IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PLAINTIFFS A, B, C, D, E, F,	)	
	)	No. 02 C 7530
Plaintiffs,	)	
	)	Judge Kennelly
v.	)	
	)	
JIANG ZEMIN and FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10),	)	Magistrate Judge Levin
	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY BRIEF TO THE
U.S. GOVERNMENT'S RESPONSE BRIEF ON
PRELIMINARY AND JURISDICTIONAL QUESTIONS

1. The Response Brief filed by the United States Government in its capacity as *amicus curiae* on May 8, 2003 raises a number of additional arguments and new case citations in support of its positions that service of process on Defendant Jiang was inadequate, and that head of state immunity, sovereign immunity, and separation of powers concerns require dismissal of the complaint on jurisdictional grounds. The brief also challenges the accuracy and appropriateness of the Plaintiffs' treatment of the sovereign immunity and separation of powers arguments in our brief of April 12, 2003, and provides additional grounds in support of the Government's position that they have the authority to raise jurisdictional issues in their capacity as *amicus curiae*.

2. This Reply Brief addresses each of these major contentions, and also provides additional judicial support for Plaintiffs' position that Defendant Jiang's status as head of state on the date that this proceeding was instituted and on the date that he was served with process does not preclude jurisdiction on head of state immunity grounds. It is important in this regard to note that a number of case precedents, including the U.S. Supreme Court case prominently relied upon by the Government in its Response Brief, make clear that an immunity claim is not based on the date of initiation of the lawsuit or service on the defendant, as the Government claims, but

rather on when the immunity claim is brought before the court for decision. (See section 3, below) Since the Defendant's head of state immunity claim now is before the court for decision, and since he no longer is in a position to claim head of state immunity having stepped down from that position on March 15, 2003, the core legal basis for the U.S. Government's challenge to the jurisdiction of this Court no longer is available.

1. Implications of the Government's Amicus Status

3. The U.S. Government contends (Section I, pages 2-6 of the Response Brief) that their status as amicus does not restrict their ability to challenge the jurisdiction of the Court in this case, and that very broad authority is given to the government to represent the interests of the United States in any court proceeding under the provisions of 28 U.S.C. section 517.

4. The Government seriously misconstrues the Plaintiff's argument regarding the Government's role as Amicus and the power of the United States to intervene under 28 U.S.C. § 517. Plaintiffs recognize that section 517 grants considerable authority to the U.S. Government to represent its interests in pending judicial proceedings. We do not dispute this authority. What we are suggesting is that there is a broad variety of options open to the U.S. Government as to the way it seeks to present its views and interests before the courts. The weight given by courts to these representations likewise varies depending on which form of intervention the Government has chosen to take in a particular case. Different weight is accorded when the government intervenes, as a party to the proceeding, when it presents a suggestion of immunity, when it submits a statement of interest, and when it is given the status of *amicus curiae*. For example, it is recognized that the U.S. Government, as *amicus,* does not have the same ability as it would as an intervening party to move for dismissal based on jurisdictional or other grounds, since only a party to a proceeding, not an *amicus*, has that authority. *See e.g.,* Plaintiff's Memorandum on Preliminary and Jurisdictional Issues, April 14, 2003, p. 3, 4, 36-38. Having

made the choice to enter this proceeding in the capacity of an *amicus* pursuant to its section 517 authority, the U.S. Government must now abide by the restrictions normally imposed on an *amicus*' powers under the Federal Rules of Civil Procedure and standard judicial practice.

5. Plaintiffs are not arguing that the government should not be permitted to represent its views and interests to this Court pursuant to section 517, only that its options are limited by its choice to operate as an *amicus* in this case, as opposed to some other form of intervention. In the context of this proceeding, this means that the Government, as *amicus*, lacks the authority to request dismissal of the case as it has sought to do, and lacks the ability to raise defenses on behalf of the Defendants that are personal in nature and must be raised by parties to the proceedings, not by a third party *amicus*.

