No. 03-3989

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PLAINTIFFS A, B, C, D, E, F, and OTHERS
SIMILARLY SITUATED, WEI YE, and HAO WANG,
Plaintiffs-Appellants,

v.

JIANG ZEMIN and
FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10),
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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INTERESTS OF THE UNITED STATES

This appeal involves the legal effect of an assertion of immunity made by the Executive Branch on behalf of a foreign head of state—the President of China.

The Executive Branch's ability to assert immunity for foreign leaders traveling to the United States is a central part of the President's powers under Article II of the Constitution to "receive Ambassadors and other public Ministers," and to conduct this Nation's foreign affairs. In implementing the United States' foreign policy, the President regularly engages in high-level diplomacy with foreign leaders, which is

often best achieved by inviting those leaders to consult with the President or his advisers in the United States. This case presents a clear illustration of that point: It is difficult to conceive of any responsibilities of the President more important in the current world situation than dealing with the President of China, and those dealings were ongoing when plaintiffs initiated this suit, as defendant Chinese President Jiang Zemin was visiting the United States to confer with President Bush.[1]

As numerous legal precedents have made clear, the constitutional separation of powers doctrine requires that the courts recognize and give force to Executive Branch assertions of immunity for foreign heads of state so that the President can engage in foreign diplomacy in the best interests of the United States. The courts have a duty to do so even when the foreign head of state is accused of heinous acts because, in such instances, dealings with such foreign leaders will be the most difficult and delicate, and the recognition of immunity will be vital to achievement of U.S. foreign policy objectives, including fulfillment of our international legal obligations.

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[1]We note that, more generally, the Executive's foreign relations powers are obviously also involved whenever a foreign head of state is sued in our country, including on visits to the United States for nondiplomatic purposes. Nothing in this brief is meant to suggest that the Executive's authority to assert immunity is more limited in these other cases.

In this case, plaintiffs brought suit against Jiang Zemin, who was then the President of the People's Republic of China, and the Falun Gong Control Office (Control Office), an entity plaintiffs contend is an agency of the Chinese Communist Party, and which plaintiffs allege President Jiang established to suppress the Falun Gong spiritual movement. Although the Executive Branch asserted immunity for President Jiang, the United States Government is greatly concerned about serious charges of the sort plaintiffs have made in their complaint. The Government has on various occasions documented and strongly condemned the systematic persecution by the Chinese Government of the followers of Falun Gong.[2] And the Executive Branch has made strenuous efforts through diplomacy to bring an end to these intolerable abuses.[3] This *amicus* brief represents no change in the United States

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[2]*See, e.g.*, Dep't of State, 1 Country Reports on Human Rights Practices for 2002, submitted to the Comm. on Int'l Relations, U.S. House of Representatives & the Comm. on Foreign Relations, U.S. Senate, at 749–820 (Comm. Print 2003); Dep't of State, Annual Report on Int'l Religious Freedom 2002, submitted to the Comm. on Foreign Relations, U.S. Senate & the Comm. on Int'l Relations, U.S. House of Representatives, at xviii, 197–219 (Comm. Print 2002); *see generally* Dep't of State, Country Reports on Human Rights Practices for 2003, China, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm.

[3]*See, e.g.*, Dep't of State, Annual Report on Int'l Religious Freedom 2002, at 209; President George W. Bush, Remarks at Photo Opportunity with Vice Premier of China Qian Qichen (Mar. 22, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/03/20010322-12.html.

Government's policy of condemning the human rights abuses suffered by Falun Gong members at the hands of the Chinese Government.

Nevertheless, we file this brief in order to ensure the application of head-of-state immunity in this case and thereby help protect against encroachment upon the President's vital constitutional power to effectively conduct the Nation's foreign affairs. We therefore defend the district court's holding that it was bound to accept the Executive Branch's assertion of President Jiang's immunity from suit. We also argue that the district court similarly should have accepted the Executive Branch's assertion that President Jiang was immune from service of process, which meant that he could not be used as an unwilling agent for service of process on the Control Office. And we further contend that the courts lack authority to order federal security officers performing the critical duty of protecting the lives of visiting foreign dignitaries to change their roles and instead serve as instruments of service on the very foreign leaders they are protecting.

STATEMENT OF THE ISSUES

The United States will address the following three issues in this brief:

1. Whether the district court properly deferred to the Executive Branch's assertion of immunity for President Jiang from this suit.

2. Whether the district court erred in concluding that plaintiffs could effect service of process on the Falun Gong Control Office through service on President Jiang, despite the Executive Branch's assertion that President Jiang's head-of-state immunity rendered him immune from service.

3. Whether the district court properly entered a special alternative service order directing federal and local security officers to serve process on the President of China, even though these officers were engaged in protecting his safety.

STATEMENT OF THE CASE AND OF THE FACTS

The plaintiffs in this case are practitioners of Falun Gong, a spiritual movement of Chinese origin. Op. 1 (Sept. 12, 2003) (the district court's opinion is published at 282 F. Supp. 2d 875 (N.D. Ill. 2003)). They brought suit against then-Chinese President Jiang and the Falun Gong Control Office, an entity plaintiffs contend is an agency of the Chinese Communist Party, and that President Jiang purportedly established to suppress Falun Gong.[4] *Ibid.*

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[4]Plaintiffs assert claims under the Alien Tort Statute, 28 U.S.C. § 1350, as well as under the Torture Victim Protection Act, 28 U.S.C. § 1350, note. The Supreme Court is currently considering whether the Alien Tort Statute creates private rights of action or, instead, is only a jurisdictional statute. *See Sosa v. Alvarez-Machain*, 331 F.3d 604 (9th Cir.), *certiorari granted*, 124 S.Ct. 807 (No. 03-339) (oral argument scheduled for March 30, 2004).

Plaintiffs also claim that those two statutes provided the district court with jurisdiction over their claims. Appellants' Br. 1. But as the district court properly held, the Torture Victim Protection Act is not a jurisdictional statute. Op. 2 n.2

Plaintiffs obtained from the district court a special *ex parte* order, permitting them to serve the defendants by alternative means while President Jiang was in Chicago as part of an official visit to meet with President Bush. *Id*. at 4. That order authorized plaintiffs to deliver the summons and complaint "to any of the security agents or hotel staff helping to guard Jiang," which included federal officials. *Ibid*. (quotation marks omitted). It then ordered the security agents to serve President Jiang.

Under 28 U.S.C. § 517, the United States moved to vacate the alternative service order or, in the alternative, to assert head-of-state immunity for President Jiang.[5] D. Ct. Docket No. 11 at 15 ("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.'" (quoting Letter from William H. Taft, IV, Legal Adviser, Dep't of State, to Robert D. McCallum, Jr., Assistant

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(citing *Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir.), *cert granted*, 124 S.Ct. 534 (2003) (oral argument scheduled for April 20, 2004)).

