IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

BASHE ABDI YOUSUF, *et alii*,	*	
	*	
Plaintiffs,	*	
	*	
versus	*	**Civil Action No. 04-1360 (LMB/JFA)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

REPLY IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO RECONSIDER

COMES NOW, before this Honorable Court, your Defendant in the above-encaptioned matter, *viz.*, Mohamed Ali Samantar ("Samantar"), by and through undersigned counsel, and hereby respectfully replies to the Opposition of Plaintiffs to Samantar's Motion to Reconsider by directing this Honorable Court to the following considerations, *viz.*:

INTRODUCTION

Your Plaintiffs make two arguments in their Opposition. They contend that this Honorable Court has no authority to reconsider its order denying immunity to Samantar, and then go on to assert that, even if this Honorable Court were to have such authority, it should sustain its subject order on the basis of the considerations adduced by the Executive Branch in its Statement of Interest. For the reasons set forth below, these arguments are unavailing.

ARGUMENT

I. *THIS COURT HAS AUTHORITY TO RECONSIDER ITS ORDER DENYING IMMUNITY TO SAMANTAR.*

As your Plaintiffs note in their Opposition, this Honorable Court may reconsider an order so as "to correct a clear error of law or to prevent a manifest injustice." Plaintiffs' Opposition to Motion for Reconsideration (Docket Entry ("DE") #156) ("Opposition") at 3, *quoting Pac. Ins.*

Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). A motion for reconsideration "permits a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Pac. Ins. Co.*, 148 F.3d at 403 (internal quotation marks and citation omitted). This Court made, respectfully, a clear error of law in deferring to a determination by the Executive Branch as to Samantar's lack of immunity where that determination was not informed by any finding of impact upon the conduct of United States foreign policy from a contrary decision by this Honorable Court.

In the absence of any expression of consequence to this nation's foreign relations from the recognition or non-recognition of Samantar's immunity, the Executive Branch is simply requesting that this Honorable Court accept, *ex cathedra*, the Executive Branch's interpretation of the common law. Yet, as noted by Samantar, it is the province of this Honorable Court and not the Executive Branch "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The sole injunction against this Honorable Court is not, as your Plaintiffs assert, that this Court's immunity determination might result in "the embarrassment of two branches of government issuing conflicting opinions in a matter that could implicate foreign relations." Opposition (DE #156) at 4. Rather, it is to avoid "the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations." *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 361 (1955). Even if this rule were expanded to include avoiding the embarrassing consequences for diplomatic relations that might flow from an *acceptance* of a claim of sovereign immunity, the rule cannot apply here. It could hardly be a

source of embarrassment within the language of this rule that this Honorable Court determines, as it should, that the Executive Branch's view of the common law finds no support in precedent and cannot be adopted.

II. THE EXECUTIVE BRANCH'S PUTATIVE INTERPRETATION OF THE LAW OF SOVEREIGN IMMUNITY IS PECULIAR AND SHOULD NOT BE ADOPTED

As the Executive Branch recognized in its Statement of Interest, "[f]ormer officials generally enjoy residual immunity for acts taken in an official capacity while in office." Statement of Interest (DE #147) at ¶ 10 (citation omitted). The Executive Branch would, however, have this Honorable Court create, apparently out of whole cloth, two wholly novel exceptions to this clear expression of the law, *i.e.*, that immunity does not exist unless a recognized government requests such immunity and that immunity may be surrendered when a foreign official takes up residence in the United States. One can scour the Statement of Interest and Plaintiffs' Opposition in vain for any precedent or foundation in judicial policy for either proposition, and, indeed, ample support exists for the absence of any such exceptions.

As for an exception to common law immunity grounded in the failure of a recognized government to ratify such immunity, all of the authority cited by Plaintiffs, *see* Opposition (DE #156) at 6, speaks to the well-accepted authority of a recognized government to waive immunity. *See, e.g., In re Doe #700*, 817 F.2d 1108, 1111 (4th Cir. 1987). No court has ever failed to find immunity due to the want of ratification of such immunity by the government of the state the foreign official served. Indeed, courts have routinely found sovereign immunity to exist without any such ratification. *See, e.g., Underhill v. Hernandez*, 168 U.S. 250 (1897); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 917 (N.D. Ill. 2003).