6. In essence, the Government in this case is seeking to serve as counsel for the Defendant, and to raise defenses on his behalf that the Defendant has not seen fit to raise through an appearance before this Court. This type of approach was rejected in *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 22 F.Supp.2d 521 (E.D.VA1998), where the court rejected an attempt by the U.S. Government to assert the claims of the Government of Spain. As the court in *Sea Hunt* explained, even if the United States contends that its interests are at stake in the matter at hand, it cannot "act as counsel for the foreign sovereign." *Id*. at 524. The Court in *Sea Hunt* expressly denied the Government's contention that 28 U.S.C. section 517 grants the Government authority to represent a foreign government. *Id.* at 525. Instead, the Court in *Sea Hunt* looked to the United States' involvement in *Jackson v People's Republic of China,* 794 F.2d 1490 (11th Cir.1986), as an illustration of the proper role the United States should play when diplomatically or politically pressured to intervene in a case.

7. In *Jackson,* the Chinese Government, faced with a possible default judgment, requested diplomatic assistance from the United States and threatened retaliatory suits against the

United States if assistance was not afforded. In response to the threat, the United States, instead of intervening on behalf of the Government of China to seek dismissal of the case, advised China to "retain counsel to appeal in the district court and urge sovereign immunity and any other defenses." *Jackson,* 794 F.2d at 1495.

8. Further, the Court in *Ex Parte Republic of Peru,* 318 U.S. 578, 581 (1943), explained that the "accepted course of procedure" for United States involvement in judicial proceedings where a foreign government is concerned about possible liability in U.S. courts is for the "State Department to advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the [relevant district] to file in the district court the appropriate suggestion of immunity." *Id.* Consequently, any intervention amounting to less than a suggestion of immunity should not convey the same weight and receive the same deference as a suggestion of immunity. The Government's decision to accept the role of *amicus* in this case therefore has a significant impact on the deference this Court should afford the Government.

9. Plaintiffs recognize that in instances where the United States presents a suggestion of immunity to the court, it should be given substantial deference. However, in *Tachiona v Mugabe,* the court acknowledged the significant difference that exists between the deference afforded to the Government when it presents a suggestion of immunity and when the Government enters a case as an Amicus. The court pointed out that:

> "the Government distinguishes between an assertion in a suggestion of immunity, which it contends confers absolute common law immunity that must be given conclusive effect by the courts, and a statement of interest, which it deems akin to an amicus brief in which it argues that a particular non-binding analysis should be considered by the court in assessing an official's claim for immunity." 169 F.Supp.2d 259, 283 fn 91 (S.D.N.Y 2001).

10. Moreover, there is a significant difference between presenting the court with a

suggestion of immunity, and moving for dismissal of a case or otherwise seeking to assert claims on behalf of defaulting defendant, as the government is seeking to do in this case in its *amicus* capacity. This is the distinction the court in *Sea Hunt* relied upon in its decision.

2. The "Binding" Nature of A Suggestion of Immunity From the U.S. Department of State

11. As indicated in Section 2, above, Plaintiffs do not dispute that suggestions of immunity, that is, findings by the U.S. Department of State regarding the factual circumstances as to whether or not a defendant in a U.S. judicial proceeding is serving as head of state at a particular point in time, must be given great deference by the courts. Rather, Plaintiffs dispute only whether such representations can be used as a basis for the U.S. Government to file motions and otherwise act on behalf of foreign governments or officials in U.S. courts (See Section 1, above), and whether immunity, once established, extends indefinitely or can be lost by virtue of changes in the defendant's official status (See Section 3, below).

