RECORD NO. 11-1479

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF , et al.,

Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Judge Leonie M. Brinkema

OPENING BRIEF OF APPELLANT

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August 8, 2011

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1479 Caption: Bashe Yousuf v. Mohamed Ali Samantar

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mohamed Ali Samantar (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on 7 June 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Joseph Peter Drennan
(signature)

7 June 2011
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JURISDICTIONAL STATEMENT

The District Court purported to exercise subject matter jurisdiction under 28 U.S.C. § 1350, and, by Order entered on 15 February 2011, the District Court purported to strike your Appellant's common law immunity from suit. Your Appellant, *viz*., Mohamed Ali Samantar, thereupon interposed timely, on 15 March 2011, a Motion for Reconsideration of the said Order, denying immunity to Samantar, which motion was denied by the District Court on 1 April 2011. Samantar then filed timely his Notice of Appeal to this Honorable Court on 29 April 2011. Accordingly, this Honorable Court has jurisdiction over the instant appeal under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1.) Is deference to be accorded a Statement of Interest of the Executive Branch, concluding that Defendant Mohamed Ali Samantar ("Samantar") is not entitled to foreign official immunity where the Statement of Interest does not recite any foreign policy impact precluding such immunity and where the Statement of Interest advances preconditions to foreign official immunity that find no support in common law precedent or sound judicial policy?

2.) Is Samantar otherwise entitled to immunity on the basis of the common law doctrines of foreign official act and head of state immunity?

STATEMENT OF THE CASE

On 10 November 2004, Plaintiffs filed a Complaint in the United States District Court for the Eastern District of Virginia. The Complaint alleged that Samantar violated the human rights of residents of Somalia, giving rise to liability under the Torture Victim Protection Act of 1991 (the "TVPA"), 28 U.S.C. § 1350 note, and the Alien Tort Statute, 28 U.S.C. §1350, while Samantar served, variously, as Prime Minister, First Vice President, and Defense Minister of Somalia from January 1980 to September 1990.

Samantar filed a motion to dismiss the Complaint on 1 December 2004. (J.A. at 5)[1] [Document 3][2] At a hearing on the motion on 7 January 2005, *inter alia*, the District Court stayed the proceedings, before ruling on the motion, to enable the United States Department of State ("State Department") to make its views known to the District Court on Samantar's eligibility for immunity. (J.A. at 7) [Document 25].

A little over two years later, in the face of State Department inaction, the District Court reinstated the case to the active docket. With leave of court, the Plaintiffs filed a Second Amended Complaint. (J.A. at 12) [Document 82] On 29 March 2007, Samantar moved to dismiss the Second Amended Complaint. (J.A. at 13) [Document 89]. Samantar argued, principally, that Samantar enjoyed immunity from Plaintiffs' claims under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq*. ("FSIA") and common law, that Plaintiffs' claims were time barred, and that Plaintiffs had improperly failed to exhaust their legal remedies in Somalia. (J.A. at 13) [Document 90, *passim*].

On 27 April 2007, at the hearing on Samantar's aforesaid motion to dismiss, the District Court, in open court, without reaching Samantar's other arguments,

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1 All references to "J.A." denote the Joint Appendix in respect of the instant appeal, filed on even date.

2 All references herein to "Document" denote the corresponding District Court Docket No(s). in the case *sub judice*.

granted Samantar's motion, on the basis that Samantar enjoyed immunity under the FSIA from Plaintiffs' claims. (J.A. at 14) [Document 102] The District Court thereafter issued its opinion, and judgment was entered in favor of Samantar, on 1 August 2007. *Yousuf v. Samantar*, 2007 WL 2220579 (E.D. Va. 2007) (J.A. at 15) [Document 107]

Plaintiffs appealed the decision to this Honorable Court. (J.A. at 15) [Document 109] This Honorable Court reversed the decision of the District Court in a decision issued 8 January 2009. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009). (J.A. at 15) [Document 111] This Honorable Court found that FSIA did not apply to individuals and that, even if the FSIA did apply to individuals, it did not shield a former official such as Samantar from suit.

