PROTECTED INFORMATION – FILED UNDER SEAL

[ORAL ARGUMENT TO BE HELD ON OCTOBER 8, 2009]

No. 09-5236

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DJAMEL AMEZIANE,
Petitioner-Appellee,

v.

BARACK OBAMA, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Guantanamo Review Task Force to transfer appellee Djamel Ameziane should be sealed under the protective order because its disclosure could harm significant foreign policy and national security interests. The district court erred in rejecting Ambassador Daniel Fried's explanation of how public

disclosure of the decision could harm those significant interests by complicating the diplomatic negotiations needed to resettle or repatriate Guantanamo detainees.

The district court failed to give Ambassador Fried's assessment of the foreign policy impact of public disclosure the deference that is warranted, and abused its discretion in failing to conclude that Ambassador Fried had established a significant interest under the Protective Order. Additionally, the district court erred in its assessment of the public interest. Such transfer approval information may be important *both* to the habeas courts in their efforts to conserve their limited resources in the face of numerous unresolved habeas cases *and* to habeas petitioners that seek to coordinate release or repatriation efforts with the United States. Thus, the public interest is harmed by a rule that precludes the government from providing transfer information to the court and the habeas petitioner confidentially. Moreover, the public interest is disserved by the diplomatic harms identified by Ambassador Fried that interfere with the effort at pursuing a *global* and coordinated approach to repatriating and resettling Guantanamo detainees.

Ameziane's jurisdictional arguments have no merit. First, this case is not moot. The district court's order will require the disclosure of the official government acknowledgment – in court filings – that Ameziane has been approved for transfer.

The possibility that the Red Cross and petitioner's brother may possess this information does not make the case moot because the harms Ambassador Fried identified rests on use of the official government acknowledgment that Ameziane has been approved for transfer by him and his counsel to conduct their own private diplomatic efforts at resettlement.

Second, Ameziane is incorrect to suggest that this Court lacks appellate jurisdiction – the issue is sufficiently important because it involves harm to significant foreign policy and national security interests; it is entirely unrelated from the merits of this habeas case; and if the district court's ruling is not reviewed now, the issue will not be subject to review after a final judgment in this case.

On the merits, as an initial matter, Ameziane appears to have conceded that discussion of the Task Force decision in pleadings and transcripts of the district court may properly be sealed, Appellee's Br. at 17. Thus, the district court order should be reversed to the extent it requires those judicial pleadings unsealed.

Ameziane's arguments on the remaining issue in dispute – whether he and his counsel may publicly disclose the Task Force decision – are unpersuasive. First, Ambassador Fried provided a detailed assessment of the harm that would be caused by the release of a single piece of information in a subset of habeas cases, and that

explanation is more than adequate under this Court's decisions in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) and *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007). Ambassador Fried also described harm that would be caused in circumstances identical to those presented here – where the government believed a detainee could appropriately be resettled but the detainee seeks to use the Task Force decision to obtain resettlement in a third country. Contrary to petitioner's suggestion, this Court does not require that Ameziane be identified by name in the declaration supporting the sealing of Task Force decisions, given that the facts described therein apply squarely to his circumstances.

Finally, Ameziane's personal interests do not call for unsealing the records here. First, the nature of the interest he has identified – a desire to avoid repatriation in the face of the government's contrary assessment – is an interest that this Court has rejected in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009). Petitioner has argued that he is harmed because he is unable to litigate his habeas case. The halt of litigation, however, is not at issue here and is caused by the district court order to stay proceedings, not by the order to seal. More importantly, the harm is imaginary: if a third country is concerned about Ameziane's Task Force status, it can speak directly to the United States about that status, a line of direct diplomatic communication that

resolves the confusion and mixed messages identified by Ambassador Fried as the basis for sealing the information at issue.

ARGUMENT

I. THIS APPEAL IS NOT MOOT.

Ameziane argues that this appeal is moot based on the district court's observation that "'both the Red Cross and petitioner's brother . . .are already aware that petitioner has been cleared for transfer." Appellee's Br. at 18. This factual assertion, even if credited, does not render this dispute moot.

The question here concerns the sealing of records filed in the district court in which the government *formally* acknowledged Ameziane's status as having been approved for transfer by the Task Force. Those records will undeniably be *unsealed* and *publicly released* if the district court order is affirmed. *See* App. 86 ("petitioner's motion to unseal is GRANTED" and government's motion to designate protected information in "all related or derivative documents . . . and respondents' sealed . . . status report" "is DENIED"). Thus, the dispute is not moot.