3. Determining The Date When Immunity Applies

12. One of the core legal arguments presented by the U.S. Government in their Response Brief (Paragraph V(B) on pages 26-29 of the Brief) is that Defendant Jiang's status as head of state at the time he was served with process "rendered him immune from service," so that he could "not be served" either in his own capacity, or "as an agent for the defendant Falun Gong Control Office." (Government's Brief, page 26-27) This argument is not consistent with prevailing judicial opinion, including the U.S. Supreme Court case of *Ex Parte Peru*, 318 U.S. 578 (1943), which is prominently cited as authority by the Government in other portions of their Response Brief. Both *Ex Parte Peru*, and the case of *Petrol Shipping Corp. v. Greece*, 360 F.2d 103 (2nd Cir. 1966) make clear that only ***after*** personal jurisdiction is acquired by service of process (or appearance before the court) does the immunity defense properly come into

consideration. The courts in both these cases stipulate that the immunity claims do not affect:

> "the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of Process or by the defendant's appearance or participation in the litigation.... Therefore, the question we must decide is not whether there was jurisdiction in the district court, ... but whether the jurisdiction which the court had already acquired ... should have been relinquished in conformity to an overriding principle of substantive law." *Ex Parte Peru*, 318 U.S. at 587-8.

13. Applying these principles of jurisdiction and immunity as articulated by the U.S. Supreme Court to the present case, so long as service was adequate, this Court properly obtained jurisdiction over Defendant Jiang. It is only now, when the issue of head of state immunity has been raised, that the Court must decide whether "jurisdiction previously acquired" through service of process must be relinquished on immunity grounds. Since, as of the present time, Defendant Jiang no longer is a sitting head of state, and neither he nor the U.S. Department of State acting in his behalf can legitimately present such a claim, there is no legal basis for challenging jurisdiction as the Government is seeking to do.

14. This case presents a very novel circumstance in that the head of state immunity status of the Defendant changed after the date when the lawsuit was filed and service of process took place, but before any matters associated with the case, whether jurisdictional or on the substantive merits, actually were considered or decided by a court. In all of the cases cited by the Government in their Response Brief in support of the proposition that immunity should be determined as of the date the lawsuit is filed, the defendants' eligibility for immunity either remained as it was when the case was initiated, or had been previously addressed and decided by the court, and therefore was no longer open to question. This was the case, for example, in *Congo v. Belgium*, where the International Court of Justice, as an appeals court, had no alternative but to accept the status of the defendant as an immune diplomat as a given, even

though his status had changed prior to the case coming before the ICJ, since the appeals court was bound by the record presented on appeal, and had no alternative but to accept the facts as presented to them from the proceeding below. This is not the situation in the present case, where the claim of head of state immunity is coming to the Court's attention for the first time for review and decision, and the record of the case on these matters has not been closed.

15. Indeed, the one court that was faced with a similar situation of a head of state leaving office ***during the pendency of a lawsuit*** ruled that the issue of head of state immunity that it previously had used as a basis for dismissal of portions of the complaint had to be revisited when the defendant left office, and reinstated the dismissed counts based on the changed circumstances. (*Estate of Domingo v Republic of The Phillipines,* 694 F. Supp. 782) This finding was made six years after the suit was first filed. In the present case, no decisions have been made based on the change in the Defendant's status that has to be reversed. The court in *Estate of Domingo* determined that head of state immunity is granted to maintain foreign relations and once a head of state leaves office, the purpose of granting immunity no longer exists. *Id.* at 786. Further, once Marcos left office, the court dismissed the State Department's suggestion of immunity, which had been the bases of its initial immunity decision. *Id.*

16. This Court should follow the precedent, established in *Estate of Domingo* and *In Re Peru*, in order to assess whether ***at this point in time***, in the words of the U.S. Supreme Court, it is appropriate to "relinquish jurisdiction" previously acquired through service of process. Defendant Jiang's prior status as head of state is only the starting point for this inquiry, not determinative as the Government suggests in its brief. The change in the Defendant's immunity status prior to the Court of first instance considering these issues presents a novel set of circumstances that has not previously been addressed, outside of the *Estate of Domingo* decision,

and the general principle set out in the *In Re Peru* and *Petrol Shipping Corp. v. Greece* cases distinguishing between establishing jurisdiction based on service of process, and a subsequent challenge to maintaining jurisdiction based on a valid claim of immunity that may still be available to the defendant.