[5]In addition, the Government argued that plaintiffs had failed to effect service under the terms of the alternative service order. Plaintiffs claim that they delivered service documents to a Chicago Police commander and to agents of the United States Secret Service. Op. 4. But plaintiffs provided no evidence that these officials served President Jiang with process. And plaintiffs' own evidence demonstrates that the individuals plaintiffs allege to have been Secret Service agents refused to accept the documents plaintiffs' process servers tendered. D. Ct. Docket No. 33 at 5–6.

Attorney General (Dec. 6, 2002))). The motion explained that Executive Branch assertions of head-of-state immunity are binding on the courts, and that the passage of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602–1611, which established legislative standards for immunity determinations concerning foreign states to be applied by the Judicial Branch, did not diminish the Executive's authority to assert the immunity of heads of state. It also explained that the Executive Branch's assertion of immunity not only rendered President Jiang immune from suit in his own name, but also from service in a suit against the Control Office.

The district court accepted the Executive Branch's assertion of head-of-state immunity on behalf of President Jiang, and, accordingly, dismissed plaintiffs' claims against him. Op. 9. But the district court held that it was not bound by the Executive Branch's assertion that President Jiang was immune from service of process as an alleged agent of the Control Office. *Id*. at 14. Because it concluded that President Jiang's head-of-state immunity did not preclude his use as an unwilling service agent on a third party, the district court considered whether plaintiffs' purported service on President Jiang effected service on the Control Office, and whether such service was sufficient to give the court personal jurisdiction over that entity.

The district court held that plaintiffs had not properly served the Control Office through service on President Jiang, because they failed to establish that the latter was

"an officer [or] a managing or general agent" of the Control Office within the meaning of Fed. R. Civ. P. 4(h)(1). Op. 16–18. In the alternative, the district court held that, even if plaintiffs properly served the Control Office through President Jiang under Rule 4(h)(1), that service did not establish personal jurisdiction over the Control Office under Fed. R. Civ. P. 4(k)(1) or 4(k)(2). *Id.* at 18–23. For these reasons, the district court also dismissed plaintiffs' claims against the Control Office.

The district court did not address the Government's challenge to the special service order, which had imposed service responsibilities on the officers protecting the safety of President Jiang.

SUMMARY OF ARGUMENT

There are two aspects to the Executive's assertion of immunity for President Jiang. The Executive Branch asserted President Jiang's immunity from this suit and his immunity from service of process as an agent for the Control Office. The district court correctly recognized the Executive Branch's assertion and dismissed plaintiffs' claims against President Jiang. At the same time, though, the district court erred in not fully recognizing the breadth of the immunity the Executive Branch asserted for President Jiang, and in declining to hold that he was inviolable and thus could not be used as an unwilling instrument for service of process on others.

1. For almost two hundred years, the courts of the United States have accepted Executive Branch assertions of immunity of foreign states from our courts, as part of the Executive Branch's discharge of its responsibility for the Nation's foreign affairs, including fulfillment of the country's international obligations. In 1976, through the FSIA, Congress codified the principles governing the immunity of foreign states and transferred from the Executive to the Judicial Branch the responsibility for making immunity determinations by applying the legislative standards. But that codification was limited to the immunity of foreign states and did not touch on the immunity of foreign heads of state. Thus, the Executive Branch retained its traditional power to assert the immunity of heads of state, as every court to have considered the issue has held.

The courts' deference to executive assertions of foreign sovereign immunity was constitutionally required. As the Supreme Court has repeatedly emphasized, the President exercises the "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003) (quotation marks omitted). Because an exercise of jurisdiction over a foreign sovereign had significant implications for this Nations' foreign affairs, the Supreme Court required the courts of the United States to surrender jurisdiction over cases against foreign sovereigns, when the Executive Branch asserted the foreign state's immunity. That

same separation of powers principle continues to require judicial acceptance of Executive Branch assertions of immunity for foreign heads of state.

2. The Executive Branch's authority to assert such immunity derives, in part, from the Constitution's assignment to the President of the power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. To be meaningful, the President's power to receive foreign heads of state must encompass the power to protect, through assertions of immunity from service, visiting heads of state from interference with their diplomatic functions. Such interference arises not only from the assertion of jurisdiction over the head of state, but also from service of process itself. Thus, deciding whether immunity from service is required is part of the Executive Branch's constitutional responsibility in determining how to fulfill the Nation's foreign policy and international obligations.

In this case, the Executive Branch determined that permitting the assertion of jurisdiction over President Jiang during his official state visit as a guest of the President of the United States would be a serious attack on the dignity of a foreign head of state and would compromise this Nation's delicate foreign relations with China. Accordingly, it asserted President's Jiang's immunity, which included his immunity from legal process. As a result, the district court properly dismissed plaintiffs' action against President Jiang. But the district court's failure to defer to

the Executive Branch's assertion that President Jiang's personal inviolability rendered him immune from service of process in the action against the Control Office usurped the Executive's constitutional authority to determine that immunity and inviolability was warranted in this case.

3. In addition to asserting President Jiang's immunity, the Government challenged the validity of the district court's alternative service order, which required federal agents guarding President Jiang to accept process and serve it on him. This order was improper because courts have no authority to order federal officials to carry out tasks unless those officials have some nondiscretionary, legal duty to act and the United States has waived its sovereign immunity. Except for one statute that applies only to United States Marshals, Congress has not authorized the federal courts to require federal agents to serve process. Without such a statute, the court was without power to order federal agents to serve President Jiang.

Moreover, the district court abused its discretion insofar as it ordered local officials responsible for guarding President Jiang to serve him. In order to protect visiting dignitaries properly, security agents must have the full trust and cooperation of their charges. Requiring security agents to serve process would erode this trust and cooperation, potentially leading to catastrophic results to this Nation's foreign

relations. Accordingly, the district court should not have issued the alternative service order.

ARGUMENT

I. The District Court Correctly Recognized the Binding Nature of the Executive Branch's Assertion of President Jiang's Immunity from This Suit.

On appeal, plaintiffs make two arguments intended to show that the district court erred in deferring to the Executive Branch's assertion that President Jiang is immune from suit in this case. First, plaintiffs argue that judicial deference to Executive Branch assertions of head-of-state immunity violates the constitutional separation of powers principle. Second, plaintiffs argue that President Jiang's departure from office as China's head of state during the course of this litigation rendered him amenable to suit, despite the Executive Branch's assertion of immunity.

Neither argument has merit. Rather than violating the separation of powers doctrine, judicial acceptance of Executive assertions of head-of-state immunity is required by that constitutional principle. And because no service could be effected in this case, the Executive Branch did not withdraw its assertion of immunity after President Jiang stepped down from office, and the People's Republic of China did not waive that immunity, President Jiang's change in status had no bearing on his amenability to suit. To hold otherwise would undermine the very purposes of the

head-of-state immunity doctrine, as well as the Executive Branch's special responsibility in implementing it.

A. Acceptance of the Executive Branch's Assertion of Head-of-State Immunity Is Required by the Separation of Powers Doctrine.