The United States Supreme Court, on September 30, 2009, granted a *writ of certiorari* filed by Samantar. *Samantar v. Yousuf*, 130 S. Ct. 49 (2009). Following oral argument, the Court, in a decision dated 1 June 2010, sustained the decision of this Honorable Court. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). The Supreme Court confirmed the conclusion of this Honorable Court that the FSIA did not codify official immunity and remanded the case to the District Court. The following excerpt of the Opinion of the Court, per Justice Stevens, emphasized the limited scope of the Court's decision, *viz.*:

> We emphasize, however, the narrowness of our holding. *Whether [Samantar] may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed by the District Court on remand.*

Id. at 2292-3 (Emphasis added)

Alas for Samantar, on remand, the District Court did not decide his entitlement to immunity under the applicable common law. To be sure, upon remand, Samantar filed, on 29 November 2010, a Motion to Dismiss ((J.A. at 18) [Document 138]), in which, *inter alia*, he, essentially, renewed his claim of immunity from suit under common law ((J.A. at 18-19) [Document 139]), and your Appellees opposed said motion. (J.A. at 19) [Document 143] However, before the said motion came on for a hearing, the United States of America, on 14 February 2011, filed a Statement of Interest (J.A. at 65-78), concluding that Samantar was not immune from suit. The Statement of Interest indicated, *ex cathedra*, that, "[b]ecause the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that [Samantar] is not immune from suit."[3] *Id*. at 70 As support for its conclusion that Samantar is not entitled to immunity, the Statement of Interest *inter alia* relied on the following, *viz*.:

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3 The Statement of Interest cites the Supreme Court Opinion in *Samantar*, 130 S. Ct. at 2284, and the case of *Isbrandsten Tankers, Inc. v. President of India*, 446 F. 2d 1198, 1201 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) in putative support of its proposition of absolute deference. However, Samantar respectfully submits that neither the holdings nor the *dicta* in either of the said decisions supports such a sweeping proposition (*see*: Section 1 of the instant Brief, *infra*, at pp. 8 -12).

1) "In the absence of a recognized government authorized either to assert or waive [Samantar's] immunity or to opine on whether [Samantar's] alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here."

2) "That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States."

3) "The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States since June 1997." (*Id.* at 73, ¶¶13 and 14)[4].

The District Court simply acquiesced in the putative determination by the Executive Branch by issuing an Order [Document 148], the following day, *viz.*, 15 February 2011, which contained, *inter alia*, the following pronouncement, *viz.*:

> "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's sovereign immunity defense is no longer before the Court . . . ." (J.A. at 79).

Samantar thereupon timely moved the District Court for a Reconsideration of its Order, striking his defense of common law immunity (*Id.* at 19) [Document 150]. However, at a hearing on the said Motion for Reconsideration, held on 1

4 It is also noteworthy that the first page of Statement of Interest contains the following statement, at footnote #1 thereof: "The United States expresses no view on the merits of Plaintiffs' claims . . . ." (J.A. At 65).

April 2011 (J.A. at 80-93), the District Court denied said Motion[5]. (*Id*. at 95) [Document 158]

On, 29 April 2011, Samantar appealed to this Honorable Court from the Order denying his common law immunity from suit. (*Id*. at 96-99)

Notwithstanding Samantar's appeal, the District Court did, on 3 May 2011, enter a Scheduling Order, which, *inter alia*, set 9 September 2011, as the close of discovery, with a final pretrial conference set for 15 September 2011 (J.A. at 20)[Document 160]. Accordingly, Samantar filed a Motion to Stay with the District Court on 13 May 2011(J.A. at 21) [Document 162], and, on 18 May 2011, the District Court entered an Order, denying the Motion to Stay and characterizing the instant appeal, *ipse dixit*, as "frivolous" (J.A. at 21) [Document 168] .

On 18 June 2011, Samantar filed a Motion to Stay the District Court proceedings with this Honorable Court. Said motion was denied on 8 July 2011.

STATEMENT OF FACTS

Samantar served in various senior capacities in the Government of Somalia from 1976 to 1990: First Vice President and, in the President's absence, Acting President (January 1976 to December 1986); Minister of Defense (1971 to 1980

5 At the said 1 April 2011 hearing before the District Court, that court indicated, *inter alia*, that the Executive Branch is ". . . entitled to deference in this case" and that "the government's position on sovereign immunity . . . is sound." (J.A. at 81)

and 1982 to 1986); Prime Minister (January 1987 to approximately September 1990). During his tenure as Vice President and Defense Minister, Samantar performed various duties as a member of Somalia's executive authority, including conducting an official state visit to the United States during which he met with then Vice President George H. W. Bush, among other high-ranking officials. As Prime Minister, he also traveled to the United States, meeting in 1989 with Vice President Dan Quayle and Secretary of State James Addison Baker III. (J.A. at 13) [Document 90] (Samantar Affidavit (Exh. 1 to Memorandum of Law in Support of Samantar Motion to Dismiss the Second Amended Complaint)).

