No. 11-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF*, et al.,*

Appellees,

v.

MOHAMED ALI SAMANTAR,

Appellant.

Appeal from the United States District Court for the
Eastern District of Virginia,
Judge Leonie M. Brinkema

APPELLEES' RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 and 28 U.S.C. § 1331.

While generally denials of immunity to individuals sued in their personal capacity are reviewable on interlocutory appeal, *see Will v. Hallock*, 546 U.S. 345, 350 (2006) (denials of qualified and absolute immunity interlocutorily appealable), neither this Court nor, to Appellees' knowledge, any court of appeals has yet addressed whether a denial of common law immunity by itself is subject to interlocutory appeal. *See Mamani v. Berzain*, No. 09-16246, 2011 WL 3795468 (11th Cir. Aug. 29, 2011) (denial of common law and statutory foreign immunities interlocutorily appealable "as of right"); *see generally Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The district court entered its judgment on February 15, 2011, and denied Appellant's motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) on April 1, 2011. Appellant filed a timely notice of appeal on April 29, 2011.

STATEMENT OF THE ISSUE

Whether the district court properly held, consistent with the United States' Statement of Interest advising that Appellant is not entitled to common law immunity, that Appellant is not immune from a damages suit filed against him in his personal capacity under the Torture Victim Protection Act, Pub. L. No. 102-

256, 106 Stat. 73 (28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. §1350, for arbitrary detention, extrajudicial killing, crimes against humanity, and war crimes.

STATEMENT OF THE CASE

This case arises out of a suit brought under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 note, by Appellees Bashi Yousuf, *et al.*, against Appellant, Mohamed Ali Samantar, who was a high-level official of the government of the former Somalia. The Supreme Court affirmed this Court's holding that Samantar is not entitled to immunity from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.* *See Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), *affirming Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009). On remand to the district court, the United States filed a Statement of Interest expressing the view of the Executive Branch that Samantar is not entitled to common law immunity. The district court subsequently denied Appellant's motion to dismiss on common law immunity (head-of-state and official-act immunity) grounds. Samantar has filed an interlocutory appeal of that ruling.

STATEMENT OF FACTS

1. The Republic of Somalia was formed in 1960 when the former colonies of British Somaliland (in the north) and Italian Somaliland (in the south) combined to

form an independent nation. State Dep't, *Background Note: Somalia* (Sept. 26, 2011) ("*State Dep't Note*"), http://www.state.gov/r/pa/ei/bgn/2863.htm. In October 1969, Major General Mohamed Siad Barre overthrew Somalia's democratic government, declared himself President, and held that position by force until he was driven from power in January 1991. *Id.*

From January 1980 to December 1986, Samantar served as Barre's First Vice President and Minister of Defense, and from January 1987 until September 1990, he served as Prime Minister under Barre's Presidency. J.A. 28. During those times, the Barre regime used its military and national security forces to "violently suppress[] opposition movements and ethnic groups, particularly the Isaaq clan in the northern region." *State Dep't Note*, *supra*. The military forces committed countless atrocities against civilians, including the widespread and systematic use of torture and extrajudicial killing. J.A. 30. The Barre regime collapsed in 1991, and Samantar moved to Italy. J.A. 33. Six years later, he moved to the United States and now resides in Fairfax, Virginia. J.A. 28, 33. He has resided in the United States continually for the last 14 years. J.A. 73.

Since the Barre regime fell, Somalia has disintegrated as a unified nation and lacks a functioning central government. *State Dep't Note*, *supra*. The United States has not recognized any entity as the government of Somalia since the end of the military regime. J.A. 72; *see Samantar*, 130 S. Ct. at 2283.

2. The plaintiffs are two United States citizens and two Somaliland residents, who either were themselves the victims of Samantar's widespread use of torture or are representatives of the estates of his torture and murder victims.[1]

Bashe Abdi Yousuf is a United States citizen. J.A. 28. He was a businessman in the city of Hargeisa (now in Somaliland) when, in November 1981, he was detained and tortured by National Security Service agents and military police. Yousuf was subjected to electrocution and deprived of food and water. J.A. 34-35. After being convicted of treason at a summary trial, Yousuf spent the next six years in solitary confinement in a windowless, six-foot-by-six-foot cell, which was kept in total darkness fifteen hours a day. After he was released in May 1989, he fled Somalia. J.A. 35-36.