1. Head-of-state immunity emerged out of the more general doctrine of foreign sovereign immunity, a doctrine with a nearly two hundred year history in this country's jurisprudence. As the Supreme Court observed in 1812, "a consent to receive [a foreign minister] implies a consent that he shall possess those privileges which his principal [the foreign sovereign] intended he should retain—privileges which are essential to the dignity of this sovereign, and to the duties he is bound to perform." *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 138-39 (1812).

Prior to the enactment of the FSIA in 1976, the Executive Branch would assert the immunity of foreign sovereigns in suits against foreign states or their property, when it concluded that doing so was necessary to fulfill the foreign policy interests and responsibilities of the United States. *See, e.g., Rep. of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943). Under pre-FSIA practice, when the Executive Branch asserted the immunity of a foreign state, courts accepted that binding assertion and dismissed the suit. *See Hoffman*, 324 U.S. at 34 ("[I]n *The*

Exchange, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction [over a case involving a foreign state], will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General.").

The FSIA codified to a large extent the then-existing restrictive theory of foreign sovereign immunity, under which the Executive Branch had recognized the sovereign immunity of foreign states as to matters concerning sovereign or public acts, but not concerning commercial acts.[6] And the statute transferred from the Executive to the Judicial Branch the responsibility for determining whether a foreign state meets the legal standards for immunity under a given set of facts. *See generally, Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–90 (1983).

The FSIA is limited by its terms to the immunities of foreign states and does not address the immunity of foreign heads of state. *See, e.g.*, 28 U.S.C. § 1604 (providing for the immunity of foreign states, subject to exceptions); *id*. § 1603(a) (defining "foreign state"). For this reason, courts have uniformly continued to

[6]The State Department announced the adoption of the restrictive theory in the so-called Tate Letter. *See* Letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, App. 2 (1976).

recognize the binding nature of Executive Branch assertions of head-of-state immunity.[7] *See, e.g., United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 914 (N.D. Ill. 2003); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296 (S.D.N.Y. 2001), *appeal docketed*, No. 03-6033 (2d Cir. Feb. 14, 2003), No. 03-6043 (2d Cir. Feb. 28, 2003); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Lafontant v. Aristide*,

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[7]The FSIA covers not only suits against foreign states, but also suits against the agencies or instrumentalities of those states. 28 U.S.C. § 1603(a). Accordingly, some courts have held that the FSIA governs in cases against individuals acting in their official capacity as officers of agencies or instrumentalities of a foreign state under the FSIA. *See, e.g., Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan,* 75 F.3d 668, 671 (D.C. Cir.1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1992). But because the FSIA does not address the immunities of foreign heads of state, and because heads of state are not generally considered officers of agencies or instrumentalities of their states, the FSIA does not govern in suits against foreign heads of state. *But cf. In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994) (analyzing claims against the estate of the former President of the Philippines under the FSIA in a case in which the Philippine government waived ex-president's head-of-state immunity).

Although they conceded that the FSIA does not apply to heads of state, plaintiffs here argued below that enactment of the FSIA "displaced" the practice of judicial deference to Executive Branch assertions of immunity on behalf of heads of state. Op. 7–8. The district court properly rejected this argument. *Id*. at 8–9. Plaintiffs did not press this point in their opening brief and thus have now waived it. *See Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1025 n.6 (7th Cir. 2003).

844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988).

Judicial acceptance of Executive Branch assertions of immunity under pre-FSIA practice was not a matter of mere discretion; it was compelled by the separation of powers in our Constitution. Two principal constitutional provisions vest in the Executive Branch the authority to conduct the Nation's foreign affairs. Article II, Section 2 states that the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." And, Article II, Section 3 assigns to the President the power to "receive Ambassadors and other public Ministers."

Although the Constitution also gives Congress certain foreign affairs powers, *see* U.S. Const. Art. I, § 8 (giving Congress the power "To regulate Commerce with foreign Nations," "To declare War," and "To define and punish * * * Offenses against the Law of Nations"), the Supreme Court has consistently recognized that the President exercises the "vast share of responsibility for the conduct of our foreign relations," *Garamendi*, 123 S.Ct. at 2386 (quotation marks omitted); *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (identifying the President as the "sole organ of the federal government in the field of international relations").

Thus, because "[e]very judicial action exercising or relinquishing jurisdiction over [a suit against a] foreign government has its effect upon our relations with that government," the Supreme Court has required courts to accept Executive Branch assertions of immunity: "[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Hoffman*, 324 U.S. at 35; *cf. Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (within the sphere of foreign relations, "courts have traditionally shown the utmost deference to Presidential responsibilities" (quotation marks omitted)).

This Court's sister Circuits consistently applied these principles prior to the FSIA's enactment. Thus, the Fifth Circuit explained that, "[w]hen the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question. 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." *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

The Fourth Circuit likewise ruled that "the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion." *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961).

Judicial acceptance of an Executive Branch assertion of head-of-state immunity continues to be required by the separation of powers. As the Supreme Court has instructed, recognition of foreign immunity from suit (in that case, of the foreign sovereign itself) "is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486 (discussing pre-FSIA foreign sovereign immunity). Rather, an assertion of immunity made by the United States Government on behalf of a foreign head of state is based on a determination by the Executive Branch that recognizing the foreign leader's immunity is in the Nation's interest, taking into account international practice and respect for principles the United States wishes to be applied to its own officials. As such, it is a political decision, not subject to review by the courts. *See In re Doe*, 860 F.2d 40, 44 (2d Cir. 1988) ("[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. * * * [F]lexibility

to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive rather than by judicial decision."); *Spacil*, 489 F.2d at 619 ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive."); *cf. Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial").

2. Nevertheless, plaintiffs make the sweeping claim that judicial recognition of Executive Branch assertions of immunity itself violates the separation of powers. Appellants' Br. 35–36. Plaintiffs correctly note that the Constitution has assigned to the federal courts the responsibility to decide cases and controversies involving the interpretation of treaties and international law. *Id*. at 35. And the Supreme Court has clearly explained that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). But plaintiffs are wrong in suggesting that judicial acceptance of Executive Branch assertions of head-of-state immunity amounts to judicial abdication of the responsibility to say what the law is. Appellants' Br. 36.

The Supreme Court has made clear that, in determining whether a matter touching on foreign affairs is subject to judicial determination, its decisions "seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker*, 369 U.S. at 211–212.