4. Demonstrating that Service of Process on Defendant Jiang Was Properly Carried Out

17. In Paragraph IV (pages 15-18) of their Response Brief, the U.S. Government maintains that "Plaintiffs have not established that they effected delivery" of the complaint on Defendant Jiang under the alternative service order, but only that delivery was made to security personnel. They suggest that delivery cannot be accomplished by leaving court papers "in the general vicinity of the person to be served." (at page 16)

18. The Government's position on adequacy of service does not address or respond to the line of cases presented in the Plaintiffs' brief indicating that "actual" service need not be demonstrated if all reasonable efforts that were possible have been made to accomplish service, that those to whom the documents were delivered could be reasonably expected to have access to the defendants for purposes of delivery, and, most important, that in fact the defendants received actual and sufficient notice of the nature and pendency of the judicial proceedings so as to satisfy due process requirements. Plaintiffs carried out numerous alternative efforts to accomplish service through various security personnel with access to Defendant Jiang. Moreover, it is beyond dispute, given the nature and extent of the efforts that have been mobilized by the Government of China through the U.S. Department of State to seek the dismissal of this lawsuit, that the Defendants and other officials of the Government of the People's Republic of China are amply aware of the existence and nature of the proceedings that have been instituted.

19. In addition to filing a formal diplomatic request through the U.S. Department of State

(as acknowledged by them) to obtain dismissal, the Government of China and Defendant Jiang have made it very clear, through numerous representations to the U.S. Department of State that dismissal of this case has a very high priority for them. The number, vehemence and specificity of these representations make clear that the Government of China and the Defendants most certainly have received actual notice of the nature and pendency of these proceedings, as well as copies of the complaint and other pleadings, even if the service efforts undertaken by the Plaintiffs may not initially have resulted in the delivery of these documents to Defendant Jiang during his visit to the United States. In essence, the U.S. Government, on page 12 of their Brief, acknowledge that actual service has taken place by noting "The reaction of the People's Republic of China to reports that former President Jiang had been served with the suit ...."

20. This demonstration of *de facto* knowledge and understanding of the legal proceedings that have been instituted, together with the conscientious and comprehensive nature of the Plaintiffs' efforts to serve the Defendants, demonstrates that service requirements were properly carried out, and that due process and notice protections have been properly observed in this case.

21. The Government cites the Seventh Circuit case of *McMasters v. U.S.,* 260 F.3d 814, 817 (7th Cir. 2001) (page 18 of Response Brief) to suggest that even if Defendant Jiang received "actual notice," this may not be sufficient. Unlike the situation in the *McMasters Case*, the Plaintiffs in the present proceeding have conscientiously complied with the directives of the rule governing service of process, and have made numerous efforts under very difficult circumstances to secure proper service. Actual service, in these circumstances, even under the standards set out in *McMasters*, suffices to meet due process and adequate notice requirements.

5. Implications of the Sovereign Immunity Arguments

22. The Government suggests (Section II on pages 6-12 of their Brief) that sovereign

immunity concerns are implicated by the alternative service order and the requirement that U.S. security personnel assigned to protect Defendant Jiang during his visit accept delivery of court documents in this case, and in turn deliver them to Defendant Jiang. They characterize as "of no relevance" the fact that "no prior authority has held similar service orders invalid under sovereign immunity" grounds, and dismiss Plaintiffs' contention that sovereign immunity issues only are raised where the United States Government or U.S. officials are themselves parties to a proceeding, and are being required to carry out significant functions. Instead, the Government uses *Edwards v Department of Justice*, 43 F.3d 312 (7th Cir.1994), to claim that "a third-party subpoena served on the government must be authorized by a waiver of sovereign immunity." Gov. Reply Brief, at 8. In *Edwards* the Seventh Circuit held that a federal agency's refusal to comply with a subpoena, must be reviewed under APA procedures. *Id.* at 316. However, the Plaintiffs are not requesting this Court review the refusal of an agency to act. We simply are pointing out that the October 21 Order for service is not a violation of the separation of powers doctrine. The Plaintiffs are not seeking this Court to compel any agency action, but simply to make a finding that the actions taken during the service of the Defendant were adequate and in no way a violation of sovereign immunity concerns. The Government's analysis of the *Edwards* decision is not relevant to the circumstances of the present proceedings.