Aziz Deria is a United States citizen who fled Somalia in 1983 after suffering political persecution. J.A. 28-29, 36. His family, including his father, Mohamed, and younger brother, Mustafa, remained in Hargeisa. J.A. 36-37. In June 1988, soldiers kicked down the door of the Deria home and announced their intention to kill all the members of the Isaaq clan. J.A. 37. The soldiers then dragged Mohamed from the house. Later that afternoon, the soldiers returned and dragged Mustafa from the house. The family never saw either man again. J.A. 37.

[1] In 1991, the former British Somaliland withdrew from the Somali union and formed the independent Republic of Somaliland. J.A. 49. The United States has not recognized the Republic of Somaliland. J.A. 72.

In December 1984, soldiers abducted John Doe I, a resident of Somaliland, and his brothers and took them to a military installation. They were tortured and, after a summary trial, were sentenced to death. Doe I and his brothers were then immediately loaded onto military trucks to be driven to the execution site. A local commander allowed John Doe I to escape. As he fled, he heard the gunshots from his brothers' execution. J.A. 37-40.

In the Spring of 1988, John Doe II, a resident of Somaliland, was serving as a non-commissioned officer in the Somali National Army when he and numerous other Isaaq officers were arrested and detained by the Army because of their clanship. One afternoon, Army soldiers lined up John Doe II and numerous other Isaaq officers along a riverbank and shot them. John Doe II was hit and fell backwards into the riverbed, unconscious but not fatally wounded. When he regained consciousness, he found himself covered by the dead bodies of other victims. He remained there until the mass execution was completed, and then he fled. J.A. 42-43.

3. In November 2004, Appellees filed suit against Samantar under the Torture Victim Protection Act, 28 U.S.C. § 1350 note, and the Alien Tort Statute, 28 U.S.C. § 1350. J.A. 26. The complaint alleged that Samantar "was an active participant in the enforcement of this system of repression and ill-treatment against members of the Isaaq clan" and was responsible for the plaintiffs' torture,

attempted killing, and the murders of their family members. J.A. 47-48. The complaint seeks only monetary damages from Samantar. J.A. 62.

Samantar moved to dismiss for lack of jurisdiction on various grounds, including immunity from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.*, and the common law. *See* J.A. 66. The district court originally held that Samantar was immune from suit under that Act. J.A. 66. This Court reversed, *Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009), and the Supreme Court unanimously affirmed, holding that the Foreign Sovereign Immunities Act does not grant immunity to individual government officials sued for money damages in their personal capacity, *see Samantar v. Yousuf*, 130 S. Ct. 2278, 2286- 2292 (2010). The Supreme Court then remanded the case for consideration of whether Samantar was entitled to common law immunity, such as the head-of-state and official-act immunities that he had invoked. *Id*. at 2293. In so holding, the Supreme Court explained that "[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 2291.

4. On remand, the Department of State, through the Department of Justice, filed a Statement of Interest, J.A. 65-78, explaining that it had "reviewed this matter carefully and * * * concluded that Defendant Mohamed Ali Samantar is

not immune from the Court's jurisdiction in the circumstances of this case," *id.* at 77. In reaching its conclusion, the Executive Branch took "into account the potential impact of such a decision on the foreign relations interests of the United States," J.A. 73, including that Samantar "is a former official of a state with no currently recognized government to request immunity on his behalf." J.A. 71. The government also factored in to its decision Samantar's fourteen-year residency in the United States. J.A. 73. "In the absence of a recognized government * * * to suggest the immunity of its former official," the Executive Branch determined that "the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity." J.A. 73.

After full briefing, the district court ruled that Samantar was not entitled to common law immunity and accordingly denied his motion to dismiss on immunity grounds. *See* J.A. 79.

Samantar then filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). J.A. 19 [D.E. #150]. At the hearing on that motion, the district court denied reconsideration, J.A. 95, explaining that:

> I have considered with care your motion for reconsideration, but I'm satisfied that it ought not be granted. The Executive Branch has spoken on this issue and [] they are entitled to a great deal of deference. They don't control but they are entitled to deference in this case. The rationale for finding – for the government's position on sovereign immunity, I think, is sound. As you know, they looked upon among other things the status of the government of Somalia at this point * * *. And the residency of the defendant has also been taken properly into consideration. In the past, at

> least the Second Circuit has found that the lack of a recognized government is a factor in the sovereignty determination, and I'm going to go with that.