In 1991, after the collapse of the government of President Mohamed Siad Barre[6], Samantar sought temporary asylum in Kenya and then emigrated to Italy, where he lived openly from 20 February1991, to 25 June 1997 . In June 1997, Samantar moved to the United States and took up his current residence in Fairfax, Virginia. (*Id.*).

SUMMARY OF ARGUMENT

The District Court improperly deferred to a Statement of Interest of the Executive Branch concluding that Defendant Mohamed Ali Samantar was not entitled to foreign official immunity, and wrongly denied Samantar immunity under the common law. The Statement of Interest did not recite *any* perceived or

6 Somali: *Maxamed Siyaad Barre*.

averred foreign policy impact precluding such immunity, and, hence, its putative conclusion demanded none of the respect due a finding of the Executive Branch premised upon such impact. The basis for the Executive Branch's purported conclusions, *viz.*, that no government recognized by the United States requested immunity for Samantar, and that Samantar's residence in the United States, since 1997, somehow, diminished or abnegated his eligibility for immunity, find no support in common law precedent or sound judicial policy.

As a former high official of Somalia who is conceded to have performed all of the wrongful acts alleged as part of his official duties, Samantar is otherwise entitled to immunity on the basis of the common law doctrines of foreign official act and head of state immunity.

ARGUMENT

The District Court erred in deferring unreflexively to the State Department's putative determination, contained in the Statement of Interest of the United States, that Samantar was not entitled to immunity. The common law grants immunity to Samantar against Appellees' claims.

I. DEFERENCE TO THE STATE DEPARTMENT IS ONLY MANDATED WHEN THE DEPARTMENT MAKES A FINDING OF IMMUNITY.

The District Court wrongly yielded to a determination by the State

Department that Samantar was *not* entitled to immunity. Under the procedures for State Department participation in immunity decisions approved by the Supreme Court in this case, any deference is only due to a State Department finding that an official *is entitled* to immunity. As the Supreme Court stated:

> "Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. . . . *But in the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed*."

Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010) (emphasis added) (internal quotations marks and citations omitted); *see, also: Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.").[7]

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7 The Supreme Court in *Republic of Mexico* further indicated that a court should not "allow an immunity on new grounds which the government has not seen fit to recognize." 324 U.S. at 35. This statement, however, has no relevance here since the immunities that Samantar asks this Honorable Court to recognize are not based upon new grounds, but, rather, are founded upon the very bases that have supported immunity determinations since the earliest days of the Republic (see Section II of this Brief, *infra*). The decision of *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971), cited in the Statement of Interest for the purported principle that a court should defer to any immunity determination made by the Executive Branch, is not to the contrary, since it only addressed a circumstance where the Executive Branch had found the existence of a right to immunity. As Samantar concedes, and as the court, in

The distinction apparently drawn by the Supreme Court between deference to the State Department when the Department suggests the existence of immunity and reliance on common law principles for a determination of immunity in the absence of a suggestion of the existence of immunity finds support in the basis that the Supreme Court has cited for entertaining the views of the State Department in immunity determinations. As the Court indicated in *Ex parte Republic of Peru*, 318 U.S. 578 (1943), in the context of the immunity of a foreign ship from seizure through court process, "[T]he 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." 318 U.S. at 588.

A decision to permit a case to go forward against a foreign official might well challenge the dignity of a foreign state and affect United States foreign policy. Accordingly, the conclusion of the State Department confirming such adverse impact and suggesting immunity demands deference.