23. Another important distinction between the *Edwards* case, the present proceeding, and all other cases cited by Plaintiffs in their Memorandum is that the Edwards case originated in state court, and as Milton Hirsch observes in *The Voice of Adjuration: The Sixth Amendment Right to Compulsory Process Fifty Years after United States ex rel. Touhy v. Ragen,* 30 Fla. St. U.L.Rev. 81, subpoenas issuing from state courts (irrespective of transfer to Federal court) are barred by sovereign immunity claims, where subpoenas issuing from federal courts are usually, although not always, enforced. Moreover, it is highly significant that *Edwards* focused on

matters relating to subject matter jurisdiction issues linked to the powers of an executive branch agency and its officials. This proceeding, on the other hand, deals with a much simpler matter of personal jurisdiction. This Court is not being asked to pass judgment on the rights and responsibilities of government officials, or to mandate their action, but rather to simply assess the adequacy of the service of process on Defendant Jiang. It is not necessary to assess the appropriateness or inappropriateness of the alternative service order to make this determination.

24. The Government also suggests that delivery of service "is significant and substantial," and has "severe consequences for the United States' ability to conduct foreign relations." While acknowledging that delivery of the court documents by security personnel to Defendant Jiang most certainly was contemplated under the procedures set out in the alternative service order, Plaintiffs must note that service requirements were satisfied by delivery of the documents to the security personnel, even if they chose not to deliver them, in turn, to Defendant Jiang. Plaintiffs fulfilled what could be reasonably expected of them in the way of service, given the special difficulties presented by securing service on a visiting foreign dignitary of the highest level, who is carefully isolated from outside contact because of security concerns.

25. Moreover, delivery of the court papers to Defendant Jiang or to a member of his entourage who would be reasonably expected to pass them on to Jiang, does not constitute more than a minor ministerial act that does not implicate the type of sovereign immunity concerns that serve as the basis for the judicial decisions the Government cites. All of the cases cited by the Government involve situations where government agencies or officials are themselves defendants in the lawsuits, and are being required to take specific actions in that capacity,[1] or where more extensive actions are being required of government officials as third parties to

1 The "functional approach" recommended by the Government (section II, pages 7-8 of their Brief) is based on cases which bear only on the role of state immunity and have no relevance to the federal sovereign immunity of the case at bar.

litigation, as would be the case, for example, with discovery orders involving extensive efforts to compile, examine and assess the relevancy of documents in response to a subpoena.

26. Many Courts in addition to the Ninth Circuit have concluded that Congress, in establishing an Administrative Procedure Act (APA) mechanism to review court orders requiring action by government officials did not intend to preclude such orders, or to suggest that such orders should be disobeyed. Many courts considering this issue have held that federal courts have, and must exercise, power to decide what evidence shall be produced before them, and some have even gone so far as to hold that abandoning to the executive branch the power to decide what evidence shall or shall not be produced would 'raise serious separation of powers questions.' *In re Boch*, 25 F.3d 761 (9th Cir.1994)(Norris, J. dissenting).

27. Finally, the Government claims that court orders may be challenged when they require action that interferes with the proper functioning of a government agency. Government Response Brief, at 7, *citing Larson v Domestic & Foreign Commerce Corporation*, 337 US 682, 703-704 (1949). In fact, the October 21 Order requesting that service be completed on the Defendant through government security personnel did not have involve a disruption of vital security functions, and therefore did not result in an intrusion on sovereign immunity.

