

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                    |   |                        |
|--------------------|---|------------------------|
| LI WEIXUM et. al., | ) |                        |
|                    | ) |                        |
| Plaintiffs,        | ) | Civ. No. 04-0649 (RJL) |
| v.                 | ) |                        |
|                    | ) |                        |
| BO XILAI,          | ) |                        |
|                    | ) |                        |
| Defendant.         | ) |                        |
|                    | ) |                        |

**RESPONSE OF THE UNITED STATES TO PLAINTIFFS’ SUPPLEMENTAL  
SUBMISSION**

Pursuant 28 U.S.C. § 517, the United States hereby responds to Plaintiffs’ letter brief asserting that the Defendant is a “former official” who can “no longer [] claim the same level of protection and immunity that that [sic] the U.S. Government has argued should be made available to him as a sitting high-level [official].” Pls. Letter at 1. Plaintiffs’ letter provides no basis for concluding that Defendant Bo Xilai was not immune from service.

The issue before the Court is whether Defendant Bo Xilai was immune from service *at the time service was attempted*. As set forth in our Suggestion of Immunity, the Department of State determined that, at the time of that attempt, Minister Bo was in the United States on a special diplomatic mission. Minister Bo was therefore immune from U.S. jurisdiction for the duration of his special diplomatic mission in this country, and could not lawfully be served with compulsory process. *See* U.S. Suggestion of Immunity at 4 (“Minister Bo is entitled to immunity *for the duration of his visit*”). Put another way, because Bo was immune from service, the attempt to serve him was defective, and without effective service this Court lacks jurisdiction over him. Any subsequent change in his employment status does not, and could

not, retroactively cure the clear defect in service resulting from his immunity.<sup>1</sup>

It is well established that a foreign diplomat's immunity from process is determined based upon diplomatic status at the time of attempted service. Diplomatic immunity "provides protection from the exercise of jurisdiction by a federal court over a diplomat" because "service of process is void" against diplomats. *Aidi v. Yaron*, 672 F. Supp. 516, 517 (D.D.C. 1987); *United States v. Benner*, 24 F. Cas. 1084, 1086 (C.C.E.D. Penn. 1830) (noting that under federal law service against those with diplomatic immunity was "utterly null and void"). *See also Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 979-80 (D.C. Cir. 1965) (concluding that the district court properly dismissed because "diplomatic immunity would have been violated by any compulsory service of process").<sup>2</sup>

More recently, the Seventh Circuit considered the government's analogous suggestion of head of state immunity for the former President of China who had allegedly been served with process while visiting the United States. By the time the issue of immunity from service

---

<sup>1</sup> Defendant's current official status is thus irrelevant to the question of his special mission immunity and the resulting defect in service. Plaintiffs' alleged new facts are, at best, relevant to whether the Defendant might be subject to service *now* if Plaintiffs attempted to serve him if he happened to be in the United States. This, however, is a hypothetical question and the Court should not, within Article III's limits on deciding actual cases and controversies provide an opinion on that question because such an opinion could only be advisory. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Moreover, the government is informed that Defendant Bo has been named to the Politburo of the Communist Party of China, a significant position within the PRC's constitutional structure. While defendant's status has no bearing on his immunity from service during the 2004 visit, and thus should not be considered, even if it were to be considered, it would support dismissal under the case-specific deference rationale appropriate in this case. *See* USSOI at 11-17; *see also* Exh. A to USSOI (Bellinger Letter).

<sup>2</sup> Although these cases dealt with the immunity of members of permanent diplomatic missions, a diplomat on special mission has comparable immunity. Indeed, at the time these cases were decided, the immunity of diplomats on missions of both types was governed by rules of customary international law. The entry into force for the United States of the Vienna Convention on Diplomatic Relations in 1972 codified those rules for members of permanent missions in this country but that codification did nothing to undercut the analogous protections afforded those here on a special mission.

came before the district court, President Jiang Zemin had returned to China and was no longer its President; but the Seventh Circuit nevertheless “agree[d] with the Executive Branch that its power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state even where that service is intended to reach third parties.” *Wei Li v. Jiang Zemin*, 383 F.3d 620, 628 (7th Cir. 2004).

Moreover, in the suggestion of immunity by the Executive Branch and its acceptance by this Court, the United States is applying a widely accepted rule of customary international law. As one of the leading commentators on diplomatic law has summarized that rule:

One must look at the date of the service of process in order to assess whether the diplomatic agent can invoke immunity. Thus, in *Foucault de Mondion contre Tcheng-Ki-Tong*, the Civil Court of the Seine (11 February 1892, *Clunet*, 1892, p. 429; Kiss, III, no. 576), while noting that the defendant no longer enjoyed diplomatic immunity for purposes of objecting to the court’s jurisdiction, nevertheless stated that it was clear that the process served several months previously had been served at a time when the defendant was still charged with his mission and that it therefore could not have touched him legally, nor led to the court’s being properly seized of the matter.

Jean Salmon, *Manuel de Droit Diplomatique* 403 (Bruylant Bruxelles 1994).<sup>3</sup> Thus, when U.S. courts properly defer to such a suggestion of immunity from the Executive, their practice helps to ensure application of the same rule to U.S. diplomats and other officials who must travel abroad on government business.

Here, the Executive Branch has determined that Defendant Bo Xilai was cloaked with immunity from U.S. jurisdiction at the time Plaintiffs attempted to serve him with process.

---

<sup>3</sup> An informal translation, provided by the Department of State, from the French: “C’est à la date de l’assignation que l’on se place pour examiner si l’agent diplomatique peut invoquer l’immunité. Ainsi, dans l’affaire *Foucault de Mondion contre Tcheng-Ki-Tong*, le Tribunal civil de la Seine (11 février 1892, *Clunet*, 1892, p. 429; Kiss, III, no. 576), tout en prenant note que le défendeur ne jouissait plus des immunités diplomatiques pour arguer de l’incompétence du tribunal, déclara qu’il était manifeste que l’assignation délivrée quelques mois auparavant l’avait été au temps où il était encore investi de sa mission et qu’elle n’avait pu, par conséquent, l’atteindre légalement, ni saisir régulièrement le tribunal.”

Because the Court is bound by the Executive Branch's immunity determination and because, in light of that immunity the attempted service failed as a matter of law, this case cannot proceed against Defendant.

Dated: June 30, 2008

Respectfully submitted,

GREGORY G. KATSAS  
Acting Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

VINCENT M. GARVEY  
Deputy Director, Federal Programs Branch

/s/ Alexander K. Haas  
ALEXANDER K. HAAS (CA Bar 220932)  
Trial Attorney, U.S. Dep't of Justice  
Civil Division, Federal Programs Br.  
20 Massachusetts Ave., NW, Rm. 7328  
Washington, D.C. 20530  
Tel. 202-305-9334 Fax. 202-616-8470  
alexander.haas@usdoj.gov  
*Attorneys for the United States of America*