A general requirement that immunity be ratified in order to be effective also runs counter to the scheme of the Vienna Convention on Consular Relations to which the United States is a party. *See* Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261. That Convention provides in Article 32 for the waiver of the immunities for particular categories of individuals set forth in Article 37. It does not make the recognition of those immunities subject to any duty of the employing state to assert them.

Good judicial reason exists not to put every foreign official to the burden of eliciting a government's endorsement of his or her immunity before that immunity will be recognized. Such a requirement would pose a great obstacle to the fair and effective management of a case. How long should a court wait before deciding that no such ratification is likely to be forthcoming, recognizing that, if such ratification arrived after the case were well-advanced, the resources of the court and the litigants would have been expended unnecessarily? *See* Fed. R. Civ. P. 10(h)(3) (requiring dismissal of action if the court determines at any time that it lacks subject matter jurisdiction).

Such a rule would also risk vitiating one of the salutary effects that immunity is intended to achieve. As the U.S. Supreme Court said in the related context of protecting the property of foreign sovereigns in the United States, "[W]e have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens." *Boos v. Barry*, 485 U.S. 312, 323-24 (1988). What chilling effect might a rule requiring government ratification have on the performance by government officials of their official duties if they understood that the only barrier to their being answerable for that performance in a foreign court was their ability perhaps many years after their service to interest

a government with possibly different interests and predilictions to submit a statement of support on their behalf? Should it concern such an official that, through unfortunate happenstance, the government in office at the time of the suit may not be recognized by the government of the country in which suit has been filed? It is hardly surprising that no U.S. court has ever seen fit to erect government ratification as a precondition to the recognition of a foreign official's immunity.

The exception to immunity suggested by the Executive Branch for residence in the United States represents a similar departure from the common law as uniformly applied. Again, neither the Statement of Interest nor Plaintiffs' brief discloses a single instance in which immunity has ever been denied on the grounds of presence in the United States. Indeed, as with the exception advanced by the Executive Branch for absence of governmental ratification, case authority contradicts the existence of any residence-based exception to immunity. *See, e.g.*, *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (1876) (the presence of the former President of Santo Domingo in New York did not bar a finding that he was entitled to common law immunity).

Despite the suggestion by Plaintiffs that the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, contemplated an exception to immunity for defendants resident in the United States, *see* Opposition (DE #156) at 7, the Congressional history of the TVPA makes clear that the act was not intended to alter the applicability of any immunities otherwise available. As the Senate report accompanying the TVPA stated, "The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats." S. Rep. No. 102-249, 102d Cong., 1st Sess., 1991 WL 258662 at *7.

CONCLUSION

The extent to which this Honorable Court must defer to the opinion of the Executive Branch as to the dimensions of the common law of sovereign immunity has not previously been the subject of briefing before this Honorable Court. As Samantar has here shown, this Honorable Court need only defer to the Executive Branch in matters of sovereign immunity where the Executive Branch has found some impact upon the conduct of foreign policy from a holding as to the existence or nonexistence of that immunity. Since the Executive Branch has cited no such impact and since the Executive Branch has urged upon this Honorable Court an interpretation of the law of common law immunity that finds no support in precedent or sound judicial policy, this Court's order denying immunity to Samantar should respectfully be reconsidered and Samantar should be accorded the immunity to which traditional notions of immunity entitle him.

Respectfully submitted,

Dated: 31 March 2011, at Alexandria, Virginia

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CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this 31st day of the month of March, 2011, a true, cyclostyled facsimile of the foregoing was despatched by hand carriage of First Class Post, through the United State Postal Service, with adequate postage prepaid thereon, enshrouded in a suitable wrapper, unto:

Joseph W. Whitehead, Esquire
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Respectfully submitted,

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