J.A. 81-82.

Samantar moved for a stay pending appeal, but the district court denied it, certifying Samantar's appeal as "frivolous." *See* District Court Order, May 18, 2011, *reproduced as* Exh. W to Appellant's Emergency Motion for a Stay of Proceedings in the District Court Pending Appellate Review, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. June 18, 2011), ECF No. 14. This Court likewise denied a stay. Order, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. July 8, 2011), ECF No. 23.

SUMMARY OF THE ARGUMENT

The district court's decision to deny Samantar common law immunity was correct and in accordance with governing legal principles. Because Samantar is (i) a former official of (ii) a collapsed state with no recognized government, and (iii) a long-term resident of the United States, this suit against him personally for money damages does not implicate either the head-of-state or official-act immunity doctrines. Head-of-state immunity does not apply to officials who have never been recognized as a head of state by the United States, and particularly not to *former* heads of state like Samantar. Likewise, Samantar enjoys no immunity under the doctrine of official-act immunity, given that the acts of torture, extrajudicial killing, and crimes against humanity that he is charged with all far exceeded the scope of his official authority.

Both forms of immunity are especially inappropriate in a case such as this, given that the United States does not even recognize a government in Somalia, and has determined that a suit against Samantar would not adversely affect comity in international relations. And even if it were otherwise, such immunity would still not attach to Samantar in the context of this lawsuit, which is not a suit against a foreign state but rather a suit for damages against Samantar personally for conduct that no law did or could authorize.

The district court's decision is all the more correct because it is consonant with and properly deferential to the reasonable view of the Executive Branch. In concluding that Samantar was not immune from suit, the district court, after properly exercising its independent judgment, gave the State Department's Statement of Interest the proper amount of deference due such carefully considered immunity determinations. To the knowledge of Appellees, no appellate court has ever reversed a district court's common law immunity decision that accorded with such an Executive Branch immunity statement.

Samantar argues that deference should turn on and off based on the content of the Executive Branch's suggestion, with courts according deference only when the United States suggests immunity, but casting aside the Executive Branch's views if it suggests that immunity be denied. That argument defies the very reasons why the Supreme Court has held that courts should defer to the views of

the United States in the first place: the Executive Branch is singularly equipped to evaluate the comity, foreign relations, and repercussive sovereignty implications of an immunity determination, and decisions to withhold immunity from war criminals like Samantar can play just as important a role in foreign relations and comity as decisions to suggest such immunity.

Samantar also urges this Court to enunciate a new rule that would afford deference only when the Executive Branch explicitly recites that a grant of immunity would cause "embarrassment" or other negative foreign policy consequences. In the first place, Samantar's case fails his own test because the State Department's Statement of Interest in this case recounted just such a weighing of foreign policy concerns. Beyond that, his argument overlooks that State Department immunity determinations, by their very nature, necessarily take into account all the pertinent foreign policy consequences. Samantar's proposed rule thus would lead to the incongruous and separation-of-powers troubling possibility of courts deciding immunity questions based on hypothesized foreign policy concerns that the Executive Branch has already discounted solely because the Statement of Interest was not scripted to the court's satisfaction. Regardless, Samantar's approach fails to appreciate that foreign relations "embarrassment" can stem from any case in which courts assume an antagonistic jurisdiction to the Executive Branch.

Finally, under established principles of international law, Samantar cannot be accorded immunity for the extrajudicial killings, torture, and other illegal and inhumane acts that he committed. That is especially true given that the Torture Victim Protection Act forecloses the use of common law immunity doctrines in a case like this one, as its express purpose is to allow suits against officials who commit torture and other crimes while acting under actual authority or color of law of a foreign nation. The Act's clear language, along with its legislative history, evidence that Congress did not intend for common law immunity doctrines to insulate officials from the very liability that the Act created.

ARGUMENT

I. AS A FORMER OFFICIAL OF A COLLAPSED STATE AND LONG-TERM RESIDENT OF THE UNITED STATES, SAMANTAR IS NOT IMMUNE UNDER THE COMMON LAW FROM A SUIT SEEKING PERSONAL DAMAGES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

A. Standard Of Review

Although no court to Appellees' knowledge has addressed the appropriate standard of review of a denial of common law immunity under the collateral order doctrine, the standard should be the same as for collateral order review of a denial of immunity under the Foreign Sovereign Immunities Act, in which the district court's legal conclusions are reviewed *de novo*, *see Eckert International v. Government of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir.

