunity until after he left office. We note that in the case of *Estate of Domingo vs. the Republic of the Philippines*, 808 F.2d 1349 (9th Cir. 1987), *on remand* 694 F.Supp. 782 (W.D. WA. 1988), the court held that the suggestion of immunity filed while a head of state was in office did not have significance once he was out of office. 694 F.Supp. at 786. In that case, similar to the case at bar, the United States filed a suggestion of immunity while President Marcos was in office but did not reaffirm the suggestion after the head of state had left office. In this unique circumstance, we believe the

court should give due consideration to the equities involved in unnecessarily filing this case a second time.

## CONCLUSION

For these reasons, we respectfully suggest that the court not dismiss this case at this time but to proceed to the merits of the case at bar.

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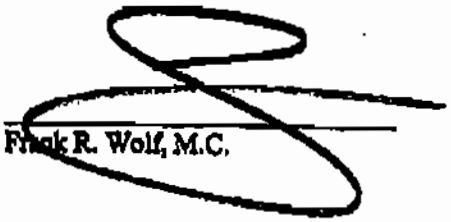

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