However, such is not the situation with the expression by the State Department of a view that a foreign official should not be accorded immunity, as is

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Isbrandtsen Tankers noted, deferral to the Executive Branch is appropriate in such circumstances in view of the "potential harm or embarrassment resulting to our government from a judicial finding of jurisdiction, in the face of an Executive recommendation to the contrary." *Id.* at 1201.

evident from the instant circumstances. A decision by a court to recognize the immunity of a foreign official will rarely cause embarrassment to the conduct of U.S. relations with the state that the official served. If there were the risk of such embarrassment, the foreign state would ordinarily have a ready remedy in waiving the immunity of the official, much as the Philippines did for claims brought against then-Former President Ferdinand Marcos. *See, e.g.: In re Doe #700*, 817 F.2d 1108, 1111 (4th Cir. 1987). Should this not be a sufficient remedy and the foreign policy interests of the United States dictate that a foreign official not receive the immunity to which the common law otherwise entitles him or her, a State Department expression of interest *grounded in such foreign policy considerations* should, indeed, receive respectful consideration from the court.

The instant Statement of Interest does not call for such court adherence. One can scour in vain the Statement of Interest for any finding that a decision granting immunity to Samantar would give offense to the Government of Somalia or have any other consequence for the conduct of the nation's foreign policy. In fact, as the Statement of Interest recites, there is not even a recognized Government of Somalia to take offense. *See*: U.S. Statement of Interest (J.A. at 72, ¶12).

To the extent that the Statement of Interest mentions at all "the foreign policy interests of the United States," the Statement can be read merely to conclude that a decision to deny immunity to Samantar will not have any "potential impact"

on those interests. *See: id*. (J.A. at 73, ¶ 13). Instead, the Statement of Interest relies for its conclusion, as discussed more fully below (see Section II.C. of the instant Brief, *infra*), on unsupported assertions, *ipse dixit*, that common law immunity should turn upon the absence of a request by a recognized government for the conferring of such immunity, and upon the foreign official's prior residence in the United States, considerations quite other than the ones implicating foreign policy that have prompted court respect for Executive Branch statements in the past. *See, e.g.: Ex Parte Republic of Peru*, 318 U.S. at 589 ("The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."); *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 360-61 (1955) (recognizing that the refusal of the State Department to suggest immunity in a particular circumstance "has been accorded significant weight by this Court" but only because of "the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations").

Once the State Department declined to find that foreign policy considerations dictated that Samantar receive immunity, the responsibility devolved upon the District Court, as the Supreme Court explicitly indicated, "to decide for itself whether all the requisites for such immunity existed." *Samantar v.*

Yousuf, 130 S. Ct. at 2284. These requisites are to be found within the "common law" of foreign sovereign immunity. *Id.* Because, as more fully discussed below, the common law supports immunity for Samantar, the case against Samantar must, respectfully, be dismissed.

II. SAMANTAR IS ENTITLED TO IMMUNITY UNDER THE COMMON LAW.

The common law accords immunity to Samantar under the doctrines of foreign official act and of head of state immunity The creation of exceptions to these doctrines, as suggested by the State Department, for circumstances under which a recognized government has not ratified the immunity of the foreign official or where the official has taken up residence in the United States, has no support in precedent or sound judicial policy and must be rejected by this Honorable Court.

A. SAMANTAR CANNOT BE SUED FOR ACTIONS TAKEN IN HIS OFFICIAL CAPACITY.

From the earliest days of our nation's courts, the "absolute" immunity of a foreign sovereign was understood to encompass not only the state and the head of state, but also other individual officials insofar as they acted on the sovereign's behalf. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court applied the common law of foreign sovereign immunity to find a foreign official

exempt from suit under conditions remarkably similar to those here. A Venezuelan general became the subject of an action for an assault by troops allegedly under the general's command that took place during the quelling of a civil insurrection. Finding the general immune from suit, the Supreme Court held that "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact." 168 U.S. at 252.

Plaintiffs acknowledge that Samantar's actions were taken in the course of his official duties. "Defendant Samantar, acting as Minister of Defense, and later as Prime Minister, bears responsibility" for the alleged wrongdoing. *See*: Second Amended Complaint (J.A. at 43, ¶ 65) [Document 76][8]. It is asserted, though, that human rights abuses, as violations of law, cannot be deemed to be official acts. This argument is, however, logically flawed and gains no force from the assertion that the actions might have violated customary international norms.