1994), and its findings of facts are reviewed for "clear error," *Filler v. Hanvit Bank*, 378 F.3d 213, 216 (2d Cir. 2004). Furthermore, because a denial of immunity is a "purely legal" issue that is reviewable under the collateral order doctrine only "to the extent that it turns on an issue of law," *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the factual allegations in the complaint must be accepted as true for purposes of this appeal, *cf. United States v. Moats*, 961 F.2d 1198, 1202 (5th Cir. 1992) (holding that "we have authority to decide only legal issues when we review an appeal from a collateral order" denying immunity under the FSIA).

B. Common Law Immunity Does Not Apply To Personal-Damages Suits Against Former Officials Of Collapsed States

Samantar has sought dismissal of this case on the basis of two related residual immunity doctrines: head-of-state and official-act immunity. *See* Samantar Br. 13-18. Head-of-state immunity provides that, under certain circumstances, a foreign head of state is immune from suit for official acts taken while in power. *See In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1110 (4th Cir. 1987). Official-act immunity extends immunity to other foreign officials acting in their official capacities and sued on claims that, in effect, would enforce a rule of law "against the state." Restatement (Second) of Foreign

Relations Law of the United States § 66(f) (1965); *see Samantar*, 130 S. Ct. at 2290 (noting that "the immunity of individual officials is subject to [this] caveat").[2]

The district court properly rejected both types of immunity. Foreign sovereign immunity is a matter of "grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). As such, immunity should attach "only when it serves th[e] goals" of comity and respect for foreign sovereignty. *Doe No. 700*, 817 F.2d at 1110-1111. Samantar does not satisfy the legal terms of either immunity doctrine and, in any event, because Samantar is (i) a former official of (ii) a collapsed state with no recognized government, and (iii) a long-term resident of the United States, this personal-capacity damages suit would not serve the goals of either the head-of-state or official-act immunity doctrines.

First, by its ordinary terms, head-of-state immunity does not apply. The United States never recognized Samantar as the head of state of Somalia, which is a prerequisite to a grant of this type of immunity. *See Ye v. Zemin*, 383 F.3d 620,

[2] In 1987, the American Law Institute issued the Restatement (Third) of Foreign Relations Law. The new version omitted the discussion in Section 66 of the common law of official immunity in favor of a new section on application of the Foreign Sovereign Immunities Act. Because the Supreme Court in this case specifically rejected the applicability of the Foreign Sovereign Immunities Act to individual government officials, *see* 130 S. Ct. at 2292, and specifically invoked the Second Restatement's "instructive" articulation of the common-law immunity doctrine, *id.* at 2290, the Second Restatement should provide the governing legal standard in this case.

625 (7th Cir. 2004) ("[T]he decision concerning the immunity of foreign heads of states remains vested * * * with the Executive Branch."); *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."). Moreover, the Somali Constitution designated the President, not the Prime Minister, as the head of state. Constitution of the Somali Democratic Republic, Art. 79. *See* Exh. A. to Pls.' Opp. To Motion to Dismiss, *reproduced as* Exh. G to Appellant's Emergency Motion for a Stay, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. June 18, 2011), ECF No. 14.

Beyond that, as the United States advised the Supreme Court, as a matter of law a *former* head of state is not entitled to head-of-state immunity, but rather retains only those immunities available to all foreign officials for their official acts. *See* Brief for the United States of America as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), (No. 08-1555), 2010 WL 342031, at *11 n.5 ("U.S. SCT Amicus") (citing 1 *Oppenheim's International Law* 1043-1044 (Robert Jennings & Arthur Watts, eds., 9th Ed. 1996)); *see also Doe No. 700*, 817 F.2d at 1111 (immunity attaches to the head of state only while he or she occupies that office).

