IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 1:04 CV 1360 (LMB/BRP)
v.	)	
	)	
MOHAMED ALI SAMANTAR	)	
	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO MOTION FOR RECONSIDERATION

Plaintiffs Bashe Abdi Yousuf, Aziz Mohamed Deria, Jane Doe I, John Doe I, and John Doe II, through undersigned counsel, hereby respectfully submit this memorandum in opposition to Defendant Mohamed Ali Samantar's Motion for Reconsideration ("Motion").

INTRODUCTION

Plaintiffs filed the instant action in 2004, seeking to hold Defendant Mohamed Ali Samantar accountable for his role in orchestrating the brutal human rights crimes that they and their families suffered during the Siad Barre regime. From the outset, Defendant Samantar has claimed immunity from having to answer for these torts in a U.S. court, despite the fact that he has permanently resided in this country since 1997. Now, after full briefing from the parties, an unequivocal Statement of Interest from the U.S. government that he is not entitled to common law immunity, and a ruling from this Court denying his common law immunity defense, Samantar yet again seeks to invoke the shield of immunity to thwart this lawsuit. For the reasons set forth below, this Court should reject the Defendant's Motion.

First, the Defendant has not even approached the threshold showing necessary to prevail on a motion for reconsideration. Instead, Samantar, through misleading citations to Supreme Court precedent, asks this Court to invent a new rule out of whole cloth – a rule that would require the Executive Branch to articulate expressly a showing of embarrassment to its foreign policy interests before a court could properly consider the Executive's position on common law immunity. For Defendant, it is not enough for the Executive Branch, as it has done in this case, to state explicitly that the exercise of jurisdiction will not hinder foreign relations. In Defendant's view, the Executive must do more. Samantar has not, however, cited a single case that imposes such a heightened requirement on the Executive Branch. This Court should not impose one here.

Second, the Motion presents no arguments that were not already presented to and considered by this Court; but rather merely repackages arguments in response to the Executive's Statement of Interest. This Court's conclusion that the Defendant is not entitled to common law immunity is fully supported by the authorities cited in Plaintiffs' Opposition to the Motion to Dismiss (Dkt. 143) and the Statement of Interest. Accordingly, this Court should deny the Motion.

I. SAMANTAR HAS NOT MET THE STRINGENT BURDEN REQUIRED TO PREVAIL ON A MOTION FOR RECONSIDERATION

Samantar has not met his burden of showing that reconsideration by this Court is warranted. The law is well settled that litigants bear a stringent burden when seeking to have courts reconsider their decisions. *Fattahi v. Bureau of Alcohol, Tobacco & Firearms*, 195 F. Supp. 2d 745 (E.D. Va. 2002). Courts grant motions for reconsideration in *only* three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for

new evidence not available at trial; or (3) to correct a clear error of law or to prevent a manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998). Simply put, motions for reconsideration cannot be granted where, as here, the moving party simply seeks to have the Court "rethink what the Court ha[s] already thought through – rightly or wrongly." *U.S. v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997) (citing *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

Here, Samantar fails to meet any of these criteria. First, Defendant does not contend that there has been a change in controlling law that would require this Court to revisit its decision that he is not entitled to immunity. Second, he does not proffer any new evidence that would support grounds for reconsideration. Third, he does not argue that there has been a manifest injustice; nor could he. Indeed, the record shows that Samantar has had ample opportunity to present, to the Executive Branch and to this Court, the reasons why he believes he is entitled to immunity from answering the claims in this action. Because he has failed to satisfy any of these stringent criteria, this Court should deny the motion for reconsideration.

Rather than showing how he meets these grounds for reconsideration, the Defendant urges a novel theory – that courts should consider the views of the Executive only when the United States government shows that the exercise or non-exercise of jurisdiction would cause embarrassment to its foreign policy interests. Mot. at 4. Samantar has the law entirely backward; as Plaintiffs demonstrated in their Opposition to the Motion to Dismiss; there is a presumption in favor of the court exercising jurisdiction *unless* facts show that immunity is appropriate. In support of his novel theory, Defendant cites *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). *Ex Parte Republic of Peru* does not, however, stand for the proposition advanced by the Defendant. Quite the contrary. *Ex Parte Republic of Peru* in fact supports the Plaintiffs'

position that this Court should give due weight to the stated views of the Executive Branch in this case.

In *Ex Parte Republic of Peru*, the government of Peru petitioned the Supreme Court to prohibit a district court from exercising jurisdiction over one of its vessels in an *in rem* action. In pressing its case, Peru requested and received formal recognition from the Executive Branch that it had a valid claim of sovereign immunity. *Id.* at 589. Nonetheless, the district court refused to release the vessel on the ground that Peru had waived immunity from suit by taking depositions and filing for extensions of time. The Supreme Court reversed, holding that the "principle is that courts may not so exercise their jurisdiction . . . [so] as to embarrass the executive arm of the government in conducting foreign relations. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Id.* at 588 (citing *United States v. Lee*, 106 U.S. 196 (1982)). Thus, the potential "embarrassment" that the Court was concerned about was the embarrassment of two branches of government issuing conflicting opinions in a matter that could implicate foreign relations. In deciding that immunity was appropriate, the Court did not announce a bright line rule about what showing the Executive Branch needs to make before its immunity determinations are endorsed by courts. Indeed, other than the bare fact that the Executive Branch formally recognized the immunity of the vessel, nowhere in the opinion does the Court offer any details about the content of the government's Suggestion of Immunity.

