

1 JOSEPH P. RUSSONIELLO, CSBN 44332
United States Attorney
2 JOANN M. SWANSON, CSBN 88143
Chief, Civil Division
3 EDWARD A. OLSEN, CSBN 214150
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055
5 San Francisco, California 94102
6 Telephone: (415) 436-6915
FAX: (415) 436-6927

7 Attorneys for Defendant United States of America

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 WANXIA LIAO,)

12 Plaintiff,)

13 v.)

14 JOHN ASHCROFT, ET AL.,)

15 Defendants.)
16

No. C 08-2776 PJH

**UNITED STATES REPRESENTATIVE
CHRISTOPHER SMITH'S NOTICE OF
MOTION AND MOTION TO DISMISS**

Date: April 29, 2009
Time: 9:00 a.m.

17 **NOTICE OF MOTION**

18 TO: ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

19 Please take notice that on April 29, 2009, at 9:00 a.m., or as soon thereafter as this
20 matter may be heard by this Court, United States Representative Christopher Smith will and
21 hereby does move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)
22 for an order dismissing plaintiff's claims against him with prejudice and without leave to amend.
23 Alternatively, Representative Smith respectfully asks the Court to dismiss plaintiff's claims
24 against him *sua sponte*. The hearing will take place before the Honorable Phyllis J. Hamilton, in
25
26
27
28

1 Courtroom 3, Seventeenth Floor, 450 Golden Gate Avenue, San Francisco, CA 94102.¹

2 This Motion is based on this Motion and Memorandum of Points and Authorities, the
3 Court files and pleadings in this action and plaintiff's previous related actions, and any other
4 matters that the Court may consider at the hearing.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 In 1991, while a graduate student at the University of Toronto, the plaintiff had an
8 academic dispute with a professor in the University's East Asian Studies Department. This event
9 has spawned, over the course of the last eighteen years, at least two state court actions and two
10 prior federal court actions, all of which have been resolved against plaintiff. The history giving
11 rise to these actions is well chronicled in this Court's multiple orders in *Liao v. Cahill*, No. C 03-
12 2906-SBA and in this Court's order dismissing *Liao v. Quidachay*, C-05-1888-CW. In this most
13 recent action, the plaintiff alleges, *inter alia*, that Christopher Smith, a member of the United
14 States House of Representatives, failed to respond to a letter the plaintiff wrote complaining
15 about alleged efforts by Yahoo, Google, MSN and other companies to restrict her freedom of
16 expression on the Internet. First Amended Complaint ¶ 105.

17 Although Representative Smith has not been properly served, Representative Smith asks
18 the Court to dismiss the claims against him with prejudice and without leave to amend.

19 **II. FACTUAL ALLEGATIONS**

20 In her First Amended Complaint, the plaintiff alleges that, on May 15, 2006, she wrote a
21 letter to Representative Christopher Smith, "Chairman of the 109th Congress Subcommittee on
22 Africa, Global Human Rights and International Operations [sic],"² describing the alleged efforts
23

24 ¹Representative Smith has not been served with the plaintiff's original or First Amended
25 Complaint and, by filing this motion to dismiss, does not waive any objections to improper
26 service under Fed. R. Civ. P. 12(b)(5).

27 ²In the 109th Congress, Representative Smith was the Chairman of the Subcommittee on
28 Africa, Global Human Rights and International Relations of the Committee on International
Relations.

1 by Yahoo, Google and companies to restrict her freedom of expression on the Internet. First
2 Amended Complaint ¶¶ 105-106. The plaintiff alleges that In her letter,

3 I described my experiences with these companies, and made urgent request to him
4 that he act on my complaint against these companies in the same way as he did on
5 their same kinds of conduct in China, and include my complaint into his campaign
6 for investigation and public condemnation.

7 In the Complaint I also brought in other issues such as that American government
8 agent colluded with the former Supreme Court of Canada judge, High
9 Commissioner for Human Rights at UN Louis Arbor to cover up for US and
10 Canadian governments, seized all of my complaints sent to the UN's international
11 human rights bodies, in violation of the UN's human rights complaint rules, and
12 the death threat I received on Yahoo's message board while posting my story, etc.

13 First Amended Complaint ¶¶ 105-106.

14 The plaintiff alleges that she never received a response from Representative Smith and
15 that "the silence of Defendant Smith on my complaint can only mean that he condones and
16 endorses the gross human rights abuses committed by his own US government and Canadian
17 government." First Amended Complaint ¶ 109. The plaintiff seeks "a declaratory judgment for
18 violations of 14th Amendment of United States Constitution – equal protection clause, and
19 International Covenant on Civil and Political Rights, Article 26." First Amended Complaint ¶
20 111.

21 **III. ARGUMENT**

22 **A. The Plaintiff's Claims Against the Representative Are Barred By the Speech or 23 Debate Clause**

24 This Court should dismiss the plaintiff's claims against Representative Smith pursuant
25 to the Speech or Debate Clause of the United States Constitution.

