IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DOE I, JOHN DOE II, and JOHN DOE III,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-05-1047
ROMAN CATHOLIC DIOCESE OF GALVESTON-HOUSTON, et al.,	§	
Defendants.	§	

SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

The undersigned attorneys of the United States Department of Justice, at the direction of the Attorney General of the United States, pursuant to 28 U.S.C. § 517,[1] respectfully inform this Honorable Court of the interest of the United States in the pending lawsuit against defendant Joseph Ratzinger, now Pope Benedict XVI, the sitting head of state of the Holy See, and suggest to the Court the immunity of the Pope. In support of its interest and suggestion, the United States sets forth as follows:

1. The United States has an interest in this action against the Pope insofar as it raises the question of immunity from the Court's jurisdiction of the head of state of a foreign state. The interest of the United States arises from a determination by the Executive Branch of the

---

[1] 28 U.S.C. § 517 provides, in relevant part, that "any officer of the Department of Justice[ ] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . ."

Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against the Pope would be incompatible with the United States' foreign policy interests. As discussed below, this determination should be given effect by this Court.

2. The Legal Adviser of the United States Department of State has informed the Department of Justice that the Apostolic Nunciature has formally requested the Government of the United States to suggest the immunity of the Pope from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of Pope Benedict XVI from this suit." Letter from John B. Bellinger III to Peter D. Keisler, dated August 2, 2005 (copy attached as Exhibit 1).

3. The doctrine of head of state immunity is applied in the United States as a matter of customary international law and an incident of the Executive Branch's authority in the field of foreign affairs. Unlike sovereign and diplomatic immunity, head of state immunity has not been codified in U.S. law either by statute or by treaty. As a matter of U.S. law, the doctrine is rooted in the Supreme Court's decision in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Although this case held merely that an armed ship of a friendly state was exempt from U.S. jurisdiction, the decision "came to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). Over time, the absolute immunity of the state itself was diminished through the widespread acceptance by states of the restrictive theory of sovereign immunity, a theory reflected in the passage in 1976 of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§

1602 et seq. Nevertheless, U.S. courts have held that limitations on immunity contained in the FSIA do not apply to heads of state. As the Seventh Circuit recently explained in Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004):

> The FSIA does not . . . address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch. (citations and footnotes omitted).

Thus, under customary international law and pursuant to this Suggestion of Immunity, Pope Benedict XVI, as the head of a foreign state, is immune from the Court's jurisdiction in this case. See, e.g., Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (court is bound by Executive Branch's suggestion of immunity), aff'd, 79 F.3d 1145 (5th Cir. 1996); Ye, 383 F.3d at 626 n.8 (noting the "conclusive nature of the Executive Branch's determination of immunity with regard to heads of state"); Leutwyler v. Queen Rania Al Abdullah, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (the Executive Branch's Suggestion of Immunity "is entitled to conclusive deference"); First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (court bound by Executive Branch's suggestion of immunity); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y.) ("the courts must defer to the Executive determination"), appeal dismissed, No. 94-6026 (2d Cir. 1994).

4. The Supreme Court of the United States has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. See Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex parte

Peru, 318 U.S. 578, 588-89 (1943). In Ex parte Peru, the Supreme Court, without further review of the Executive Branch's determination regarding immunity, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that the courts' retention of jurisdiction would jeopardize the conduct of foreign relations. Ex parte Peru, 318 U.S. at 589; see also Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974) ("[O]nce the State Department has concluded that immunity is warranted, and has submitted that ruling to the court through a suggestion, the matter is for diplomatic rather than judicial resolution."). Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. Ex parte Peru, 318 U.S. at 588; see also Hoffman, 324 U.S. at 35.[2]

5. The courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch.

---

[2] The conclusive effect of the Executive Branch's suggestion of immunity in this case is not affected by enactment of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 et seq. Prior to passage of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred the determination of the immunity of foreign states from the Executive Branch to the courts. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610. However, the FSIA did not alter Executive Branch authority to suggest head of state immunity for foreign leaders, or affect the binding nature of such suggestions of immunity. See, e.g., Ye, 383 F.3d at 625 ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch."); Abiola v. Abubakar, 267 F. Supp. 2d 907, 915-16 (N.D. Ill. 2003); First American Corp., 948 F. Supp. at 1119; Gerritsen v. De la Madrid, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 21, 1986) (copy attached as Exhibit 2); Estate of Domingo v. Marcos, No. C82-1055V, slip op. at 3-4 (W.D. Wash. July 14, 1983) (copy attached as Exhibit 3).