Further, because there has been no formal, public acknowledgment of the Task Force decision or Ameziane's transfer status, the dispute over whether that information in court filings must be publicly disclosed is not moot. As the

government explained in the opening brief, there is a substantial difference between a disclosure of information made by a private entity or an individual and a formal acknowledgment by the U.S. Government. *See Fitzgibbon v. C.I.A*. 911 F.2d 755, 765 (D.C. Cir. 1990) (because of the "critical difference between official and unofficial disclosures," information must be released under FOIA only if the "specific" information already "has been officially acknowledged").

Ameziane argues that cases under the Freedom of Information Act, like *Fitzgibbon*, are not relevant to the mootness inquiry because they involve "specific statutory authority to withhold classified information" and deference to the Executive Branch. Appellee's Br. at 20. This argument does not square with the district court decision, which itself relied on a FOIA case in addressing this claim. App. 126. More importantly, the reasoning of *Fitzgibbon* squarely addresses the nature of the governmental interest at issue here and the fact that this interest would be harmed by the district court order. As this Court explained, "public [disclosure] through an official and documented" channel – here, by public disclosure of the transfer decision by Ameziane or through the unsealing of judicial records in which the government acknowledges that Ameziane has been approved for transfer – is "important because . . . in the arena of . . . foreign relations there can be a critical difference between

official and unofficial disclosures." *Fitzgibbon*, 9111 F.2d at 765.

Ameziane argues that this case is not about the unsealing of judicial records, but merely about "whether Ameziane 'may publicly disclose that he has been approved for transfer from Guantanamo.'" Appellee's Br. at 17. That presentation of the scope of the district court order is incorrect – the order, as just explained, would unseal judicial records in which the government formally acknowledged the Task Force decision. Thus, the district court order *both* allows Ameziane's counsel to publicly reveal the Task Force decision *and* unseals court records that reveal the government's official acknowledgment of that decision. *See* Protective Order ¶ 38 ("Petitioners' counsel shall not disclose the contents of any protected documents or information to any person").

But even if the dispute is narrowed as suggested by Ameziane's concession that he is not seeking the unsealing of any judicial records and asks only that he be allowed to publicly disclose the transfer approval (*see*, *infra*, pp. 15-17), the appeal is still not moot. This is because the harm that would be caused by disclosure of the transfer information by Ameziane or his counsel is exactly the sort of harm identified by Ambassador Fried: "[i]t is the provision of this additional information, *i.e.*, the fact that a particular . . . detainee has been approved . . . as a result of review by the

. . . Task Force – by someone other than a representative of the U.S. Government that has the potential to create confusion and mixed messages." Fried Decl. ¶ 6. And because that harm would result from affirmance of the district court order, but not reversal of it, this case is not moot.

Indeed, the district court plainly does not believe that the dispute here is moot –it resolved the disclosure issue and ordered that the material in its files be unsealed (App. 86), a resolution that would not have been within its "'constitutional authority'" were Ameziane's mootness claim correct. Appellee's Br. at 16. It is true that the district court reasoned that sealing the material would "serve little purpose because that information" was already known by the Red Cross and Ameziane's brother. This conclusion, however, does not suggest that the dispute is moot, nor does it address the significant national security and foreign policy harm that Ambassador Fried identified when private entities conduct diplomacy using the official government acknowledgment of the Task Force decision. Fried Decl. ¶¶ 5-6.

II. This Court Has Appellate Or Mandamus Jurisdiction.

A. As we explained in our opening brief, this Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because the district court's disclosure order is appealable under the collateral-order doctrine. The order requiring the disclosure of

the Guantanamo Task Force Review Panel decision to transfer a detainee would harm the government's significant national security and foreign policy interests by complicating the diplomacy needed to close Guantanamo and resettle or repatriate detainees, as appropriate. This disclosure order is separate from the merits, important, and causes irrevocable injury unless reversed

Ameziane agrees that the district court order is conclusive, but argues that the order "does not rise to a level of importance equivalent to matters involving the loss of substantial statutory or constitutional rights." Appellee's Br. at 25. In fact, this case does involve a "'weighty public objective' that is 'deeply rooted in public policy'" (*id*. (quoting *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 883-84 (1994))), namely, the substantial foreign policy and national security interests of the United States that the protective order was entered to preserve in habeas litigation that uniquely impacts those interests.

