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

BASHE ABDI YOUSUF, *et alii*,	*	
	*	
Plaintiffs,	*	
	*	
versus	*	**Civil Action No. 1:04cv1360 (LMB/JFA)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO RECONSIDER

JOSEPH PETER DRENNAN
218 North Lee Street
Third Floor
Alexandria, Virginia 22314
Telephone: (703) 519-3773
Telecopier: (703) 548-4399
E-mail: joseph@josephpeterdrennan.com

Dated: 15 March 2011

Attorney and Counsellor for Defendant

I. STATEMENT OF SALIENT FACTS

On 29 November 2010, your defendant, *viz.*, Mohamed Ali Samantar ("Samantar" or "Defendant"), through his undersigned counsel, filed a Motion to Dismiss the Complaint in the instant action (Docket Entry ("D.E.") # 138). Among the arguments he advanced in that motion, Samantar asserted that this Honorable Court lacks subject matter jurisdiction in that, *inter alia,* Samantar is immune from suit for actions taken in his capacity as an official of a sovereign government, *viz.*, Somalia.

On 14 February 2011, the United States Department of Justice submitted a "Statement of Interest of the United States of America" (D.E. # 147) (the "Statement of Interest"). The Statement of Interest advised this Honorable Court that, *inter alia*, "the United States has determined that Defendant Samantar is not entitled to official immunity in the circumstances of this case." *Id.* at 10.

By order entered the following day, this Honorable Court held that Samantar's "common law sovereign immunity defense is no longer before the Court" (D.E. # 148) (the "Order"). This Honorable Court premised that holding on the circumstance that "[t]he government has determined that the defendant does not have foreign official immunity." *Id.*

Samantar hereby moves this Honorable Court, under the provisions of Federal Rules of Civil Procedure 59 (e), to reconsider the Order, and to hold that Samantar is entitled under the common law to the protection of sovereign immunity, the Statement of Interest notwithstanding.

II. ARGUMENT

A. THIS HONORABLE COURT MAY NOT RELINQUISH ITS DECISION-MAKING RESPONSIBILITY TO THE EXECUTIVE BRANCH.

As the Supreme Court has stated in this case, "The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA [the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1602 *et. seq.*] was enacted in 1976." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). However, in surrendering to the United States Department of Justice the authority to determine whether, *vel non,* Samantar enjoys foreign sovereign immunity, this Honorable Court, effectively, abdicated its role under Article III, Section 1, of the Constitution of the United States to decide the scope and applicability of this common law. Under the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is. " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also: Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992) (while a court should give weight to the opinions of the Executive Branch in areas of the Executive Branch's special expertise, such as in the interpretation of the Voting Rights Act, "[d]eference does not mean acquiescence").

A court may well choose to defer to the judgment of the Executive Branch when that Branch has found that the exercise of jurisdiction will embarrass the Executive Branch in the conduct of its foreign policy. *See, e.g.: Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune"). Such a deference should not, however, follow, automatically, from a determination by the Executive Branch, but only from a

consideration, informed by the participation of the parties, that the exercise or, as in the instant case, the non-exercise, of jurisdiction, would represent a challenge to the dignity of a foreign state and embarrass the foreign policy interests of the United States. In the absence of such a hearing and consideration, this Honorable Court's acceptance of the determination by the Executive Branch represents an improper abdication of its responsibilities and should be reversed.

B. THE DETERMINATION OF THE EXECUTIVE BRANCH DOES NOT WARRANT DEFERENCE.

Deference to the suggestion by the Executive Branch of an absence of a basis for immunity is particularly inapt in this case. The Executive Branch does not and cannot assert that Samantar is not entitled to immunity under traditional common law principles. As Samantar's brief in support of his motion for summary judgment amply demonstrates, Samantar's alleged actions, all irrefragably taken within his official capacity and as a head of state, entitle him to the protections from suit that the the doctrine of common law immunity was established to provide. Defendant's Brief (D.E. # 139) at 7-13. Indeed, as the Executive Branch itself 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 (D.E. # 147) at ¶ 10 (citation omitted).

Instead, the Executive Branch deigns to assert two wholly novel bases for its suggestion to this Honorable Court that it forgo recognizing Samantar's immunity under accepted principles. First, it argues that Samantar's immunity should be disregarded because no government recognized by the United States has asserted such immunity. *Id.* at ¶¶ 12-13. Second, it claims that Samantar is not entitled to immunity because he has been "a resident of the United States

since June 1997." *Id.* at ¶ 14

Neither of these explanations even pretends to any basis in the only recognized foundation, in *stare decisis,* for the deferral by a court to an Executive Branch suggestion as to the availability or non-availability of sovereign immunity. Such a basis, as articulated in *Ex parte Republic of Peru*, *supra*, is whether a decision by the court might "embarrass the executive arm of the government in conducting foreign relations." *Ex parte Republic of Peru*, 318 U.S. at 588. Stated otherwise, in a case in this Circuit, a statement of interest by the Executive Branch is intended to warn a court that it may be "venturing into a sensitive area in which its possible decrees might gravely embarrass the Executive's conduct of the Nation's foreign affairs." *Flota Maritima Browning de Cuba, Sociadad Anonima v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964). As more fully explained *infra*, the instant Statement of Interest gives no such caution, and its suggestion that this Honorable Court exercise jurisdiction is, accordingly, not entitled to any deference.

As to the assertion that Samantar does not qualify for immunity because no recognized government has asserted it, this reason to deny immunity finds no support, to our knowledge, in *any* decision by any United States court or international tribunal. Foreign governments enjoy the authority to waive immunity. *See, e.g.: In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (subjecting former President Marcos to the court's jurisdiction as a consequence of the waiver of immunity by a subsequent Philippine Government); *see also: Flota Maritima Browning de Cuba*, *supra,* 335 F.2d at 624 (determining that the Government of Cuba had waived its immunity through a general appearance prior to making any assertion of immunity). But, we are unaware of *any* case that has held that immunity is lost due the failure of a government to ratify it.