See, e.g., Alicog, 860 F. Supp. at 382 (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of complaint against King Fahd for false imprisonment and abuse); Guardian F. v. Archdiocese of San Antonio, slip op., Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (copy attached as Exhibit 4) (suggestion of immunity required dismissal of suit against Pope John Paul II); Tachiona v. Mugabe, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001) (dismissing suit against President and Foreign Minister of Zimbabwe based upon Suggestion of Immunity filed by the Executive Branch), aff'd in relevant part sub nom. Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004); Leutwyler, 184 F. Supp. 2d at 280 (Executive Branch's Suggestion of Immunity on behalf of Queen of Jordan "is entitled to conclusive deference from the courts"); First American Corp., 948 F. Supp. at 1119 (suggestion by Executive Branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); Lafontant, 844 F. Supp. at 132 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), aff'd in part and rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989); Gerritsen, slip op. at 7-9 (suit against Mexican President De la Madrid and others for conspiracy to deprive plaintiff of constitutional rights dismissed as against President De la Madrid pursuant to suggestion of immunity); Estate of Domingo, slip op. at 2-4 (action alleging political conspiracy by, among others, then-president

Ferdinand Marcos and then-First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity); Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce suit against head of state dismissed pursuant to suggestion of immunity).

6. As the Fifth Circuit has explained, judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. Spacil, 489 F.2d at 619. First, as the Fifth Circuit explained in Spacil, "[s]eparation-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." Id. (citing United States v. Lee, 106 U.S. 196, 209 (1882)); see also Ex parte Peru, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. See Spacil, 489 U.S. at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. Id. Finally, and "[p]erhaps most importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." Id.

CONCLUSION

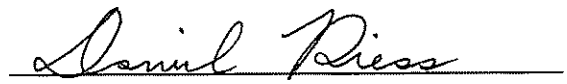
For the foregoing reasons, the United States respectfully suggests the immunity of Pope Benedict XVI in this action.

Dated: September 19, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

CHUCK ROSENBERG
United States Attorney



VINCENT M. GARVEY
DANIEL RIESS (Texas Bar No. 24037359)
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883
20 Massachusetts Ave., NW
Washington, D.C. 20530
Telephone: (202) 353-3098
Facsimile: (202) 616-8460
E-mail: Daniel.Riess@usdoj.gov
Counsel for United States of America

EXHIBIT 1

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

Peter D. Keisler
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

AUG 2 2005

Re: *Doe et al. v. Roman Catholic Diocese of Galveston-Houston et al.*,
S.D.Tex., No. 4:05-cv-1047

Dear Mr. Keisler:

The above captioned proceeding is a civil action pending in the United States District Court for the Southern District of Texas. The suit names Joseph Cardinal Ratzinger, now Pope Benedict XVI, as a defendant.

Pope Benedict XVI is the sitting Head of State of the Holy See. In light of this status, the Apostolic Nunciature has formally requested that the Government of the United States take all steps necessary to have this action against Pope Benedict XVI dismissed. A copy of the Nunciature's diplomatic note is enclosed.

The Department of State recognizes and allows the immunity of Pope Benedict XVI from this suit. Under customary rules of international law, recognized and applied in the United States, the Pope, as the Head of a foreign State, is immune from the jurisdiction of the United States courts in this case. Accordingly, the Department of State requests that the Department of Justice submit to the district court an appropriate Suggestion of Immunity in this case.

This letter recognizes the particular importance attached by the United States to obtaining the prompt dismissal of the present proceedings against Pope Benedict XVI in view of the significant foreign policy implications of such an action against the Head of a foreign State.

Sincerely,

John B. Bellinger III

Enclosure

cc: Vincent Garvey
Federal Programs Branch, U.S. Department of Justice

EXHIBIT 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACK GERRITSEN,

Plaintiff,

v.

MIGUEL DE LA MADRID HURTADO, et. al,

Defendant.

NO. CV 85-5020-PAR

This action arises out of plaintiff's attempts to distribute leaflets critical of the Mexican government. Plaintiff claims his constitutional rights were violated by defendants' use of threats and force attempting to thwart his activities. Plaintiff seeks damages and injunctive relief for deprivation of his First and Fourth amendment rights against the following defendants: Miguel de la Madrid Hurtado, President of Mexico; Javier Escovar y Cordova and Agustin Garcia Lopez Santaolalla, Consuls general of Mexico; Enrique Silva Guzman, Vice Consul; Salvador Uribe, Administrative Assistant of the Mexican consulate; and two Doe defendants. All defendants are

being sued in their individual and official capacities. Jurisdiction is invoked pursuant to 28 U.S.C. § 1343(3). Defendants move, through the United Mexican States ("UMS"), to dismiss the complaint. Plaintiff has filed a motion to prevent the UMS from appearing as counsel before this court. In addition, the United States Government has filed a suggestion of immunity in favor of President de la Madrid.