As we have explained, there is a lengthy history of judicial acceptance of Executive Branch assertions of foreign immunity. *See Hoffman*, 324 U.S. at 34 (tracing the practice to Chief Justice Marshall's 1812 opinion for the Court in *The Exchange*). That history is itself overwhelming evidence that this practice is consistent with, and indeed is demanded by, the separation of powers doctrine. *See Mistretta v. United States*, 488 U.S. 361, 401 (1988) ("[T]raditional ways of conducting government * * * give meaning to the constitution." (quotation marks omitted) (concluding that 200 year old practice does not violate the separation of powers)); *accord The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

This long history is explained by the fact that the Executive Branch's decision to assert the immunity of a foreign sovereign is a foreign policy decision based on the

Executive's determination of what is in the Nation's foreign relations interests.[8] *See Spacil*, 489 F.2d at 619. Such a decision is simply not "susceptibl[e] to judicial handling." *Baker*, 369 U.S. at 211. And the "possible consequences of judicial action" include the most severe interference with the Executive Branch's conduct of its constitutionally-assigned foreign relations power. *Id*. at 211–212; *see Hoffman*, 324 U.S. at 35. As mentioned above, this very case epitomizes this principle, as the importance of the ability of the President of the United States to comply with international norms and to engage freely in diplomacy with the leader of China cannot be overstated.

In the FSIA, Congress left untouched the Executive Branch's power to assert the immunity of a foreign head of state, and it did not stipulate standards with which the courts could review these judgments. Thus, nowhere did Congress purport to transfer out of the Executive to the Judiciary the power to declare foreign heads of state immune from suit. Indeed, Congress has acquiesced in the Executive Branch's power to assert head-of-state immunity. Though Congress has amended the FSIA on

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[8]We note that the Supreme Court has long recognized the power of the President to compromise claims of U.S. nationals against foreign governments. *See Garamendi*, 123 S.Ct. at 2387 (noting that the Washington Administration settled citizens' claims against the Dutch Government by executive agreement as early as 1799). Recognizing a foreign state's or head of state's immunity from suit is a less drastic exercise of Executive power, since it does not extinguish plaintiffs' claims.

several occasions since its enactment, it has never sought to make that statute applicable to suits against foreign heads of state, even in the face of judicial recognition of the Executive Branch's power to assert head-of-state immunity. *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (stating that longstanding Executive practice "known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent" (alternations in original)).

For this reason, judicial acceptance of Executive Branch assertions of head-of-state immunity is a continuation of the long history of deference to Executive assertions of foreign sovereign immunity. And the former is justified by the same constitutional principles that underlay the latter. Thus, plaintiffs have it exactly backwards: A court's *failure* to recognize an Executive Branch assertion of head-of-state immunity would violate the separation of powers. *See Spacil*, 489 F.2d at 620 ("Only if we permit an executive suggestion of immunity to preempt completely judicial consideration of the question can we be certain that we are not encroaching upon the executive's prerogative in foreign affairs.").

B. President Jiang's Change in Status During this Litigation Did Not Render Ineffective the Executive Branch's Assertion of Immunity.

1. When plaintiffs filed suit, defendant Jiang was the President of the People's Republic of China. During the litigation, he left his position as China's head of state. *See* Op. 3–4. Plaintiffs argue that defendant Jiang's change in status rendered ineffective the Executive Branch's assertion of immunity for him. *See, e.g.*, Appellants' Br. 16–19.

Plaintiffs' claim is wrong because the Executive Branch submitted to the district court an assertion of immunity that precluded the exercise of jurisdiction over President Jiang in this suit. The Executive Branch has not withdrawn its assertion of immunity, nor has China waived the immunity of its former President in this suit. *See In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1111 (4th Cir. 1987) (recognizing Philippine Government's waiver of former President Marcos' head-of-state immunity). Accordingly, the assertion of immunity by the Executive Branch remained binding in this litigation.

The Executive Branch's determination to assert immunity on behalf of a foreign head of state is a foreign policy decision the Executive makes, taking into account the Nation's foreign relations interests, including international norms. In this case, plaintiffs filed suit against President Jiang when he was head of state, solely for acts

allegedly taken while he was in office. The Executive Branch asserted head-of-state immunity in this suit, consistent with accepted practice in this country and in the international community. *See, e.g., Lafontant v. Aristide*, 884 F. Supp. 128 (E.D.N.Y. 1994); *Arrest Warrant of 11 Apr. 2000 (Congo v. Belg.)*, 41 I.L.M. 536 (I.C.J. 2002) (decision of the International Court of Justice holding that an arrest warrant issued by one country against another country's then-sitting foreign minister violated customary international law, despite the fact that the foreign minister was relieved of his position during the pendency of the litigation). The Executive Branch has determined that President Jiang's departure from office during the pendency of this litigation has not affected its determination that it is in the interest of the Nation's foreign relations to continue to recognize his immunity from this suit.[9]

In asking this Court to overturn the Executive's decision, the plaintiffs confront the same separation of powers problem that would have existed had the district court not accepted the Executive Branch's assertion of immunity for President Jiang in the first place. The Executive Branch's constitutionally-based prerogative to decide

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[9]This position promotes a wide variety of important interests: It fulfills the expectation of foreign states that ligitation will not be the result of state visits; it discourages efforts to sue foreign leaders near the end of their terms in office; it helps protect U.S. officials from suit abroad; and it enables the Executive Branch to uphold international obligations of the United States. *Cf. Arrest Warrant of 11 Apr.*, 41 I.L.M. at 549–50 (discussing similar considerations). These and other policy considerations are the responsibility of the Executive Branch.

whether to assert immunity encompasses the authority to decide when, if ever, to withdraw an assertion of head-of-state immunity. In his conduct of foreign relations, the President routinely negotiates with foreign leaders in pursuing the interests of the United States. His ability to do so successfully is obviously undermined if he is deprived of the ability to avoid the serious complications caused by looming litigation.

Thus, in the exercise of his Article II foreign relations function, the President retains the ability to decide when an assertion of immunity in a particular case no longer serves its proper function for the public interest or violates international practice. In this instance, the Government asserted immunity for President Jiang against plaintiffs' complaint shortly after it was filed, and reiterated to the district court the importance of recognizing the assertion of immunity even after President Jiang had left office. *See* D. Ct. Docket No. 36 at 18–29.

The continuing effectiveness of the Executive Branch's assertion of immunity here is consistent with the opinion of the sole appellate court to have addressed the issue of the scope of head-of-state immunity. In *In re Doe*, the Second Circuit explained that "in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. * * * [F]lexibility to react quickly to the sensitive problems created by conflict between individual

private rights and interests of international comity are better resolved by the executive rather than by judicial decision." 860 F.2d at 44, 45.