A civil lawsuit against a government official will almost always challenge

8 It bears mention that, on 22 February 2007, Plaintiffs filed and served their Motion for Leave to File the Second Amended Complaint [Document 76], including, *qua* "Exhibit 1" to their said motion their proposed Second Amended Complaint specimen. Thereafter, on 9 March 2007, the District Court granted said motion. (J.A. at 11) [Document 82]. However, for whatever reason, the Second Amended Complaint was not assigned a discrete docket entry by the Clerk of the District Court.

the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by allegations of lawlessness alone. *See: Waltier v. Thomson*, 189 F. Supp. 319, 321 n.6 (S.D.N.Y. 1960) (holding immune a Canadian official accused of fraud); *Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991) (*per curium*) (rejecting argument that officials lost immunity by virtue of "acting illegally" and finding that conduct was within the scope of their official capacities); *Kline v. Kaneko*, 685 F. Supp. 386, 390 (S.D.N.Y. 1988) (holding that plaintiff's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity").

This analysis does not change because of any allegation that Samantar's conduct violated customary international norms. Individuals "acting in their official capacities as agents of" a foreign government are entitled to immunity "no matter how heinous the alleged illegalities." *Herbage v. Meese*, 747 F. Supp. at 67.

The lack of an immunity exception for civil suits alleging customary international violations does not mean that such violations will necessarily be beyond the reach of the courts. As noted above, the immunity protecting foreign officials for their official acts ultimately belongs to the sovereign and can be waived. *See, e.g., In re Doe #700*, 817 F.2d at 1111. In addition, the circumstances of a case may create a question whether the conduct was performed

on behalf of the state or was instead performed in the official's private capacity. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.").

Moreover, even where sovereign immunity is validly invoked by a foreign official for an alleged international law violation, and not waived by the state, remedies may exist outside the civil setting. International criminal proceedings might be brought. Alternatively, governments may pursue sanctions or apply other forms of pressure in the diplomatic sphere. But where, as here, there is no question that the official's conduct was performed on the state's behalf and his immunity has not been waived, the official is entitled to common law immunity from suit in our courts.

Samantar retained his official act immunity despite his departure from office. *See, e.g.*, *Underhill v. Hernandez*, 65 F. 577, 579-80 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his

immunity."). Customary international law also recognizes the residual immunity enjoyed by former government officials. *See, e.g.:* Vienna Convention on Diplomatic Relations ("VCDR"), done Apr. 18, 1961, art. 39(2), 23 U.S.T. 3227 (providing that "with respect to acts performed by [a member of a diplomatic mission] in the exercise of his functions as a member of the mission, immunity shall continue to subsist" after termination of service).

Affording immunity to former officials further encourages an international regime of law under which former U.S. officials can travel abroad with less fear of being haled before a foreign tribunal to answer for their official acts. As the U.S. Supreme Court said in the related context of protecting the property of foreign sovereigns in the United States, "we 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).

B. SAMANTAR ALSO IS ENTITLED TO IMMUNITY AS A FORMER HEAD OF STATE.

There can be no doubt that Samantar is entitled to head of state immunity, in the case *sub judice*, for the period during which he served as Prime Minister (1987 to September 1990). *See: Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988),

order aff'd in part, rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (granting head of state immunity to English Prime Minister Margaret Thatcher against claims by Libyan residents); *see, also:* Restatement (Third) of Foreign Relations § 464 n.14 (1987).

Similarly, case law and the principles undergirding head of state immunity support the award of such immunity to Samantar during his tenure as Defense Minister and First Vice President. The actions of a Defense Minister and First Vice President are closely identified with the actions of the sovereign itself and must enjoy the immunity accorded the state itself. *See: Schooner Exchange*, 11 U.S. (7 Cranch) 116, 138 (1812) (under international law, "all civilized nations allow to foreign ministers" the same immunities as provided to the sovereign).

C. THE COMMON LAW DOES NOT RECOGNIZE THE PRINCIPLES OF ABSENCE OF GOVERNMENTAL RATIFICATION AND RESIDENCE IN THE UNITED STATES POSTULATED BY THE STATE DEPARTMENT.

In its Statement of Interest, the Executive Branch contends that Samantar cannot be entitled to common law immunity as long as a recognized government has not requested his immunity and that any such immunity became subject to forfeiture upon his taking up residence in the United States. U.S. Statement of Interest (J.A. at 73, ¶¶ 13-14). Since the Executive Branch's pronouncement is not grounded in any alleged adverse foreign policy impact that might flow from its

disregard, it is not entitled to deference. *See:* Section I of the instant Brief, *supra*; *see, also: Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004) ("In [Alien Tort Statute] cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view *of the case's impact on foreign policy*.") (emphasis added).