The complaint alleges that on June 27, 1983, plaintiff was attempting to distribute leaflets in the El Pueblo de la Los Angeles State Historical Park when an agent employed to protect the consulate, Reyes Cortes, confronted him and demanded that he cease. (Complaint ¶ 8). On June 28, 1983, plaintiff again attempted to distribute leaflets and was stopped by Cortes who, in service to the Mexican government, demanded that plaintiff leave the park, broke plaintiff's camera, attempted to confiscate the leaflets, and raised a club in a threatening manner. (Id. ¶ 9). Later that same day, plaintiff was handcuffed by Cortes and forced to enter the consulate, where defendant Uribe struck plaintiff with his fists and feet. Plaintiff was then held, against his will, in a room in the consulate for two hours of interrogation and threats. (Id. ¶10).

On August 5, 1983, plaintiff was shoved down the stairs located outside the northeast corner of the consulate by Uribe. (Id. ¶ 11). On September 20, 1983, while distributing leaflets, plaintiff was restrained by defendant Cordova without his consent. Cordova then "pursued a process" whereby plaintiff was arrested, booked and had his handbills confiscated. (Id. ¶ 12). The arrest report, incorporated into the complaint, indicates

that the arrest was a "citizen's arrest," and that the Los Angeles Police Department officers were only transporting plaintiff to custody pursuant to Cordova's citizen's arrest and assisting with paperwork. (Complaint, Exh. A, p. 12). On October 25, plaintiff was attacked by Uribe to prevent plaintiff from distributing leaflets. (Id. ¶ 13)

On June 18, 1984, while distributing leaflets, plaintiff was "pushed" away from the consulate by both diplomatic aide Oacar Mejia, and Uribe. (¶ 14). On July 31, 1984, plaintiff was restrained, for some unknown purpose, by Cordova while distributing leaflets. (¶ 15). On September 14, 1984, plaintiff was handcuffed by an unidentified member of the Mexican consulate, and transported to a remote location of the park, whereupon the agent destroyed the contents of his camera. (¶ 16).

On June 20, 1985, while plaintiff was peacefully distributing his leaflets, defendant Santaolalla threatened to take "more serious measures against plaintiff." Later that day Uribe threatened plaintiff with a gun. (Id. ¶ 17). On July 17, 1985 Uribe struck plaintiff with a sign. (Id. ¶ 18). On the 19th Uribe struck plaintiff in the face, and on the 25th, Uribe struck plaintiff with a heavy metal sign. (Id. ¶ 20). On the 26th Uribe smashed plaintiff's right foot with his left foot. (Id. ¶ 21).

Defendants Santaolalla and Guzman allegedly promoted, encouraged and permitted these "terrorist" acts against plaintiff. In addition they permitted the use of amplified sound from loudspeakers. (Id. ¶ 22). This sound allegedly violated

plaintiff's communication rights from the hours of 7:00-8:00 A.M., five days a week. (Id.). Plaintiff also alleges that all defendants participated in a conspiracy to deny plaintiff of his speech and press rights. (Id. ¶ 23).

On January 7, 1986 plaintiff filed a supplemental declaration to his complaint indicating that on December 18, 1985, plaintiff was attempting to distribute leaflets in front of the consulate when Uribe struck plaintiff with a disc-shaped piece of metal. On December 19, 1985, Uribe allegedly beat defendant with a metal chain, causing defendant to lose consciousness. The police were summoned, and arrested Uribe for assault with a deadly weapon. Uribe was set for arraignment on January 16, 1986; however, the court has not been apprised as to the results of that hearing.

1. United Mexican States

Under Local Rule 2.9.1 no unincorporated association may appear in any action or proceeding pro se. Although an individual may represent himself without an attorney, that representation may not be delegated to any other person. Thus, UMS may not appear on behalf of the individuals in this action, and may not appear as attorney of record for the individual defendants. The individuals may either appear on their own behalf, or obtain counsel admitted to practice in this court.

2. Personal Jurisdiction: President de la Madrid

The court has inherent power to dismiss an action for lack of subject matter jurisdiction or for failure to state a claim on the merits, where, as in this case, the plaintiff has received notice of the grounds for dismissal, and has filed

lengthy papers in response. See, e.g., Amfac Mtg. Corp. v. Arizona Mall of Tempe, 583 F.2d 426 (9th Cir. 1978); Sanborn v. U.S., 453 F.Supp. 651, (E.D. Cal. 1978); see also Wood v. McEwen, 644 F.2d 797, (9th Cir. 1981); Wong v. Bell, 642 F.2d 359 (9th Cir. 1981).

In its papers UMS moved to dismiss the action as to President de la Madrid on the ground that the court lacks personal jurisdiction. Although ordinarily a court may not sua sponte dismiss for lack of personal jurisidiction, that rule is inapplicable where the defendant has: 1) indicated his objection to jurisdiction; and 2) has not appeared by filing a motion or otherwise. First National Bank of Louisville v. Bezema, 569 F.Supp. 818 (S.D. Ind. 1983). The court's determination of whether it has personal jurisdiction over President Hurtado is governed by the same due process standard applicable to actions generally. Thos. P. Gonzalez Corp. v. Consejo Nacional, Etc., 614 F.2d 1247 (9th Cir. 1980).