The Executive's power to decide not to withdraw an assertion of immunity made on behalf of a sitting head of state, in a case in which the head of state left office during the pendency of the litigation, is also fully consistent with every case of which we are aware involving the immunity of a former head of state. The only circumstances in which the courts of appeals have held that a former head of state is not entitled to head-of-state immunity are when the Executive Branch or the foreign leader's own country has disclaimed head-of-state immunity. *See, e.g., In re Grand Jury Proceedings*, 817 F.2d at 1111 (recognizing Philippine Government's waiver of former President Marcos' head-of-state immunity); *Estate of Domingo v. Rep. of Philippines*, 808 F.2d 1349, 1351 (9th Cir. 1987) (refusing to recognize head-of-state immunity for former Philippine President Marcos where "[n]either the State Department nor the Philippine government has interceded on his behalf in the present dispute."); *Rep. of Philippines v. Marcos*, 806 F. 2d 344, 356–57 (2d Cir. 1986) (declining to recognize head-of-state immunity where United States does not assert immunity in case against former Philippine President Marcos in case brought by the

Philippines).[10] We have found no instance in which a court has held that a former head of state lacks immunity, despite an Executive Branch assertion of immunity for the case, and plaintiffs have identified none. Here, the Executive Branch asserted immunity of a sitting head of state, and its assertion has not been withdrawn.[11]

2. Plaintiffs nevertheless argue that, under U.S. law, former heads of state are not immune in cases alleging torture or *jus cogens* violations.[12] But none of the cases plaintiffs cite supports the contention that our domestic courts may disregard an assertion of immunity by the Executive Branch. There is simply no precedent

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[10]Plaintiffs cite *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), as a case in which U.S. courts refused to recognize the head-of-state immunity of a former leader. Appellants' Br. 31. But in that case, the defendant was a self-proclaimed ruler of a Bosnian-Serb entity not recognized by the United States. *Kadic*, 70 F.3d at 248. The court of appeals held that Karadzic did not have head-of-state immunity because the United States had not recognized him as a legitimate head of state. *Ibid*.; *see also Noriega*, 117 F.3d at 1212 (declining to recognize head-of-state immunity where defendant has not been acknowledged by the Executive Branch as the legitimate head of state). Thus, *Kadic* provides no support for plaintiffs' claim that U.S. courts do not recognize head-of-state immunity, despite Executive Branch assertions of immunity, in suits brought against former heads of state.

[11]This case does not present the issue of whether and to what extent a different suit could be initiated against President Jiang or any other head of state after they have left office.

[12]A *jus cogens* norm is "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character." *Sampson v. Fed. Rep. of Germany*, 250 F.3d 1145, 1149–50 (7th Cir. 2001) (quotation marks omitted).

instructing that recognition by our courts of head-of-state immunity assertions by the Executive Branch changes depending on the nature of the allegations in the complaint. To the contrary, the closest precedent from this Court suggests the opposite. *See Sampson v. Federal Rep. of Germany*, 250 F.3d 1145, 1149–50 (7th Cir. 2001) (holding that there is no *jus cogens* exception to the FSIA).

Plaintiffs first assert that recent cases "have specifically limited head of state immunity to sitting heads of state and foreign ministers." Appellants' Br. 16. But the cases plaintiffs cite are not on point. Rather, the bulk of the cases plaintiffs cite declined to recognize head-of-state immunity when a former head of state claimed immunity despite the fact that the Executive Branch did not assert the immunity in the litigation before the court. *See* Appellants' Br. 16–17 (citing, among other cases, *Estate of Domingo v. Rep. of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988)). As noted already, courts have also declined to recognize head-of-state immunity for a former foreign leader when the defendant's own country has waived head-of-state immunity. *See, e.g.*, *In re Grand Jury Proceedings,* 817 F.2d at 1111. But none of these cases supports the contention that district courts may disregard the Executive Branch's decision not to withdraw an assertion of immunity in a case initiated while the head of state held office.

Plaintiffs further argue that there is an established exception to foreign sovereign immunity for violations of *jus cogens* norms and that the Executive Branch accordingly cannot assert immunity on behalf of heads of state in cases alleging torture or *jus cogens* violations. Appellants' Br. 19–21. But plaintiffs' claim that there is such an exception to foreign sovereign immunity in our courts is demonstrably false.

This Court and three other circuits have rejected the contention that foreign states are liable under the FSIA for acts of torture or *jus cogens* violations because those violations can never be sovereign acts. *See Sampson*, 250 F.3d at 1151, 1155–56; *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996); *Princz v. Fed. Rep. of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992).
Indeed, under pre-FSIA practice, until the Executive Branch adopted the restrictive theory of foreign sovereign immunity, the Supreme Court recognized Executive Branch assertions of immunity as conferring immunity on foreign states regardless of the nature of the act. *See, e.g., Verlinden*, 461 U.S. at 486 ("For more than a century and a half, the United States generally granted foreign sovereigns ***complete*** immunity from suit in the courts of this country. * * * Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns" (emphasis added)).

Thus, even for torture and *jus cogens* violations, the President retains the authority to assert immunity from suit in a case alleging them. *See, e.g., Lafontant v. Aristide*, 884 F. Supp. 128 (E.D.N.Y. 1994); *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988). Again, the Executive Branch has the constitutionally assigned power to receive foreign dignitaries and to carry out the foreign policy of the United States, and there is nothing in the nature of that constitutional power that changes because of the type of conduct alleged.[13]

3. Plaintiffs also argue that former heads of state are not immune in cases alleging torture or *jus cogens* violations because customary international law and treaties to which the United States is a party would not allow it. Appellants' Br. 22–32. Whether or not former heads of state are immune under customary international law does not control the question of our President's authority in our constitutional scheme to assert immunity in domestic court proceedings brought against a sitting head of state. And the treaties plaintiffs cite do not affect foreign leaders' liability in U.S. courts.

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[13]We emphasize, however, that it does not follow from the fact that the Executive Branch has the constitutional power to assert head-of-state immunity in cases regardless of the type of conduct alleged that it will do so in every case involving serious human rights abuses. As noted, the Executive Branch's decision in each case is guided by consideration of international norms and the implications of the litigation for the Nation's foreign relations.

Plaintiffs do not cite any international law authority for their claim that private civil damages actions are permissible against former heads of state in cases alleging *jus cogens* violations. Instead they rely almost entirely on the opinions of international criminal tribunals, which have specialized jurisdiction. Appellants' Br. 23–29. And, in any event, plaintiffs nowhere explain how these rulings govern the question of whether, as a matter of U.S. law, the President has the constitutional authority to assert immunity from suit in U.S. courts on behalf of a head of state for acts taken while in office. Nor do they explain how these rulings control the Executive Branch's decision not to withdraw an assertion of immunity.[14]

Whether the Executive Branch has the power to assert the immunity of a head of state in such circumstances—and whether our domestic courts must accept such assertions—is a question of U.S. constitutional law. *See Spacil*, 489 F.2d at 618 ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing

[14]While international law principles certainly have a substantial impact on the policy decisions made by the Executive Branch in this area, they do not govern. This Court has recognized that the question of foreign immunity from suit in U.S. courts is not the same as the question of sovereign immunity under international law: "[A]lthough *jus cogens* norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity, *e.g.*, the Nuremberg proceedings, *jus cogens* norms do not require Congress (or any government) to create jurisdiction." *Sampson*, 250 F.3d at 1152.

the proper scope of sovereign immunity under international law."); *cf. Sampson*, 250 F.3d at 1153 ("'Our duty is to enforce the Constitution, laws and treaties of the United States, not to conform the law of the land to norms of customary international law'" (quoting *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991))).