Even if the Department's assertions were to be accorded serious weight, however, they must fail to persuade on their merits. As the Supreme Court indicated in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), the federal common law applicable to questions touching upon international relations is "necessarily informed both by international law principles and by articulated congressional policies." 462 U.S. at 623. The position of the Executive Branch, however, claims no foundation in either international law principles or articulated congressional policies. The Statement of Interest is remarkable for its want of citation to a single authority in either domestic or international law for the propositions that it advances. Indeed, as discussed more fully below, criteria upon which the Government relies find no support in domestic or international precedents and, additionally, offend sound judicial policy.

As we have noted, a government may waive the immunity of a former official. *See, e.g., In re Doe #700*, 817 F.2d at 1111. No court, however, has ever

failed to find immunity due to the absence of government ratification of that immunity. Indeed, courts have found foreign officials to be immune without any such ratification. *See, e.g., Underhill v. Hernandez*, 168 U.S. 250 (1897); *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003).[9]

A general requirement that immunity be ratified in order to be effective also runs counter to the scheme of the Vienna Convention on Diplomatic Relations ("VCDR"). The continuation of a diplomat's immunity after his or her service ends does not depend upon any continuing endorsement by the state the official served. VCDR at Art. 39(2).

Good judicial policy 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 an 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? *See* Fed. R. Civ. P. 12 (h) (3) (requiring dismissal of action if the court determines at any time that it lacks subject matter jurisdiction).

The exception to immunity suggested by the Executive Branch for residence

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9 Courts have founds states to be immune despite their not having yet been recognized by the Executive Branch. *See, e.g., Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 376, 138 N.E. 24, 26 (1923) (Soviet Russia); *Walley v. The Schooner Liberty*, 12 La. 98 (1838) (Republic of Texas).

in the United States represents a similar departure from the common law. 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).

In, essentially, confecting novel "legal" rules upon which it deigns to gainsay Samantar's common law immunity and insist that the District Court follow suit, the Executive Branch is clearly exceeding the bounds of its constitutional power and authority and invading the preserve of the Judiciary. *See: Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See, also: Medellín v. Texas,* 552 U.S. 491, 527–28 (2008) ("As Madison explained in The Federalist No. 47, under our constitutional system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'") (internal citation omitted).

CONCLUSION

Since (i) deference to the views of the State Department is mandated only for a suggestion that a litigant should be immune from suit, (ii) Samantar is entitled to immunity under traditional notions of the common law of immunity, (iii) the departures from the common law urged by the Executive find no support in judicial

precedent or sound practice, and (iv) the Executive's putative end run around governing law are violative of constitutional separation of powers principles, Samantar is immune from suit under the common law, and, accordingly, the District Court action must be dismissed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Upon information and belief, the case, *sub judice*, presents certain issues that have not hitherto been addressed in this Circuit, or, for that matter, any other Circuit; therefore, Samantar respectfully submits that this Honorable Court's decisional process may be aided significantly by oral argument. Accordingly, Samantar hereby requests to be heard at oral argument.

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CERTIFICATE OF COMPLIANCE

In re: Fourth Circuit Record No. 11-1479

BASHE ABDI YOUSUF, et alii, versus MOHAMED ALI SAMANTAR

This Brief of the Appellant has been prepared using:

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Exclusive of the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities, the Request for Oral Argument, and the Filing, Mailing & Compliance Certificates, the word count for the instant Brief is: 4,770. I fully understand that a material misrepresentation can result in this Honorable Court's striking of the Brief and the imposition of sanctions. If this Honorable Court were so to request, the undersigned would gladly furnish this Honorable Court with an electronic version of the instant Brief and/or a word count printout of same.

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FILING CERTIFICATE AND CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned , hereby certify that, on this 8th day of August, 2011, I caused to be filed, electronically, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, utilizing the CM/ECF System, the Brief of the Appellant, and that I caused to be despatched by carriage of First Class Mail, through the United States Postal Service, the required number of copies of the said Brief and Appendix unto the following, viz.:

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