Whether a party's contacts are sufficient to permit the court to exercise jurisdiction depends on the facts of the case. The exercise of general jurisdiction is appropriate only when a defendant has "substantial," or "systematic and continuous" contacts with the forum state. Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977). There is nothing in the record to indicate that President de la Madrid has any contacts with California, and thus the exercise of general jurisdiction is inappropriate.

Nor are there any facts in the record that would support limited jurisdiction over the President based on the

nature and quality of his forum contacts in relation to the claims asserted in the complaint. Data Disc requires that three factors be considered: First, whether the nonresident has done some act or consummated some transaction with the forum or performed some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; second, the claim must be one which arises out of or results from the defendant's forum-related activities; and third, exercise of jurisdiction must be reasonsable. Id. at 1287.

Plaintiff alleges only that President de la Madrid participated in a conspiracy to deprive plaintiff of his constitutional rights, from which he argues that jurisdiction is proper because the President allegedly appointed the other defendants and failed properly to supervise their actions. Plaintiff has demonstrated no contacts of President de la Madrid with California; and thus no "purposeful availment" of the benefit of conducting activities in California. The alleged tortious acts of President Hurtado must have originated outside of California, presumably Mexico. The UMS is not a defendnat in this case, and it is improper to attribute the contacts of the government, by virtue of the consulate, to the President as an individual, whether he is alleged to be acting in a personal or official capacity. In these circumstances it is not sufficient for jurisdiction that the act in Mexico imposes a burden on a California resident. See Thos. P. Gonzalez Corp. 614 F.2d at 1253.

Nor is the exercise of jurisdiction appropriate because

President de la Madrid has allegedly utilized the mail system to communicate with the consulate. This is not the kind of purposeful activity which supports jurisdiction. See, Thos P. Gonzalez, 614 F.2d 1247; Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985). Further, the exercise of jurisdiction in these circumstances would not be reasonable, in light of the potential heavy burden placed on President de la Madrid to appear in California to defend against this action.

Because it is inappropriate to assert jurisdiction over the President it is unnecessary to determine if service of process were proper, or to apply the "Act of State" doctrine to bar this action.

3. Suggestion of Immunity

On December 15, 1985, the United States, pursuant to 28 U.S.C. § 517, filed a "Suggestion of Immunity" in favor of President de la Madrid. Historically, courts of the United States have been bound by Suggestions of Immunity submitted to the courts by the executive branch. Ex Parte Republic of Peru, 318 U.S. 578, 588-89 (1942); Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974). However, in 1976 Congress passed the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603 et. seq., to make justiciable the question of sovereign immunity of foreign states, thereby freeing the executive branch from the diplomatic pressures involved in granting or denying requests of foreign states for sovereign immunity. Verlindin B.V. v. Central Bank of Nigeria, 461 U.S. 480, (1983). The FSIA provides the courts of the United States jurisdiction, in limited circumstances, over claims of United States citizens against foreign states, as

defined in the Act.

The FSIA defines a foreign state in § 1603 as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." The section as phrased does not refer to individual representatives of foreign governments. Further, the enactment of the FSIA was not intended to affect the power of the State department to assert immunity for diplomatic and consular personnel. See 22 U.S.C. § 254a-e. The State department Suggestion of Immunity for diplomatic personnel has generally been accepted as conclusive by the courts. See Abdulazia v. Metropolitan Dade County, 741 F.2d 1328 (11th Cir. 1984); Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949); see also United States v. Lumumba, 741 F.2d 12, 15 (2nd Cir.1984) ("recognition by the executive branch--not to be second-guessed by the judiciary--is essential to establishing diplomatic status."). Diplomatic status can be conferred after the filing of a lawsuit. Abdulazia, 741 F.2d at 1331, and the State Department has "broad discretion" to classify diplomats. Id.

Thus, it is clear that the State Department has the power to confer immunity on the diplomatic representatives of foreign governments. A head of state of a foreign government is indisputably a representative of that state in its dealings with the United States, and it would be within the power of the State Department to grant immunity to a head of state during a visit to the United States. See, Abdulazia at 1330. There is no basis, consistent with the purposes behind the granting of diplomatic immunity, to restrict the State Department from suggesting immunity on behalf of representatives of foreign governments for

actions taken inside the foreign state, when the very same actions would be protected by a grant of immunity if taken inside the United States. Accordingly, the Suggestion of Immunity offered by the State Department in favor of President de la Madrid is accepted, and the President is dismissed from the action, with prejudice.