26 It is well established that legislators are entitled to immunity for speech and action in the
27 legislature under the Speech or Debate Clause of the United States Constitution. *See Tenney v.*
28 *Brandhove*, 341 U.S. 367, 372-73 (1951); United State Constitution Art. 1, § 6, cl. 1 ("[F]or any
Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in
any other place."). Under the Speech or Debate Clause, "Congressmen and their aides are
immune from liability for their actions within the legislative sphere, even though their conduct, if
performed in other than legislative contexts, would in itself be unconstitutional." *Doe v.*

1 *McMillan*, 412 U.S. 306, 311 (1973) (internal citations omitted). The Founders designed the
2 Speech or Debate Clause “to [e]nsure that the legislative function the Constitution allocates to
3 Congress may be performed independently. *Eastland v. United States Servicemen’s Fund*, 421
4 U.S. 491, 502 (1975). “[T]he central role of the Clause is ‘to prevent intimidation of legislators
5 by the Executive and accountability before a possibly hostile judiciary.’” *Id.* at 502 (quoting
6 *Gravel v. United States*, 408 U.S. 606, 617 (1972)). The Supreme Court has “[w]ithout
7 exception . . . read the Speech or Debate Clause broadly to effectuate its purposes,” *id.* at 501,
8 and has stated unequivocally that when the privilege applies, it is “absolute.” *Id.*

9 In this case, the plaintiff believes that Representative Smith did not perform his
10 legislative duties in a manner that she finds satisfactorily – specifically, that Representative
11 Smith failed to respond to the plaintiff’s letter urging him to investigate alleged efforts by
12 Google, Yahoo and other companies to restrict her free speech rights. This claim is absolutely
13 barred by the Speech or Debate Clause.

14 **B. The Plaintiff Fails to State a Claim Against Representative Smith**

15 This Court should also dismiss the plaintiff’s claims against Representative Smith
16 because the plaintiff fails to state a claim upon which relief may be granted under Federal Rule of
17 Civil Procedure 12(b)(6).

18 Individuals do not have a constitutional right to force the government to listen to their
19 views. *See Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271, 283 (1984).
20 “Public officials at all levels of government make policy decisions based only on the advice they
21 decide they need and choose to hear.” *Id.* at 284. “Government makes so many policy decisions
22 affecting so many people that it would likely grind to a halt were policymaking constrained by
23 constitutional requirements on whose voices must be heard.” *Id.* at 285. “However wise or
24 practicable various levels of public participation in various kinds of policy decisions may be, this
25 Court has never held, and nothing in the Constitution suggests it should hold, that government
26 must provide for such participation. *Id.* “In *Bi-Metallic* the Court rejected due process as a
27 source of an obligation to listen.” *Id.* (citing *Bi-Metallic Investment Co. v. State Board of*

1 *Equalization*, 239 U.S. 441 (1915)). “Nothing in the First Amendment or in this Court’s case
2 law interpreting it suggests that the rights to speak, associate, and petition require government
3 policymakers to listen or respond to individuals’ communications on public issues.” *Id.* “It is
4 inherent in a republican form of government that direct public participation in government
5 policymaking is limited. *Id.* (citing *The Federalist* No. 10 (Madison)). “Disagreement with
6 public policy and disapproval of officials’ responsiveness, as Justice Holmes suggested in *Bi-*
7 *Metallic*, *supra*, is to be registered principally at the polls.” *Id.*; *see also Richards v. Harper*, 864
8 F.2d 85, 88 (9th Cir. 1988) (affirming district court’s dismissal of constituent claim that a
9 Congressman violated her civil rights by failing to assist her; Congressman’s “failure to assist
10 was neither inappropriate nor actionable”); *Craft v. McNulty*, 875 F. Supp. 121, 124 (N.D.N.Y.
11 1995) (dismissing, for failure to state a claim, suit alleging that Member of Congress failed to
12 respond to constituent’s concerns that IRS employees were acting illegally); *Adams v.*
13 *Richardson*, 871 F. Supp. 43, 45 (D.D.C. 1994) (stating that “Congressman Richardson’s
14 decisions on when and how to address his constituents were well within his legislative discretion
15 and are matters within which the courts should not become enmeshed.”).

16 Because the Constitution does not require a legislator to listen to or act upon a
17 constituent’s concerns, the plaintiff’s allegation that Representative Smith violated her
18 constitutional rights by failing to respond to and investigate her complaint fails to state a claim
19 upon which relief may be granted.

20 **IV. CONCLUSION**

21 For all of the foregoing reasons, the Court should dismiss plaintiff’s claims against
22 Representative Smith with prejudice and without leave to amend.

24 DATED: March 25, 2009

Respectfully submitted,

25 JOSEPH P. RUSSONIELLO
26 United States Attorney

27 /s/
EDWARD A. OLSEN
Assistant United States Attorney