Contrary to Samantar's protestations, the Statement of Interest here did, in fact, consider the impact on foreign relations of exercising jurisdiction over Defendant. The Statement of Interest provides that its determination "has taken into account the potential impact of such a decision on the foreign relations interests of the United States." (Statement of Interest of the

United States in *Yousuf v. Samantar* (C.A. No. 1:04 CV 1360), Feb. 14, 2011, at 13). Certainly, if exercising jurisdiction over Defendant had a potentially damaging impact on U.S. foreign relations, then the government would have so advised the Court. It did not. Instead, the Executive Branch expressly stated that ". . .*considering the overall impact of this matter on the foreign policy of the United States*, the Department of State has determined that Defendant Samantar does not enjoy immunity from the jurisdiction of U.S. Courts with respect to this action." (*Id.* at Ex. 1) (emphasis added). These statements leave no genuine doubt that the Executive Branch has concluded that this Court should allow this case to go forward, despite Samantar's pleas for immunity. Nothing more is required of the Executive Branch.

As the Supreme Court concluded in *Ex Parte Peru*, here too the Court can properly determine that following the Statement of Interest advanced by the Executive Branch is the most prudent way to avoid "embarrassment" to the United States in its conduct of foreign policy.

II. Regardless of the Weight Accorded The Statement of Interest, The Decision to Deny Common Law Immunity Was Correct

As the Supreme Court recognized in this very case, the Executive Branch plays an important role in assessing common law official immunity claims by former government officials.[1] *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). Nonetheless, even had the Executive Branch declined to file a Statement of Interest, this court would be correct to conclude that common law official act immunity is not appropriate. As Plaintiffs demonstrated in their

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[1] It is only the Executive Branch of government that may recognize foreign heads of state, and it has exclusive authority to determine whether a foreign official properly qualifies for head-of-state immunity. *LaFontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) ("The immunity extends only to the person the United States government acknowledges as the official head-of-state. Recognition of a government and its officers is the exclusive function of the Executive Branch."). Here, the Executive Branch has said that Samantar is not entitled to any type of common law immunity, including head-of-state immunity.

Opposition to the Motion to Dismiss, there are many reasons why the Defendant is not entitled to common law immunity. (Opp. at 3-10). Because the issue has been extensively briefed, Plaintiffs will not restate all of those grounds here. Instead, Plaintiffs respond only to the challenges that Defendant has made regarding whether the Statement of Interest relies on factors relevant to an immunity determination.

Defendant asserts that the two primary grounds relied upon by the Executive Branch: (1) the lack of a recognized government in Somalia; and (2) residency of the defendant are insufficient grounds to deny his assertion of immunity. Again, the Defendant misses the mark. First, the absence of a recognized government is an appropriate factor to be weighed by this Court, particularly since sovereign immunity belongs to the state, not the individual. *See, e.g., In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). "As we see it, a fundamental characteristic of state sovereignty is the right to determine which individuals may raise the flag of the ship of state and which may not." *In re Doe #700*, 817 F.2d 1108, 1111 (4th Cir. 1987) (upholding the Philippine government's waiver of head-of-state immunity for former president Ferdinand Marcos); *see also* Vienna Convention on Consular Relations (Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261.) Thus, the fact that the United States does not recognize the Transitional Federal Government or any other entity as the government of Somalia is a valid – even dispositive – consideration for this Court in determining whether Samantar is entitled to raise common law official immunity as a bar to this suit.[2]

Second, it is entirely appropriate for this Court to give weight to the fact that Samantar has lived in the United States for almost fifteen years. Defendant makes light of this factor by

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[2] *Cf. Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) ("*Recognized* states enjoy certain privileges and immunities relevant to judicial proceedings... ") (emphasis added).

suggesting that U.S. courts may not have a genuine "interest" in adjudicating claims by and against U.S. residents. Mot. at 6. But United States law, as shown in the ATS and TVPA, reflects the considered judgment of the legislative and executive branches that former government officials *may* be called to account for their human rights abuses and that U.S. courts *will* provide a forum for such claims. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (finding jurisdiction appropriate under the ATS because "the nations of the world recognize that respect for fundamental human rights is in their individual and collective interest").

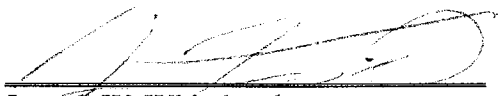
In addition, by enacting the TVPA, Congress codified the United States' interest in adjudicating serious human rights claims against former foreign officials residing or otherwise present in the United States. The legislative history demonstrates that Congress found that the TVPA was necessary to ensure that the United States not serve as a safe haven for torturers. *See* 137 Cong. Rec. 34785 (1991) (statement of Congressman Mazzoli) ("The TVPA puts torturers on notice that they will find no safe haven in the United States."). Indeed, the TVPA was intended to provide redress in circumstances exactly like this, where individuals commit human rights abuses overseas and then attempt to evade accountability and live in the United States. Thus, it is entirely within this Court's province to adjudicate whether Plaintiffs have valid claims against the Defendant, and this Court should deny the motion for reconsideration.

III. CONCLUSION

For the foregoing reasons, all of Defendant Samantar's claims of official immunity are unavailing, and his motion for reconsideration should be denied.

Dated: March 28, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2011, I caused a copy of the foregoing Plaintiffs' Opposition to Motion for Reconsideration to be sent via U.S Mail and via e-mail to the following persons:

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