4. Lack of Subject Matter Jurisdiction.

Plaintiff invokes jurisdiction pursuant to 28 U.S.C. § 1343. Jurisdiction over plaintiff's claim for violations of his First and Fourth amendment rights is appropriate only when the deprivation is "urder color of state law." This requirement has "consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." Rendell-Baker v. Kohn, 457 U.S. 830 (1982). The Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due procees, applies to acts of states, not private persons or entities. Shelley v. Kraemer, 334 U.S. 1 (1948). Thus, the requirement of state action is both a jurisdictional and substantive requirement. See, Blum v. Yaretsky, 457 U.S. 991 (1982)(failure of respondents to establish state action was failure to prove violation of rights secured by fourteenth amendment); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974)(private conduct, "however discriminatory or wrongful," not actionable under the 14th amendment); Public Utilities Commission of the District of Columbia v. Pollack, 343 U.S. 451 (1952)(First amendment does not apply to or restrict private persons).

The ultimate question in determining whether an alleged

infringement of constitutional rights is actionable is whether the infringement is "fairly attributable to the state." Rendell-Baker v. Kohn, 457 U.S. at 838, citing, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). If the alleged infringement is not state action, there is no jurisdiction and thus, "our inquiry ends." Id.

The alleged unconstitutional actions taken against plaintiff were all taken by members of the Mexican consulate or officials of the Mexican government. Although the individuals were alleged to be acting on behalf of the Mexican government, and thus not strictly as private individuals, they are not alleged to be acting on behalf of a state or territory of the United States, and thus their actions are not attributable to state or federal officials and are not "under color of state law." See District of Columbia v. Carter, 409 U.S. 418, 421 (1973)(civil rights action for violation of Fourth amendment rights against District of Columbia police officer not actionable because District of Columbia is not a state within meaning of Fourth Amendment and neither the District nor its officers are subject to its restrictions); cf. Examining Board v. Flores de Otero, 426 U.S. 572 (1976)(district court has jurisdiction under 28 U.S.C. § 1343 of a claim alleging the unconstitutionality of a Puerto Rico statute because the Fifth and Fourteenth amendments apply to Puerto Rico, and territories of the United States are included in § 1343.)

The only state involvement for purposes of § 1343 in the incidents upon which the complaint is based occurred when plaintiff was placed under citizen's arrest, and when Uribe was

arrested by the Police Department for allegedly assaulting plaintiff with a deadly weapon in December, 1985. In the arrest of plaintiff, the signed arrest report clearly indicates that the arrest was purely a "citizen's arrest" and the officers were merely assisting with paperwork and transport. In addition, it is clear from plaintiff's supplemental declaration that the Los Angeles Police Department assisted plaintiff by placing defendant Uribe under arrest. The incidents alleged in the complaint do not constitute "significant encouragement," of the alleged deprivations of constitutional rights, such that "choice in law must be deemed to be that of the state," Blum v. Yaretsky, 457 U.S. 991, 1003 (1982).

Accordingly, for the reasons stated above, President de la Madrid is dismissed from this action with prejudice; plaintiff's complaint is dismissed for lack of subject matter jurisdiction.

Dated: February 5, 1986.

Pamela Ann Rymer
United States District Court

EXHIBIT 3

AO 72.
Rev. 8/82

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASEINGTON

ESTATE OF SILME G. DOMINGO, et al., Plaintiffs, vs. FERDINAND MARCOS, et al., Defendants.	)	No. C82-1055V ORDER

Having heard oral argument and having fully considered the memoranda and affidavits submitted in connection with the following motions: (1) the motion of plaintiffs to vacate and set aside the Court's order of December 23, 1982, dismissing plaintiffs' claims against defendants Ferdinand and Imelda Marcos; (2) the motion of defendant Republic of the Philippines to dismiss; (3) the motion of defendant Ernesto Querubin to dismiss; (4) the motion of plaintiffs to disqualify the United States Attorney; and (5) the motion of the United States government

defendants to dismiss, the Court now finds and rules as follows:-

1. Plaintiffs are members of a group opposed to the policies and actions of the regime of Ferdinand Marcos, President of the Republic of the Philippines, and to the alleged policy of the United States of military, economic, political and other support of that regime.

2. Plaintiffs allege:

> "All the defendants have and are engaged in an ongoing conspiracy to silence and disrupt the anti-Marcos opposition. The goal of this conspiracy against the anti-Marcos opposition was and is to infiltrate, monitor, counteract, interfere with, disrupt, and neutralize the anti-Marcos opposition in this country and thus to deprive the opposition of equal protection of the laws and other civil rights."

The American defendants named in the complaint are alleged to have been aware of the alleged activities of Philippine agents against the anti-Marcos opposition in the United States but to have taken no action to halt or to curtail those activities. Allegedly, the United States government defendants have acted to further the objectives of the conspiracy against the anti-Marcos opposition. In addition, certain unnamed United States government defendants are alleged to have participated in the plot to murder Domingo and/or Viernes.

3. The Court has previously dismissed President Marcos and his wife, Imelda Marcos, as defendants pursuant to a Suggestion of Immunity made by the Department of State of the United States.