Second, official-act immunity is equally inapplicable. As the Supreme Court noted in this case, "Courts of Appeals have applied the rule that foreign sovereign

immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" 130 S. Ct. at 2291 n.l7 (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)). Samantar does not claim that his acts were authorized by Somali law—nor could he. The Somali Constitution, adopted in 1979 and in effect throughout Samantar's service in the Barre regime, outlawed torture and extrajudicial killing. *See* Somali Const. Art. 26.1 ("Every person shall have the right to personal integrity."); *id.* Art. 27 ("A detained person shall not be subjected to physical or mental torture."); *see also id.* Art. 19 (recognizing the Universal Declaration of Human Rights and "generally accepted rules of international law").

Federal courts also have long recognized that extrajudicial killing and torture cannot be considered authorized or "official acts" because they are contrary to longstanding and universally recognized principles of international law. *See, e.g.*, *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994) ("[A]cts of torture, execution, and disappearance were clearly acts outside of [defendant's] authority as President[,] * * * were not taken within any official mandate and were therefore not the acts of * * * a foreign state."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens."); U.S. SCT Amicus, 2010 WL 342031, at *21 n.9 (noting that, in Congress's view, because

"all states are officially opposed to torture and extrajudicial killing," such acts should not be considered to be officially authorized); *cf. Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004) (no derivative sovereign immunity for conduct in excess of authority).

Third, because common law immunity, whether head-of-state or official-act, derives from the foreign state, it is "not an individual right" for Samantar to claim. *Doe No. 700*, 817 F.2d at 1111. Rather, it belongs to the state and thus can be waived or withheld, even for actions taken in an official capacity. *Id.*; *see* U.S. SCT Amicus, 2010 WL 342031, at *26 (citing Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, pmbl., art. 23(1), 23 U.S.T. 3227, 3241 (because the purpose of "immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States," immunity can be waived by the state) & Vienna Convention on Consular Relations, *done* Apr. 24, 1963, pmbl., 21 U.S.T. 77, 79 (same)); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders."); *see also Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1988) ("Head of state immunity serves to safeguard the relations among foreign

governments and their leaders, not as [Marcos] assert[s], to protect former heads of state regardless of their lack of official status.").

When that foreign state does not exist in the eyes of the United States government, the common-law basis for asserting the immunity largely evaporates. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995) (no head-of-state immunity in absence of State Department recognition of country); *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) (denying official-act immunity in absence of country recognition by State Department or suggestion of immunity).

That limitation makes sense because the common law rule affords immunity only for actions "performed in [an] official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state*." Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965) (emphasis added). Indeed, the Supreme Court in this case recognized that "the immunity of individual officials" at common law is "subject to [this] caveat." *Samantar*, 130 S. Ct. at 2290. A court's exercise of jurisdiction would rarely, if ever, have the effect of operating against a state that, in the eyes of the United States, does not exist. Nor would allowing the lawsuit to proceed unduly interfere with comity in international relations given both the absence of any recognized Somali government and Samantar's decision to physically disassociate himself from Somalia and, instead, to take up permanent residence in the United States for a

decade and a half. When, as here, the end-result of litigation would not enforce a rule of law against a foreign state, foreign officials enjoy no "immunity from personal liability even for acts carried out in their official capacity." Restatement (Second) of Foreign Relations Law § 66 cmt. b.[3]

[3] The principal authority cited by Samantar is inapposite. *Underhill v. Hernandez*, 168 U.S. 250 (1897), involves the "act of state" doctrine, which is not a common law "immunity" doctrine at all, but instead "'provides foreign states with a substantive defense on the merits,'" *Samantar*, 130 S. Ct. at 2290-2291 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004)). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) ("The act of state doctrine * * * concerns the limits for determining the validity of an otherwise applicable rule of law."). Samantar's other cited authorities are of no help to his argument either. For example, in *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), there was no "denial of immunity from the State Department," as there is in this case, *id.* at 916, *aff'd on other grounds sub nom.*, *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (not addressing head-of-state immunity question). His other cases likewise involved affirmative suggestions of immunity by the Executive Branch. *See Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) *aff'd in part, rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989) ("[T]he United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state."); *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960) (State Department recognized that defendant was acting in the court of his official duties). His remaining cases involved immunity under the Foreign Sovereign Immunities Act, which the Supreme Court has since foreclosed in this very case. *See Herbage v. Meese*, 747 F. Supp. 60, 65 n.10 (D.D.C. 1990) *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991); *Kline v. Kaneko*, 685 F. Supp. 386, 390 (S.D.N.Y. 1988).