Plaintiffs further argue that the United States' ratification of the Torture Convention, the Genocide Convention, and the International Covenant on Civil and Political Rights eliminated the immunity of heads of state for private civil claims involving violations of those treaties. Appellants' Br. at 29–32 (discussing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, *ratified by* United States Oct. 27, 1990, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, *done* Dec. 16, 1966, *ratified by* United States, Sept. 8, 1992, 999 U.N.T.S. 171; and Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, *ratified by* United States Feb. 23, 1989, 78 U.N.T.S. 277).

Even assuming that these treaties speak to the immunities of heads of state in private civil claims (none of them addresses the issue), plaintiffs' position is mistaken because the conventions on which plaintiffs rely are not self-executing. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 163 (2d Cir. 2003) (International Covenant on Civil and Political Rights is non-self-executing); *Castellano-Chacon v. INS*, 341 F.3d

533, 551 (6th Cir. 2001) (Torture Convention is not self-executing); *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Genocide Convention is not self-executing). Non-self-executing treaties do not create privately enforceable rights in our courts. Rather, such a treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

Congress has not implemented the International Covenant on Civil and Political Rights. *Wesson v. U.S. Penitentiary*, 305 F.3d 343, 348 (5th Cir. 2002). Thus, that treaty is not privately enforceable in judicial proceedings. Congress has implemented the Torture and Genocide Conventions through legislation. However, nothing in that implementing legislation indicates that Congress intended to restrict the Executive Branch's constitutional power to assert immunity on behalf of heads of state. *See* 18 U.S.C. § 1092 ("Nothing in this chapter shall be construed * * * as creating any substantive or procedural right enforceable by law by any party in any proceeding.") (Genocide Convention Implementation Act of 1987); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Title XXII, § 2242(d), 112 Stat. 2681 (codified at 8 U.S.C. § 1231, note) ("[N]otwithstanding any other provision of law * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture] Convention or this

section* * * except as part of the review of a final order of removal [in immigration cases]."); *see also* H.R. Rep. No. 102-367 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 ("[N]othing in the TVPA overrides the doctrines of diplomatic or head of state immunity.") (legislative history for the Torture Victims Protection Act). Accordingly, plaintiffs are mistaken in claiming that the United States' ratification of these treaties eliminated the immunity of heads of state.

4. Plaintiffs argue in passing that President Jiang is not immune "for his continued role in the persecution of Falun Gong after he left office." Appellants' Br. 22. This statement in plaintiffs' brief is quite puzzling because their complaint does not allege that President Jiang took any actions against members of Falun Gong after he left office; the complaint obviously could not do so, because it was filed while President Jiang was still head of the Chinese state.

After the district court dismissed their claims, plaintiffs sought to "reopen the judgment" and to amend their complaint. The district court denied this motion, but, in any case, even plaintiffs' proposed amendments did not allege that President Jiang took actions against Falun Gong after he left office. *See* D. Ct. Docket No. 52. Accordingly, claims about President Jiang's acts after he left office were not before the district court and are thus not properly before this Court. *See Holman v. Ind.*, 211

F.3d 399, 406 (7th Cir. 2000) ("[Appellant] cannot essentially amend the complaint on appeal to state a new claim." (quotation marks and alterations omitted)).

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In sum, the district court correctly recognized the binding nature of the assertion of immunity for President Jiang by the Executive Branch from this suit. And the United States Government at no time rescinded that assertion of immunity as the litigation progressed, even though President Jiang was no longer the Chinese head of state. Pursuant to the Executive Branch's constitutional authority to decide when to assert immunity for a foreign head of state, that assertion remains binding in this litigation.

II. The District Court Erred in Failing to Accept the Executive Branch's Assertion that Jiang Was Immune from Service.

The Executive Branch's power to assert the immunity of foreign heads of state includes the power to assert not only immunity from suit against the head of state himself, but also immunity from personal service. Plaintiffs purported to serve President Jiang while he was the sitting president of the People's Republic of China. In asserting the immunity of President Jiang, the Executive Branch informed the district court that he was inviolable and incapable of being subject to legal process. That court nevertheless held that plaintiffs could use President Jiang as an involuntary

service agent. Op. 14. In failing to accept the Executive Branch's assertion of President Jiang's immunity from service, the district court violated the separation of powers and invaded the Executive Branch's constitutional authority to define the circumstances under which a foreign leader will be received on a visit to the United States.

1. We have explained that the Executive Branch's authority to assert the immunity of foreign heads of state derives not only from the President's general foreign affairs power, but also directly from the President's express constitutional power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. The Supreme Court long ago gave a functional meaning to the term "public Ministers," defining it as including any foreign agents who "possess in substance the same functions, rights, and privileges as agents of their respective governments for the transaction of its diplomatic business abroad." *In re Baiz*, 135 U.S. 403, 419 (1889). By its terms, this definition fits foreign heads of state as well as their delegates. Consequently, the Constitution vests in the President the power to determine the terms under which foreign heads of state who wish to enter the United States will be received.[15]

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[15]Since 1790, Congress has by statute defined the immunities of diplomats in the United States. See Act of April 30, 1790, ch. 9 §§ 25-27, 1 Stat. 117-18 (previously codified as 22 U.S.C. §§ 252-254), *repealed by* Pub. L. No. 95-393, §

To be meaningful, the President's power to receive foreign heads of state must encompass the power to protect, through assertions of immunity, visiting heads of state from interference with their diplomatic or other functions. If the Executive Branch could not assure foreign leaders that they will be immune from service of legal process in our courts for private civil litigation, this loophole would seriously undermine the President's ability to convince foreign heads of state to travel to this country to engage in high-level diplomacy.

Not surprisingly, it is not uncommon for foreign heads of state and their governments to view service of process as an affront to the dignity of both the leader and the state. And the potential for insult is the same, regardless of whether the service relates to the visiting head of state himself, or to service on the visiting leader in some purported representational or agency capacity. The political insult inheres in the fact that U.S. courts give effect to the service, rather than in the ultimate target of the service. Indeed, China has lodged numerous complaints with the United States Government about plaintiffs' purported service on its President in this very case. Such

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3(a)(1), 92 Stat. 808 (1978), *and replaced by* Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. §§ 254a-254e, 28 U.S.C. §§ 1251, 1351, 1364). However, Congress has never purported to define the immunities of heads of state in the courts of the United States. And, as we have explained, Congress has acquiesced in the Executive Branch's assertions of head-of-state immunity. Thus, in the absence of Congressional action, this power remains in the hands of the Executive. *See Mistretta*, 488 U.S. at 401.

attacks on the dignity of a visiting head of state can easily frustrate our President's ability to reach this Nation's diplomatic objectives, especially when foreign relations with a particular country are already in a very delicate state, as has often been true of the Sino/American relationship in the past few decades.

Similarly, the United States would take great offense if foreign states and their courts were to encourage process servers to hound our President when he is abroad to conduct important diplomatic negotiations with his foreign counterparts. Such distractions necessarily disrupt the orderly progress of diplomacy and would clearly have the potential to severely damage the foreign policy interests of the United States.