Plaintiffs move to vacate and set aside that order on the procedural ground that they were not afforded an opportunity to respond to the United States and on the substantive ground that the Suggestion of Immunity procedure was eliminated by enactment of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. Sections 1330 et seq.

4. Although the Court finds that the motion to dismiss defendants Marcos was properly noted on the Court's calendar for December 23, 1982, the Court will address de novo the substantive question of the immunity of those defendants.

5. Plaintiffs' principal argument in opposition to the Suggestion of Immunity is that, in enacting the FSIA, Congress intended to eliminate the Suggestion of Immunity procedure. The legislative history of the Act indicates that Congress had this intention only with respect to foreign states. House Rep. No. 94-1487, 94th Cong., 2nd Sess., U.S. Code Cong. and Admin. News, at 6610 ("House Report"). There is no evidence in the legislative history of the FSIA nor in the FSIA itself that Congress intended to modify the procedure with respect to the immunity of a foreign head of state.

6. Under the FSIA a foreign state is, with certain exceptions, immune from the jurisdiction of the courts of the United States. 28 U.S.C. Section 1604. The term "foreign state" is defined in Section 1603 as "a political subdivision of a

foreign state or an agency or instrumentality of a foreign state."

7. Plaintiffs have cited no reference to the immunity of a foreign head of state in the FSIA or in its legislative history. They nevertheless argue that because the head of a foreign state was historically considered the embodiment of the state itself, a head of state should now be accorded no greater immunity than a state. There is no evidence, however, that Congress intended to eliminate the Suggestion of Immunity procedure as a means of securing the dismissal of an action against a foreign head of state.

8. The Court finds additional support for this result in the fact that enactment of the FSIA was not to affect the immunity of diplomatic or consular officials. House Report at 6610. Those officials enjoy absolute immunity. It would be illogical to accord a lesser degree of immunity to a foreign head of state than to a diplomat appointed by that head of state. The Court concludes that it must accede to the Suggestion of Immunity made by the Department of State with respect to defendants Ferdinand Marcos and Imelda Marcos.

9. The Republic of the Philippines has also moved to dismiss. Its claim of immunity is expressly governed by the FSIA. Plaintiffs contend that the Republic cannot assert a defense of sovereign immunity because of the exception contained in 28 U.S.C. Section 1605(a)(5), which provides as follows:

"(a) A foreign state shall not be immune from

the jurisdiction of courts of the United States or of the States in any case

> ... (5) not otherwise encompassed in paragraph (2) above [pertaining to commercial activity] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;..."

10. In the Ninth Cause of Action of plaintiffs' complaint plaintiffs allege that certain of the defendants committed an assault and battery upon Domingo and Viernes which caused their deaths. At no place in plaintiffs' complaint is there an allegation that the deaths of Domingo and Viernes were caused by the tortious act of the Republic of the Philippines or by an official or employee of the Republic of the Philippines while acting within the scope of his office or employment. Absent such an allegation the Republic of the Philippines is immune from the jurisdiction of the courts of the United States and the motion of the Republic of the Philippines to dismiss must be granted. This Court is without jurisdiction under the FSIA to grant injunctive relief as against the Republic of the Philippines.

11. Consul General Ernesto Querubin also moves to dismiss. He argues that he is immune from suit by virtue of his "consular immunity." Querubin claims immunity under two separate consular treaties. The first is the Vienna Convention on Consular

Relations of April 24, 1963, 21 U.S.T. 78, T.I.A.S. No. 6820. This convention, however, provides immunity only with respect to acts performed by a consul in the exercise of his consular functions. Article 43(i). Defendant Querubin does not contend that the acts alleged by plaintiffs are "consular functions."

12. Broader immunity is accorded by the 1972 consular agreement between the United States and Poland, 24 U.S.T. 1233, T.I.A.S. No. 7642. That agreement provides in Article 13:

> "Consular officers and members of their families forming part of their households shall enjoy immunity from the jurisdiction of the judicial and administrative authorities of the receiving state."

13. Defendant Querubin asserts that he is entitled to the absolute immunity afforded by the Polish Treaty by virtue of the "most-favored-nation" provision in the Consular Convention entered into by the Republic of the Philippines and the United States in 1948. T.I.A.S. No. 1741. Article I(2) of that convention provides:

> "[c]onsular officers of each High Contracting Party shall, after entering upon their duties, enjoy reciprocally in the territories of the other High Contracting Party rights, privileges, exemptions and immunities no less favorable in any respect than the rights, privileges, exemptions and immunities which are enjoyed by consular officers of the same grade of any third country and in conformity with modern international usage."