C. Because The United States' Declination To Seek Immunity Is Reasonable And Comports With Governing Legal Principles, The District Court Properly Concurred And Denied Common Law Immunity

1. The Court Properly Exercised its Independent Judgment

The view of the Executive Branch could not be clearer: "Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case." J.A. 77. After expressly taking "into account the potential impact of such a decision on the foreign relations interests of the United States," J.A. 73, including that Samantar "is a former official of a state with no currently recognized government to request immunity on his behalf," J.A. 71, who also has "been a resident of the United States since June 1997," J.A. 73, the State Department concluded that "the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity." J.A. 71, 73.

The district court properly concurred in that judgment and denied immunity. In so doing, the district court was explicit that it was not reflexively deferring to the Executive Branch's determination as Samantar charges (Br. 8). The court correctly explained that the United States' position does not "control" the determination, and it independently "considered with care" not only the Statement of Interest, but also the positions of both parties as presented through extensive briefing. J.A. 81. The court then determined that the "rationale for * * * the government's position on sovereign immunity, I think, is sound." J.A. 81. The

court cited not only the deference traditionally accorded the Executive Branch's foreign policy judgment, but also "the status of the government of Somalia at this point," "the residency of the defendant," and "the lack of a recognized government." J.A. 82.

2. The District Court Correctly Accorded Deference to the Well-Reasoned Statement of Interest

Samantar further objects (Br. 8-13) to the deference that the district court accorded to the Executive Branch's Statement of Interest. But the district court's decision to accord deference, while still ultimately making its own independent determination, comported with settled law.

a. The rule of deference to reasoned decisions is well-established

The Supreme Court has repeatedly held that courts should accord deference to the reasonable views of the Executive Branch, as the "political branch of the government charged with the conduct of foreign affairs," in making immunity determinations. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945). Indeed, in this very case and thus in language that is binding on this Court, the Supreme Court unanimously held that the issue of common law immunity was one that courts traditionally permitted the Executive Branch to address in the first instance, and found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Samantar*, 130 S. Ct. at 2284-2285, 2291; *see*

Verlinden, 461 U.S. at 486 (noting the longstanding common law practice to give deference to the Executive Branch position in deciding "whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *see also The Schooner Exch. v. McFaddon*, 11 U.S. 116, 147 (1812) ("[T]here seems to be a necessity for admitting that the fact [of foreign immunity] might be disclosed to the Court by the suggestion of the Attorney for the United States.").

Indeed, to the knowledge of Appellees, no appellate court has ever reversed a district court decision on immunity that accorded with the Executive Branch's reasoned statement of whether common law immunity was available. *See Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943) (reasonable immunity determinations by Executive Branch are given "conclusive" weight); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (district court's duty was to defer to a reasoned immunity recommendation "without further inquiry").

b. Deference applies to the Government's reasoned determination that immunity should not be granted

Samantar tries to circumvent that wall of binding precedent by arguing that deference is only appropriate when the United States suggests that immunity should be granted, but not when it suggests that immunity should be denied. *See* Samantar Br. at 9 (arguing that "any deference is only due to a State Department finding that an official is *entitled* to immunity").

The short answer is that the Supreme Court has said otherwise, explaining that, "[a]s the responsible agency for the conduct of foreign affairs," the State Department's "failure or refusal to suggest * * * immunity has been accorded significant weight by this Court," *National City Bank of New York v. Republic of China*, 348 U.S. 356, 360 (1955). The Court recognized in *National City Bank* that "the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit." *Id.* at 360 (citation omitted). Tellingly, in that case the State Department had failed to offer any suggestion of immunity; on the contrary, it had issued a letter a few years earlier that "pronounced broadly against recognizing sovereign immunity" in matters involving commercial activities, which was the situation before the Court. *Id.* at 361. The Court thus held that the sovereign was not entitled to immunity in such a situation where "no consent to immunity [by the Executive Branch] can properly be implied." *Id.* at 365.

The argument has met a similar fate in the courts of appeals. Samantar cites no case agreeing with his position. The Eleventh Circuit has held exactly the opposite, concluding that the defendant "has cited no authority that would empower a court to grant head-of-state immunity" once the "Executive Branch has manifested its clear sentiment that [the defendant] should be denied" it. *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *see id.* (rejecting immunity

claim where "[t]he Executive Branch has not merely refrained from taking a position on this matter" but has "to the contrary, * * * manifested its clear sentiment that Noriega should be denied head-of-state immunity").