6. Implications of Separation of Powers Arguments

28**.** In the Government's Reply Brief, the Government ignores the fact that service upon the defendants was not dependent upon actual delivery of the legal papers. The operative section of the alternative service order contemplated that the security personnel would deliver the legal papers to the defendants, but such delivery was not made a condition of effective service in the alternative service order at issue in these pleadings. An order that finds service effective upon tendering papers to a Government official can have no impact on foreign affairs, and does not implicate the constitutional principle of sovereign immunity. Moreover, actual notice has

obviously taken place given all the diplomatic correspondence and court pleadings that have been generated on behalf of the defendant.

29. In the Government's Response Brief, they claim that their proffered separation-of-powers argument, as expressed in their Motion To Vacate October 21 Order and Statement of Interest (Motion to Vacate) is limited to a consideration of the impact of the service order on foreign policy concerns. However, the Government's Motion to Vacate is clearly as concerned with the impact of the lawsuit on U.S.-China relations as it is with the purportedly "chilling impact" of the alternative service order on foreign policy in general and U.S.-China relations as such. See, for example, section one (pages 8-9 of their Motion to Vacate). It is therefore inaccurate for the U.S. Government to state as it does, (Section III, page 14 of their Brief), that "Plaintiffs' reliance on the legislative history of the TVPA is misplaced as the government's separation of powers argument is directed at the particular manner of service set forth in the October 21 Order, not to TVPA suits generally if they can be served lawfully."

31. The Government suggests (Section III, page 12 of their Response Brief) that separation of powers concerns are implicated by the October 21 Alternative Service Order to the extent that the Order involves judicial action that interferes with the way the Executive Branch carries out its foreign policy responsibilities, an area where the government "is entitled to 'the utmost deference.'" They argue that the Court and the Plaintiffs should not be allowed "to second guess the Executive Branch's determination of the October 21 Order's [negative] impact on the nation's foreign affairs," and argue that the legal arguments provided in Plaintiff's Brief are focused on the general question of when judicial action affecting foreign policy may be justified, rather than on the specifics of the alternative service order.

32. A number of courts, both domestic and international, including the U.S. Supreme Court, have made clear that judicial review can not be foreclosed just because there may be

potential impacts on foreign policy considerations. The U.S. Supreme Court has articulated very specific standards to be applied in determining whether or not judicial action in areas affecting foreign policy is permissible in particular circumstances. *(see Banco Nacional de Cuba v Sabbatino,* 376 U.S. 398, 401 (1964))[2]

33. In applying the *Sabbatino* standards to the present case it is not possible to assess the validity of the alternative service order separately from the particular case to which it is attached. If it is the judgment of this Court that consideration of the merits of the present proceeding against Defendant Jiang is justified under *Sabbatino* because the *Sabbatino* standards have been met, including the existence of sufficiently clear and well-established legal norms that are applicable to this case, then the method of service used to secure jurisdiction over Defendant Jiang must be deemed to pass the *Sabbatino* test as well.

34. The Alternative Service Order, in relation to the present proceedings, meets each of the elements of the *Sabbatino* standards. The international consensus and well established legal standards against torture and genocide is evident. *See* e.g. The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. In addition, the United States Government has acknowledged and "strongly condemns violations of human rights in China against Falun Gong members." (Gov.

[2][1] The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. [2] It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issues are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3] The balance of relevant consideration may also be shifted if the government which perpetrated the challenged act of state is no longer in existence...for the political interests of this country may, as a result, be measurably altered." *Sabbatino,* 376 U.S. at 401.

Reply Brief at 2 Note 2). Given both the international consensus against torture and the United States' stance on the human rights violations committed in China against Falun Gong members, any foreign policy implications are minimal. Finally, the Court in *Sabbatino* recognized the diminished foreign policy implications when courts in the United States pass judgment against governments and officials no longer in power. Since Defendant Jiang no longer is head of state, the foreign policy and diplomatic ramifications for the United States Government are greatly diminished.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court reject the preliminary and jurisdictional matters raised by the U.S. Government in its capacity as *amicus*, and proceed with a consideration of the substantive merits of the case, including the default status of the Defendants.

Dated:_____

Respectfully submitted,

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