U.S. DEPARTMENT of STATE

25. Letter from Legal Adviser William H. Taft re U.S. views in Doe v. Liu Qi (Northern District of California, August 3, 2004)

The Honorable Daniel Meron
Acting Assistant Attorney General
Civil Division
United States Department of Justice
Washington. D.C 20530

Re: *Jane Doe I, et al.* v. *Liu Qi, et al.,* No. C-02-0672; *Plaintiff A,* et *al.* v. Xia *Deren. et al.,* No. C-01-0695

Dear Mr. Meron:

By letter dated November 7, 2003, US. District Court Judge Claudia Wilken invited the Department of State to submit its views regarding Magistrate Judge Chen's Report and Recommendation and Plaintiffs' objections thereto related to the above-captioned case. See Letter from U.S. District Judge Claudia Wilken to William Howard Taft, IV of November 7, 2003. In response to that letter and at my request, the Department of Justice submitted to the Court a Statement of Interest attaching a letter from me, dated January 13, 2004, in which the Department of State suggested that it would be appropriate if the Court were to postpone this matter, but noting that if the Court were to dispose of the matter the Department of State would appreciate an opportunity to submit additional substantive comments. See Statement of Interest (together with attachments), dated January 16, 2004.

In light of the Supreme Court's recent decision in *Sosa* v. *Alvarez-Machain,* 542 U.S. ___, 124 S. Ct 2739 (2004), on July19 Judge Wilken issued an order requesting that the United States file any further Statement of Interest by August 4, 2004.[1] I am writing now to ask that you file a copy of this letter with Judge Wilken in the manner you deem most appropriate.

The Department of State continues to hold the views expressed in my letter of September 25, 2002 (submitted to the Court via Statement of Interest, dated September 26, 2002, attached) responding to Magistrate Judge Chen's questions concerning the Foreign Sovereign Immunities Act and the Act of State doctrine. In that letter I noted that, in the context of the instant cases, "U.S. courts should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy." I also pointed out that such suits could typically not be brought against foreign sovereigns wider the Foreign Sovereign Immunities Act.

Particularly with regard to the Act of State doctrine, we note that Magistrate Judge Chen's Report and Recommendation concludes that prudential considerations weigh in favor of application of the doctrine in the circumstances of this case with respect to the claim for damages and injunctive relief. See Report and Recommendation at pp. 30- 52. While we do not attempt here to address the contents of the Report and Recommendation in detail, we disagree with the view that declaratory relief of the nature sought would neutralize any foreign policy concerns about adjudication of these cases. Indeed, the Act of State doctrine counsels against the courts making such an assessment in the face of Executive Branch assessments to the contrary.

While the Executive Branch has continued to express the United States' concerns to the Chinese government at the highest levels about the activities that have given rise to the allegations in these complaints and has challenged China's anti-Falun Gong policies repeatedly and publicly (see, e.g., *China: Country Report on Human Rights Practices - - 2003,* http://www.state.gov/g/drl/rls/hrrp/2003/27769.htm), we believe that the concerns we have expressed weigh in favor of engaging the Chinese bilaterally and in other appropriate fora, such as the United Nations, rather than having official Chinese government conduct and policy in China subject to review by U.S. courts. Any determination by this Court in the form of declaratory relief - - even if some might regard it to be consistent with the views expressed by the Executive Branch - - would have negative implications for the conduct of United States foreign policy. The Chinese Government has vigorously protested these suits at the highest levels, has declined on at least one occasion to send officials to the United States due to fear that they will be harassed and has threatened not to send officials in the future. This negative reaction is based on China's view that suits such as *Liu* and *Xia* represent an illegitimate assertion of U.S. legal competence over matters that are internal Chinese affairs.

The Executive Branch's view that further adjudication of these cases, even if only to provide declaratory relief, would negatively impact the conduct of United States foreign relations is entitled to significant weight. Indeed, as Magistrate Judge Chen's Report and Recommendation notes, the "touchstone of the act of state doctrine is the risk of interfering with the conduct of foreign relations by coordinate branches of the government." Report and Recommendation at 52. We believe that the *Sosa* decision reinforces the notion that serious weight should be accorded the Executive's views (as expressed in my previous letter submitted to the Court as well as in this letter) concerning the impact on foreign policy of further adjudication of these cases and counsels in favor of ending these suits to be non-justiciable. *See Sosa* at n. 21 ("federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

We trust that these views will be helpful to Judge Wilken in her further deliberations, and we thank her for having accorded us the opportunity to comment.

Sincerely,

William H. Taft, IV

Attachments: a/s

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[1] The United States originally was requested to make any such filing on or before July 27, but the Court subsequently extended the deadline to August 4.