The law in other circuits is in accord. The Second Circuit, for example, has explained that "the courts should deny immunity where the State Department has indicated, either directly or indirectly, that immunity need not be accorded." *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358 (2d Cir. 1964); *see also Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (the "degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive").

There is a reason the argument has been roundly rejected. It defies the foundational reason deference is accorded in the first place. Foreign sovereign immunity is "founded on the need for comity among nations and respect for the sovereignty of other nations," and thus immunity should attach "only when it serves those goals." *Doe No. 700*, 817 F.2d at 1111. Because the Executive Branch is singularly equipped to evaluate those international comity, foreign relations, and repercussive sovereignty implications, deference is appropriate to that sensitive and foreign-policy calibrated judgment either way it comes out. Indeed, a decision to *grant* immunity to those who commit violations of clearly

established international law can have just as severe and adverse repercussions for diplomatic relations and foreign policy as a denial of immunity might in another case, underscoring that the decision by the Executive Branch to withhold a recommendation of immunity is just as laden with foreign policy implications as a decision to recommend immunity.

That is particularly true when, as here, there is no recognized government in the foreign country and multiple factions are competing for power. In those circumstances, "to recognize an immunity or not to recognize [an immunity] * * * might favor one faction or another in the ongoing dispute in—in Somalia." Transcript of Oral Argument at 57, *Samantar v. Yousuf* (U.S. Mar. 3, 2010) (No. 08-1555) (Deputy U.S. Solicitor General Edwin Kneedler); *see* J.A. 72 (Statement of Interest notes that "[t]wo competing putative governmental entities have sought to opine regarding the application of immunity to Samantar"). It thus blinks reality to argue, as Samantar does, that the decision to withhold or to accord immunity in the midst of such a diplomatically sensitive and politically volatile situation categorically lacks significant foreign policy repercussions. And "it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize." *Hoffman*, 324 U.S. at 38.

Samantar's only answer is to invoke the Supreme Court's statement in this case that, "'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.'" 130 S. Ct. at 2284 (quoting *Ex parte Peru*, 318 U.S. at 587). But Samantar overreads that language. The Court's accurate statement of the governing law meant only that, when the State Department has failed to offer any view on immunity at all, courts have to determine for themselves "'whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.'" *Samantar*, 130 S. Ct. at 2284 (citation omitted). The statement certainly did not silently disavow the statement in *National City*, *supra*, or overturn two centuries of precedent respecting the primacy of the Political Branches in assessing matters of foreign affairs, especially given that the Supreme Court was not even addressing a situation where the Executive Branch had (yet) expressly declined to suggest immunity.

c. Courts do not require particular formulations by the Executive Branch

Finally, Samantar argues that this Court should script the Executive Branch's Statements of Interest, according deference only when they affirmatively recite that a grant of immunity would cause "embarrassment" or similar negative foreign policy consequences. *See* Samantar Br. at 10-11 (arguing that only "a State Department expression of interest *grounded in such foreign policy considerations*

should * * * receive respectful consideration from the court"). That argument suffers from manifold defects.

First, Samantar's argument fails under his own test. The Statement of Interest is explicit that its determination reflected, in part, "the potential impact of such a[n] [immunity] decision on the foreign relations of the United States" in "the highly unusual situation" where "the Executive Branch does not currently recognize any government of Somalia," and "[t]wo competing putative governmental entities" have submitted conflicting views on Samantar's eligibility for immunity. J.A. 72-73; *see also* J.A. 78 ("[C]onsidering 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.").

Second, Samantar's approach overlooks that a State Department immunity determination by definition takes into account all relevant foreign policy considerations. Indeed, this Court has held that "the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion [on immunity claim]." *Rich*, 295 F.2d at 26. Samantar's position, by contrast, would require courts to presume oversights or miscalculations in any Statement of Interest solely because it was not scripted to the defendant's or

court's satisfaction. There is no legal or logical basis for adopting such a rule, and *Rich* forecloses it.

Third, Samantar's proposed rule would lead to the incongruous result that judicially hypothesized foreign policy interests would trump the actual interests of United States citizens and the United States judicial system in adjudicating disputes between U.S. citizens and a U.S. resident under federal law, even though the government has flatly denied that any such foreign policy interests exist. "It makes no sense for the courts to deny a litigant his day in court and to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed." *Victory Transp.*, 336 F.2d at 358.