14. Defendant Querubin does not contend that, upon entry into force of the Polish Treaty, Philippine consular officials

were automatically accorded the immunity enjoyed by Polish consular officials. That is, defendant does not argue that the most-favored-nation clause is self-executing. Rather, he argues that he became entitled to the consular immunity of the Polish Consular Convention when the United States accepted the tender by the Philippines of immunity in a note, dated December 6, 1982, in which the United States stated:

> "In accordance with the provisions of Article I(2) of the 1947 United States-Philippines Consular Convention, the request of the Republic of the Philippines is granted on the basis of the representations and guarantee of reciprocity set forth in the Embassy's note. Accordingly, consular officers of the Philippines will henceforth enjoy reciprocally in the United States privileges, exemptions and immunities no less favorable in any respect than those that are enjoyed by Polish consular officers in the United States pursuant to the 1972 United States-Poland Consular Convention."

15. Plaintiffs' action was filed on September 14, 1982, which was two months prior to the exchange of diplomatic notes granting Philippine consular officials the immunity enjoyed by Polish officials. Plaintiffs argue that this immunity cannot be conferred retroactively. They contend that their cause of action against Querubin accrued no later than June 1, 1981, the date upon which Domingo and Viernes were slain.

16. Plaintiffs have cited Arcaya v. Paez, 145 F.Supp. 464, 468 (S.D.N.Y. 1956), 244 F.2d 958 (2d Cir. 1957) for the proposition that a consular officer cannot be retroactively

immunized. Arcaya was a libel action against a Venezuelan consul, who was not immune from suit at the time he was served. Subsequently, the defendant was promoted to the rank of ambassador and became entitled to absolute immunity from suit. Plaintiff argued that the Venezualan government could not retroactively immunize defendant for the acts he committed while he was a consular officer. The court ruled that since defendant was served with process before he was immune, the action against him should not be dismissed. The court held, however, that the action should be suspended because defendant's promotion to ambassador entitled him to absolute immunity.

17. The absolute immunity of defendant Querubin under the Polish Convention requires the termination of these proceedings as against him. The action must be dismissed, rather than simply suspended, as against him since even a suspension of the action would be inconsistent with the provision in the Polish Convention that a consular official "shall enjoy immunity from the jurisdiction of the judicial and administrative authorities" of the United States.

18. Plaintiffs also assert that Article I(2) of the U.S.-Philippine Convention does not contemplate absolute immunity because immunity of that character is not "in conformity with modern international usage." The Court is not, however, persuaded that the U.S.-Poland Consular Convention is in any way contrary to

modern international usage.

19. The Court finds no merit in the other arguments made by plaintiffs against the absolute immunity of defendant Querubin.

20. Plaintiffs have moved to disqualify the United States Attorney on the ground that he has a conflict of interest because his investigation of the murders of Domingo and Viernes may uncover evidence which inculpates one or more of the United States government defendants in the present action. At the hearing held on plaintiffs' motion, the Court granted the United States' request for a waiver of Local Rule 2(d), which requires out-of-the-district counsel to associate local counsel. At that time, however, the Court indicated that it would be a convenience to all parties and to the Court to have a representative of the United States Attorney's office to be available to attend to such ministerial functions as the acceptance of service of pleadings. In order to avoid even the appearance of a conflict of interest, however, the Court requests counsel for the United States defendants to associate as local counsel an attorney from the Seattle office of some federal agency other than the office of the United States Attorney.

21. Since neither the Federal Rules of Civil Procedure nor federal practice recognizes John Doe pleadings, the named John Doe defendants one through seventy-five must be dismissed. Should unknown defendants hereafter be identified, plaintiffs may seek

leave to add those parties as parties defendant.

22. The federal agencies named as defendants, namely, The Federal Bureau of Investigation, the Department of Justice, the Department of State, Naval Intelligence, and Naval Investigative Service are not legal entities. They can neither sue nor be sued. The complaint of the plaintiffs must, therefore, be dismissed as to those defendants.

23. The named United States government defendants have moved for dismissal of plaintiffs' complaint as against them. The Court is persuaded by the memoranda of authorities filed by those defendants and by the decisions cited therein, that the following rulings must be made with respect to the claims asserted by plaintiffs as against the United States government defendants:

(1) With respect to plaintiffs' claims for damages against the United States government defendants in their individual capacities, the Court finds that those defendants do not in their individual capacities have such minimum contacts with the State of Washington as to make them subject to the jurisdiction of this Court under the Long Arm Statute of the

State of Washington. The damage claims of plaintiffs against the United States government defendants in their individual capacities must therefore be dismissed.

(2) With respect to the other claims by plaintiffs against the United States government defendants, those claims must be dismissed because the allegations against those defendants in plaintiffs' complaint are lacking in the requisite specificity to enable the defendants to answer to the complaint. Before any one of the named United States government defendants may be required to defend himself against the charges in plaintiffs' complaint, plaintiffs must as to that defendant allege with particularity the personal involvement of that defendant in the alleged unlawful conduct of which plaintiffs complain.