The critical point for our argument is that, in Article II, Section 3, the Constitution specifically assigns to the President the authority to decide how to receive visiting heads of state. It is therefore up to the Executive to determine, in each instance, whether an assertion of immunity for a foreign head of state is consistent with international norms and necessary to protect this Nation's foreign relations interests, and whether the assertion should include immunity from service. This type of determination depends upon how such service will be perceived in light of international expectations and the foreign policy objectives the President is pursuing. The courts must, under the Constitution, accept the Executive Branch's determinations, because they have been assigned to that branch. *See Spacil*, 489 F.2d

at 619 ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive"); *cf. Nixon v. United States*, 506 U.S. 224 (1993) (holding that courts cannot review impeachment procedures utilized by the Senate because the power to set such procedures is assigned by the Constitution to that body).

2. The district court's failure to defer to the Executive Branch's assertion that President Jiang's personal inviolability rendered him immune from service of process—and so incapable of serving as an involuntary service agent—usurped the Executive Branch's authority to determine that immunity from service was warranted in this case.

Starting from the premise that visiting heads of state enjoy the same inviolability as that of diplomats, the district court gave three reasons for its decision to disregard the Executive's assertion. Op. 14 (citing 1 Restatement (Third) of Foreign Relations Law § 464 n.14 (1987)). None of these is correct, however, as the district court failed to appreciate the constitutional foundation for the Executive's power to decide the terms on which foreign dignitaries will be received in the United States.

The district court first stated that the justification for diplomatic inviolability is to prevent a foreign diplomat from being "hindered in his official function" and to avoid affronting the dignity of the diplomat's country. *Id*. at 14–15. It held that permitting service on a diplomat as an agent for a third party does not implicate these justifications "to the same degree." *Id*. at 15. As we have pointed out, it is not a court's role to determine whether permitting diplomats—or heads of state—to serve as unwilling service agents has sufficiently serious foreign relations implications to justify immunity from service. As the only court of appeals case on point makes clear, that is a question reserved to the Executive Branch.

In *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965), the D.C. Circuit considered whether an ambassador could be forced to serve as an involuntary agent for service on his country. Considering the personal inviolability of diplomats in light of the purpose of the Vienna Convention on Diplomatic Relations, "to ensure the efficient performance of the functions of diplomatic missions," the D.C. Circuit treated as conclusive the State Department's declaration that permitting such service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions."[16] *Ibid*. (quotation marks omitted). The D.C.

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[16]The Vienna Convention on Diplomatic Relations, *done* April 18, 1961, *ratified by* United States Nov. 8, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95, defines the immunities of foreign diplomats in the United States. *See* 22 U.S.C. § 254d.

Circuit therefore concluded that the "the purposes of diplomatic immunity forbid service in this case." *Id.* at 981.

Hellenic Lines thus holds that a foreign dignitary enjoying inviolability under the Vienna Convention cannot be used as an involuntary agent for service on another, when the Executive Branch asserts that such service is incompatible with the diplomat's status.[17]

The district court here next held that President Jiang could be compelled to act as an unwilling service agent, despite the Executive Branch's assertion of immunity, because "the FSIA does not foreclose the possibility that a diplomat may receive process as an agent." Op. 15 (discussing 28 U.S.C. § 1608). This statement is mistaken. The district court assumed that, because the FSIA's service provisions do not explicitly prohibit service on diplomats, such service is not foreclosed. But this

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[17]And, as the Executive Branch informed the court in *Hellenic Lines*, forcing a diplomat to act as an involuntary service agent will typically be incompatible with a diplomat's status because it would "divert[the diplomat] from the performance of his foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances." *Hellenic Lines*, 345 F.2d at 980 n.5 (quotation marks omitted). Moreover, permitting service on foreign heads of state could discourage foreign leaders from traveling to the United States, not only because of the legal consequences of service, but also because a foreign state will view the Executive Branch's failure to prevent effective service as a "fail[ure] to protect the person and dignity of its official representative." *Ibid*. (quotation marks omitted).

notion gets things backwards. As the D.C. Circuit explained in *Hellenic Lines*, diplomatic immunity, recognized by the United States by treaty, precludes forcing diplomats to be service agents. Thus, if Congress had intended in the FSIA to permit service on diplomats, it would have expressly said so, and overridden the applicable treaty provisions.

Moreover, the legislative history of the FSIA service provision—expressly relying on *Hellenic Lines*—indicates that Congress did not intend to permit service on inviolable agents. *See* H.R. Rep. 94-1487, at 25 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6624 ("It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965) * * *."); *see also Tabion v. Mufti*, 73 F.3d 535, 539 n.7 (4th Cir. 1996) ("Congress did not intend for the FSIA to affect diplomatic immunity under the Vienna Convention."). Thus, contrary to the district court's conclusion, the FSIA does not provide that diplomats can be forced to act involuntarily as service agents.

The district court's final reason for holding that it was not obliged to accept the Executive Branch's assertion of President Jiang's immunity from service was that there is "the possibility" that heads of state "may not be immune in all situations." Op. 15. The court noted that in *The Exchange*, the Supreme Court stated that, by acquiring property in a foreign state, a prince "'may possibly be considered as subjecting that

property to the territorial jurisdiction.'" *Id*. at 16 (quoting *The Exchange*, 11 U.S. (7 Cranch) at 145). The district court also noted that, under the Vienna Convention, diplomats are not immune from suits involving real property abroad, private services as an executor of an estate, or personal commercial activities. *Ibid*. (citing Vienna Convention, Art. 31).

Even assuming that the district court identified actual exceptions to inviolability and to the immunity of foreign heads of state that the Executive Branch would recognize in suits against foreign heads of state, these limited exceptions do not support the proposition that foreign leaders can generally be used as involuntary service agents. More fundamentally, the district court erred in failing to recognize that, once the Executive Branch exercises its constitutional authority and determines that a plaintiff's service on a foreign head of state should not be recognized, that determination is not subject to judicial second-guessing. The district court therefore should have concluded that President Jiang could not be served and could not be compelled to act as the instrument of service of process on the Control Office. The court accordingly should have concluded that no proper service occurred either for President Jiang or for the Control Office.[18]

[18]After improperly failing to defer to the Executive Branch on the question of President Jiang's immunity from service, the district court turned to the question of whether the service on him was sufficient to provide the court with personal

III. The District Court's Service Order Was Fundamentally Flawed Because It Required Federal Officers to Serve Process on a Foreign Leader They Were Charged with Guarding.

The Government appeared in the district court not simply to assert immunity for President Jiang, but also to challenge the validity of the district court's alternative service order, which constitutes an improper and dangerous precedent. By requiring federal security officers charged with the crucial task of guarding the safety of President Jiang also to serve him with process, the district court violated the United States' sovereign immunity and placed the Executive Branch in an intolerable position by seriously undermining the Government's ability to protect foreign leaders when

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jurisdiction over the Control Office. The district court noted that a "significant question exists" about whether the Control Office is a "foreign state" within the meaning of the FSIA, and whether, therefore, it lacked subject matter jurisdiction over plaintiffs' claims. Nevertheless, it held that plaintiff had failed to obtain personal jurisdiction over the Control Office under Fed. R. Civ. P. 4. Op. 23, 16–23.