More importantly, however, the Statement of Interest does not try to link the failure of a recognized government's endorsement of immunity to any embarrassment that might be suffered by the United States, or, indeed, to any other possible adverse foreign policy consequence that might flow from declining jurisdiction. At best, the Statement of Interest is permissive as to the foreign policy implications of a grant of immunity. It purports to conclude, merely, that an exercise of jurisdiction by this Honorable Court would not jeopardize U.S. interests. At no point does the Statement of Interest recite that the exercise or non-exercise of jurisdiction would actually *harm* the conduct of United States foreign policy. In the absence of such a determination, the Statement of Interest may give some comfort to this Honorable Court were it to conclude, against the weight of the evidence and the law, that Samantar was not entitled to common law immunity. However, the Statement of Interest cannot qualify for the deference that *Ex parte Republic of Peru* allows to Executive Branch statements that present the specter of adverse foreign policy consequences from a failure to follow the Statement's recommendation.

The contrast with *Ex parte Republic of Peru, supra,* could not be clearer. In that case, the district court had refused to dismiss an *in rem* claim against a Peruvian vessel even though the State Department and the government of Peru had reached a negotiated solution to this dispute. 318 U.S. at 587. The Supreme Court noted, as to the foreign policy implications of continuing to exercise jurisdiction, that:

> When the Secretary [of State] elects . . . to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.
>
> *Id.*

The instant Statement of Interest adduces no comparable foreign policy consequences, or, in fact, any harm, whatsoever, to U.S. foreign policy interests, from the recognition by this Honorable Court of Samantar's right otherwise to common law immunity. Rather, it merely recites, in effect, that a decision by this Honorable Court to exercise jurisdiction will not cause embarrassment since Somalia has no recognized government that could take umbrage at such an action.

As for the second averred foundation for the Executive Branch's suggestion, *viz.*, that Samantar has resided for a number of years in the United States, this lacks as much as an avowed nexus to foreign policy considerations. Indeed, this putative explanation does not even appear in the request from the State Department Legal Adviser to the Justice Department requesting the initiation of a Statement of Interest. *See:* Statement of Interest, Ex. 1. The sole explanation offered by the Executive Branch for recommending the exercise of jurisdiction on this basis is "that the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity." Statement of Interest (D.E. # 147) at ¶ 14. Yet, whether, *vel non*, U.S. Courts, indeed, have such an interest, or whether that interest would, or would not, be furthered by a recognition of Samantar's immunity, is a question outside the scope of any Executive Branch expertise, and is, indeed, uniquely within the ability and authority of this Honorable Court to decide.

In addition, as with the Executive Branch's comments regarding the absence of any ratification of Samantar's immunity by a recognized Somali Government, this assertion by the Executive Branch contends that no harm would be caused to U.S. foreign relations if this Honorable Court exercised jurisdiction. Once again, such an assertion does not present the prospect of injury to the conduct of foreign policy that alone, under *Ex parte Republic of Peru,*

supra, can support the extraordinary step of deference to a suggestion by the Executive Branch as to whether this Honorable Court does or does not have jurisdiction in this case.

III. CONCLUSION

This Honorable Court cannot Constitutionally surrender to the Executive Branch a determination as to its subject matter jurisdiction, and it should not defer to an Executive Branch suggestion that it disregard established common law immunity principles in order to exercise jurisdiction in the absence of an assertion of harm to the foreign policy interests of the United States from a failure to do otherwise. For these reasons, Samantar requests, respectfully, that the Order denying him immunity be reconsidered, and that, for the reasons set forth in the brief in support of his motion to dismiss, he should be accorded the immunity to which he is entitled under the common law.

Respectfully submitted,

Dated: 15 March 2011, at Alexandria, Virginia

JOSEPH PETER DRENNAN
218 North Lee Street
Third Floor
Alexandria, Virginia 22314
Telephone: (703) 519-3773
Telecopier: (703) 548-4399
E-Mail: joseph@josephpeterdrennan.com
Virginia State Bar No. 023894

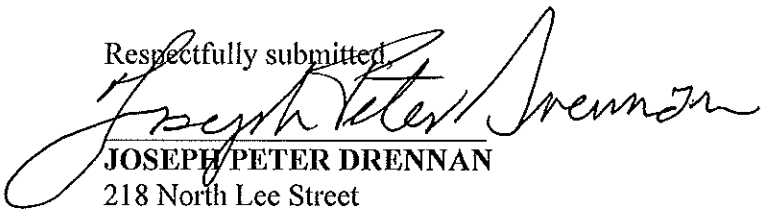
ATTORNEY AND COUNSELLOR,
IN PRAESENTI, FOR
MOHAMED ALI SAMANTAR

IV. CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this fifteenth day of the month of March, 2011, a true, cyclostyled facsimile of the foregoing was despatched by hand carriage, enshrouded in a suitable wrapper, unto:

Joseph W. Whitehead, Esquire
Thomas P. McLish, Esquire
W. Randolph Teslik, Esquire
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564, and that, on even date, an electronic copy of the foregoing was sent, by *e-mail*, unto the said Messrs. Whitehead, McLish & Teslik, at the respective *e-mail* addresses of each, *viz.*: jwhitehead@akingump.com , tmclish@akingump.com , & rteslik@akingump.com .

Respectfully submitted,



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Third Floor
Alexandria, Virginia 22314
Telephone: (703) 519-3773
Telecopier: (703) 548-4399
E-mail: *joseph@josephpeterdrennan.com*
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IN PRAESENTI, FOR
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