Finally, Samantar's argument fails to appreciate that foreign relations "embarrassment" comes not just from allowing a suit to proceed against the Executive Branch's wishes, but from "'assuming an antagonistic jurisdiction'" generally. *Hoffman*, 324 U.S. at 35 (citation omitted). The Supreme Court's direction in *Hoffman* applies with equal force here: "[R]ecognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Id.* at 36.

D. Federal Law Forecloses Immunity For Extrajudicial Killing, Unlawful Detention, Torture, And Other Violations Of Clearly Established International Law

Finally, the district court's decision was correct for the further reason that the common law affords no immunity to the criminal acts of extrajudicial killing and torture, in violation of the clearly established law of nations and the law of the United States, that are at issue in this lawsuit. Because "of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world," *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), whatever immunity could be granted to officials for legitimate governmental acts, international law *denies* torturers immunization for their actions and precludes foreign states from cloaking such actions with official authorization, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-702 (1949). That leaves no immunity for the common law to enforce.

Underscoring the point, "there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law." *In re Doe*, 860 F.2d at 44-46; *see also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *done* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. 100-20, Arts. 5 & 14 (1988) (authorizing the United States to provide redress against offenders within its

territory); *cf. Filartiga*, 630 F.2d at 889-890 ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay * * * could properly be characterized as an act of state."); 28 U.S.C. § 1605A(a) (Foreign Sovereign Immunities Act provides exception to immunity for suits against state sponsors of terror "for personal injury or death that was caused by an act of torture[or] extrajudicial killing").

Moreover, the Torture Victim Protection Act forecloses the use of a common law immunity doctrine that would empty that statute of its core operative force. That Act creates a right of action against foreign officials who commit torture and extrajudicial killing while acting "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note; *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (A "clear mandate appears in the Torture Victim Protection Act * * * providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing.") (quoting H. R. Rep. No. 367, 102d Cong., 1st Sess. 3 (1991)). Thus, by definition, all suits under this statute involve "'some governmental involvement in the torture or killing to prove a claim'" under claim of official authority or color of law. *Kadic*, 70 F.3d at 245 (quoting H. R. Rep. No. 367, *supra*, at 5). If claims of governmental authority or involvement rendered all actions "official" and therefore

immune from suit, the Torture Victim Protection Act would be rendered a dead letter.

Common law immunity principles, however, cannot leave an Act of Congress "drained of meaning." *Butz v. Economou*, 438 U.S. 478, 501 (1978); *see also City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."); *cf. American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2530 (2011) (holding that the Clean Air Act displaces "federal common-law right to seek abatement").

Thus, as the United States told the Supreme Court, Congress believed that the Torture Victim Protection Act "would not affect traditional diplomatic or head-of-state immunities but, consistent with longstanding principles, that these immunities would not protect such officials after they left office." U.S. SCT Amicus, 2010 WL 342031, at *20. Indeed, the legislative history confirms that Congress did not intend for common law immunity doctrines to insulate officials from the very liability that the Act created. *See* S. Rep. No. 249, 102d Cong., 1st Sess. 6-7 (1991) ("[T]he Committee does not intend these immunities [sovereign, diplomatic, and head-of-state] to provide former officials with a defense to a lawsuit brought under this legislation. * * * Similarly, the committee does not

intend the 'act of state' doctrine to provide a shield from lawsuit for former officials.")*; cf. Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002) ("[N]othing in the Constitution limits congressional authority to modify or remove the sovereign immunity that foreign states otherwise enjoy."). That is because the statute is specifically designed to govern abuses "committed by officials both within and outside the scope of their authority," given that "no state officially condones torture and extrajudicial killings" and thus "few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties." *See* S. Rep. No. 249, *supra*, at 6-7; *see*, *e.g.*, *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1282 (N.D. Cal. 2004) ("The mere fact that acts [of arbitrary detention and torture] were conducted under color of law or authority, which may form the basis of state liability by attribution, is not sufficient to clothe the official with sovereign immunity.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation prescribed by this Court's rules. The brief contains 7469 words in Time New Roman font, 14-point size.

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I hereby certify that on October 3, 2011, I electronically filed the foregoing **Appellees' Response Brief** with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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