But the FSIA not only defines the subject matter jurisdiction of district courts over actions against foreign states, it also provides for the manner in which plaintiffs are to obtain personal jurisdiction over such states. *See* 28 U.S.C. §§ 1330(b), 1608. Accordingly, the district court had to determine whether the Control Office is a "foreign state" within the meaning of the FSIA before it could turn to the question of whether plaintiffs had obtained personal jurisdiction over that entity.

On the record in the district court, it is not possible to determine whether the Control Office is a "foreign state," subject to the FSIA's subject matter and personal jurisdiction provisions, or whether it is a private entity, subject to the service provisions of Fed. R. Civ. P. 4. But this Court should affirm the district court's decision to dismiss plaintiffs' claims against the Control Office because the Executive Branch's assertion of immunity rendered President Jiang immune from service of process. For that reason, plaintiffs failed to obtain personal jurisdiction over the Control Office.

they visit this country. That order was thus centrally flawed and service could not therefore be premised on this invalid order.

1. The district court order was erroneous because the courts have no authority to order federal officials to carry out tasks unless those officials have some legal duty to act. No such responsibility to act existed here, and the district court's order identified none.

Congress has granted the federal courts the power to compel Executive Branch officials to act if those officials owe a nondiscretionary duty to a particular plaintiff. *See, e.g.,* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."). But the federal officers assigned to guard President Jiang plainly owed no nondiscretionary duty to the plaintiffs in this case to facilitate service of process on the very official they were charged with protecting *from* unwanted intrusions. Moreover, although courts also can remedy a federal official's violation of the law, s*ee, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952) (affirming district court's injunction against Secretary of Commerce's unauthorized seizure of steel plants), no such violation is shown here.

At the same time, it is equally clear that, absent a nondiscretionary duty or a violation of law, federal courts lack authority to compel Executive Branch to act, unless the United States has waived its sovereign immunity. *See Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

A statute does authorize the courts to direct the United States Marshals, officers within the Department of Justice, to "execute all lawful writs, process, and orders." 28 U.S.C. § 566(c). That statute also directs the Marshals to "obey, execute, and enforce all orders" of the courts of the United States. *Id*. § 556(a). But no similar statute authorizes a district court to direct agents of the State Department, the Secret Service, or the Federal Bureau of Investigation to serve process, as the district court did here. In the absence of such a statute, the district court lacked the power to compel agents of the Executive Branch to serve President Jiang.[19]

Plaintiffs argued below that the fact that courts permit third-party discovery requests against Executive Branch employees shows that courts may compel Executive

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[19]The All Writs Act, 28 U.S.C. § 1651(a), allows courts to issue writs in aid of federal court jurisdiction. But here, the court's order was designed to *secure* jurisdiction when it would not otherwise be present.

agents to act without a waiver of sovereign immunity. *See* Docket No. 33 at 18. But every Circuit to have considered the issue, except the Ninth Circuit, has held that enforcement of a third-party discovery request against an Executive Branch official requires a waiver of sovereign immunity.[20] Thus, the bulk of the third-party discovery cases are consistent with the proposition that, in the absence of a violation of law, the United States must waive its sovereign immunity before a federal court may compel an Executive official to act.

2. Even if courts had the power to require federal agents to serve foreign leaders they are guarding, critical public policy concerns demonstrate that the district court here plainly abused its discretion by ordering federal officials ensuring President Jiang's safety to act instead as the instruments for service of process on him.

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[20]*See Linder v. Calero-Portocarrero*, 251 F.3d 178, 181 (D.C. Cir. 2001) (sovereign immunity did not bar third-party subpoena against an Executive Branch agency because the United States had waived its sovereign immunity under the Administrative Procedure Act from actions seeking non-monetary relief); *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 598 (2d Cir. 1999) ("[T]he only identifiable waiver of sovereign immunity that would permit a court to require a response to a subpoena in an action in which the government is not a party is found in the APA."); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 274 (4th Cir.1999) ("When the government is not a party, the APA provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas."). *But see Exxon Shipping Co. v. Dep't of the Interior,* 34 F.3d 774, 778 (9th Cir. 1994) ("The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. Such limitations do not apply when a federal court exercises its subpoena power against federal officials." (quotation marks omitted)).

The overriding responsibility of federal agents charged with protecting visiting dignitaries is to shield these foreign officials from danger. As the declaration of Peter E. Bergin from the State Department Bureau of Diplomatic Security makes clear, this responsibility would be grievously undermined were courts to require federal agents to effect service. *See* D. Ct. Docket No. 11, Attach. C (Decl. of Peter E. Bergin, Principal Deputy Assistant Secretary of State, Bureau of Diplomatic Security, and Dir. of the Diplomatic Security Serv., Dep't of State).

In order to effectively protect a visiting dignitary, federal agents must be able to obtain unfettered information from the dignitary, including a detailed itinerary, and must "enjoy the trust and confidence of the protectee." *Id*. ¶ 2. But "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. This could prove "catastrophic," both to the agents' ability to protect the visiting official, and, consequently, to the United States' foreign relations. *Id*. at ¶ 6. "Should death or injury occur to a foreign leader during a visit to the United States, there would be lasting damage to our relations with that leader's government." *Id*.; *see also* D. Ct. Docket No. 11, Attach. D (Decl. of Donald A. Flynn, Assistant Dir. of the United States Secret Service for the Office of Protective Operations).

As Mr. Bergin's declaration makes clear, requiring a security official to serve a visiting dignitary seriously undermines the United States Government's ability to protect the dignitary, whether that agent is a federal or local officer. In addition, we note that, if a district court can order federal officials to serve process on visiting foreign heads of state, there would seem to be little reason why the court could not instead simply order the Secretary of State, or some other official with access to the foreign head of state to accomplish this task. Obviously, such an order would be devastating to effective diplomacy. The special alternative service order issued here was comparably damaging because such orders will seriously hamstring the ability of the President to convince foreign leaders to travel to the United States for high-level consultations. Accordingly, the alternative service order here should not have been used as a basis for concluding that service could have been accomplished on President Jiang.[21]

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[21]We note that Fed. R. Civ. P. 4(f) provides multiple procedures through which to serve individuals in foreign countries. Thus, even if a rule that prevented plaintiffs from serving visiting dignitaries through security agents effectively precludes service on the dignitary during his visit to the United States, it is not at all clear that plaintiffs would be precluded from effecting service in some other way.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and the Court's order of February 3, 2004, granting the Government leave to file an *amicus curiae* brief of up to 12,000 words, because the WordPerfect 9.0 word count is 11,955, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on this 5th day of March, 2004, I filed and served the foregoing Brief for the Appellee by causing 15 copies to be delivered by OVERNIGHT DELIVERY to the Clerk of the Court at the following address:

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