(3) With respect to the claims of the Estates of Silme G. Domingo and Gene A. Viernes for money damages by reason of the wrongful deaths of the decedents, the

actions against the named United States government defendants in their official capacities must be dismissed. The United States cannot be sued for money damages except and to the extent that it has waived its sovereign immunity. The United States has waived its sovereign immunity from suits for money damages only by the Federal Tort Claims Act. In order to commence an action under the Federal Tort Claims Act a claimant must comply strictly with the terms of that act. One of the provisions of that Act is that prior to the commencement of an action for damages against the United States, the claimant must submit an administrative claim and have that claim ruled upon administratively. This, the claimants have not done. Their claims for money damages against the named United States government defendants in their official capacities must therefore be dismissed.

Accordingly, the motion of President Ferdinand E. Marcos and

Imelda Marcos to dismiss is GRANTED. The motion of Ernesto Querubin to dismiss is GRANTED. The motion of the Republic of the Philippines to dismiss is GRANTED. The motion of the United States government defendants to dismiss is GRANTED in part. The complaint of plaintiffs as to defendants Federal Bureau of Investigation, Department of Justice, Department of State, Naval Intelligence, Naval Investigative Service, and John Does one through seventy-five, is DISMISSED.

Plaintiffs shall have leave to file an amended complaint. That amended complaint must, however, comply with the mandate of Fed. Rules Civ. Proc. 8 that the complaint be a short and plain statement of each of plaintiffs' claims. The Court will strike an amended complaint that is not in compliance with Rule 8.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 14th day of July, 1983.

United States District Judge

EXHIBIT 4

CAUSE NO. 93-CI-11345

GUARDIAN F., INDIVIDUALLY AND AS NEXT FRIEND OF MINOR G.,	)	IN THE DISTRICT COURT
Plaintiff,	)	225TH JUDICIAL DISTRICT
v.	)	
ARCHDIOCESE OF SAN ANTONIO, et al.,	)	BEXAR COUNTY, TEXAS
Defendants.	)	

ORDER

The United States of America has filed a Suggestion of Immunity in this cause. The Suggestion indicates that Pope John Paul, II, a named defendant, is the sitting head of state of a friendly foreign state, the state of Vatican City. It further states, and attaches a letter indicating, that the United States Department of State has recognized and allowed the immunity of the Pope from this lawsuit.

The courts of the United States are bound by a Suggestion of Immunity filed by the United States. When such a Suggestion of Immunity is filed, it is the duty of the Court to surrender jurisdiction. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex Parte Peru, 318 U.S. 578, 588-89 (1943); LaFontant v. Aristide, ___ F. Supp. ___, 1994 WL 30044, *13 (E.D.N.Y. Jan. 27, 1994); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988), aff'd in part and rev'd in part on other grounds, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990); Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (N.Y. App. Div. 1992).

Therefore, pursuant to the Suggestion of Immunity Submitted

by the United States, and for good cause shown, it is hereby:

ORDERED that the plaintiffs' claim against Pope John Paul, II, is hereby dismissed with prejudice.

Dated: March 15, 1994

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the following counsel of record by facsimile and/or certified mail, return receipt requested pursuant to the ECF/Rules of the Southern District of Texas, Houston Division on September 19, 2005:

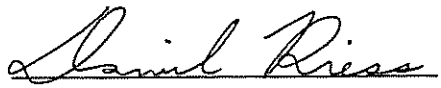
Via CMRRR 7005 0390 0002 6297 7922
and Via Fax No. (713) 942-7507
Daniel J. Shea
Daniel J. Shea, P.C.
1928 West Bell Street
Houston, Texas 77019-4814

Via CMRRR 7005 0390 0002 6297 7939
and Via Fax No. (214) 503-7300
Tahira Khan Merritt
Tahira Khan Merritt, P.L.L.C.
8499 Greenville Avenue
Suite 206
Dallas, Texas 75231-2424
Attorneys for Plaintiffs John Doe I, John Doe II, and John Doe III

Via CMRRR 7005 0390 0002 6297 7946
and Via Fax No. (713) 615-5766
Phillip B. Dye, Jr.
Vinson & Elkins, L.L.P.
First City Tower
1001 Fannin Street, Suite 2300
Houston, Texas 77002
Attorney for Defendants
Archdiocese of Galveston-Houston,
Archbishop Joseph A. Fiorenza, and
Msgr. William Pickard

Via CMRRR 7005 0390 0002 6297 8066
and Via Fax No. (510) 588-5555
Jeffrey S Lena
Law Offices of Jeffrey Lena
1152 Keith Avenue
Berkeley, California 94708

Via CMRRR 7005 0390 0002 6297 8073
and Via Fax No. (713) 224-5055
Karl Van Gardner
Hennessy, Gardner & Barth
502 Caroline
Houston, Texas 77002
Attorneys for Defendant Joseph Ratzinger, also known as Pope Benedict XVI



Daniel Riess