Ameziane cites two cases in support of their claim that "the mere invocation of foreign policy concerns does not provide a basis for interlocutory review." Appellee's Br. at 26 (citing *Doe v. Exxon Mobil Corp*, 473 F.3d 345, 351-52 (D.C. Cir. 2007) and *United States v. Cisneros*, 169 F.3d 763, 764-66 (D.C. Cir. 1999)). Neither case is on point. Rather, both involved attempts to appeal a denial of a

motion to dismiss that was not based on a litigation immunity. Such a denial is, however, the quintessential unappealable interlocutory order for reasons other than the importance of the issues raised; namely, such an order is fully reviewable on appeal from final judgment and is inseparable from the merits. *See Cisneros*, 169 F.3d at 769 (refusal to dismiss indictment on separation of powers grounds is "fully reviewable on appeal").

Here, on the other hand, the order to publicly release government information that would harm foreign policy and national security interests is the type of order that is normally appealable in this Court. *See Doe*, 473 F.3d at 212-13 (in rejecting appellate jurisdiction over denial of motion to dismiss, expressly noting that litigation would not require the disclosure of documents against the wishes of a foreign government); *Al Odah v. United States*, 559 F.3d 539, 543-44 (D.C. Cir. 2009) (appellate jurisdiction exists to consider mandated disclosure of classified material to cleared counsel under similar protective order). *Cf. In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (order unsealing judicial records appealable under collateral order doctrine).

Ameziane also claims that the order is not sufficiently important because it was entered under "a protective order that itself was crafted and entered by the District

Judges in an exercise of their discretion." Appellee's Br. at 26. If anything, however, the need for a comprehensive protective order in these unique cases reveals the importance of the foreign policy and national security interests at stake. As the Supreme Court has recognized, this type of litigation poses unique risks to those interests. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) ("[w]e make no attempt to anticipate all of the evidentiary . . . issues that will arise during the course of the detainees' habeas corpus proceedings"). For that reason, the protective order protects information that would harm "the security of the United States and other significant interests." App. 8.

Here, the President and Ambassador Fried have identified the important foreign policy and national security interests at stake. The President has concluded that the closure of Guantanamo and the "prompt and appropriate disposition" of the detainees "would further the national security and foreign policy interests of the United States." Exec. Order 13,498, § 2(b). Ameziane does not dispute the importance of that interest. Appellee's Br. at 34 ("Ameziane does not dispute that the government has a significant interest in closing Guantanamo Bay and promptly repatriating or resettling the detainees"). Ambassador Fried, in turn, explained that "public

disclosure of the decisions resulting from reviews by the Guantanamo Review Task Force will impair the U.S. Government's ability effectively to repatriate and resettle Guantanamo detainees." App. 44. These interests are undeniably of sufficient importance to warrant immediate review by this Court.[1]

Contrary to Ameziane's claim, the issue of sealing the Task Force decision is "completely separate from the merits of this case." Appellee's Br. at 27. Ameziane argues that the Task Force decision is, itself, related to the case because once a Task Force transfer decision is made, the government "seek[s] a stay of [the] habeas petition pending the government's efforts to repatriate or resettle him." *Id*. at 28. Whether or not the decision of the Task Force is related to the case is of no moment, however, because the issue on appeal is the propriety of sealing judicial records that

[1] The other significant interest served by appeal – this Court's supervisory role over the district courts, which have issued conflicting rulings on the issue – persists. Since the filing of the government's brief, three additional district court judges have addressed the issue, and all have concluded that the Task Force information should be sealed. *See Hussein v. Obama*, No. 06-1766 (D.D.C. Aug. 27, 2009) (Kennedy, J.) (under seal); *Tumani v. Obama*, No. 05-0526 (D.D.C. Aug. 6, 2009) (Urbina, J.) (under seal); *Amerfedi v. Obama*, No. 05-1645 (D.D.C. Aug. 5, 2009) (Friedman, J.) (under seal) (all attached as Addendum to Reply Brief). Thus, currently six Judges (Chief Judge Lamberth and Judges Kessler, Friedman, Urbina, Kennedy, and Leon) have held that the Task Force decisions should be sealed, and two (Judges Huvelle and Walton) have held that they should be publicly released. Judges Walton and Bates have stayed further decision on the issue pending this Court's resolution of this appeal. *See* Add. 20.

reveal the Task Force decision, not the propriety of the Task Force decision itself. In any event, the Task Force decision is not related because, as Ameziane notes, "habeas review tests the legality of detention while the Task Force review considers other factors." Appellee's Br. at 28.

Ameziane also reasons that the public disclosure of the Task Force decision is "related to the merits of his habeas case" because disclosure might facilitate his private diplomatic efforts to secure release and moot the habeas case. Appellee's Br. at 31. Even if this were true, it does not make the issues related – the legal issue of whether the decision is properly sealed under the protective order simply has no relation to the issue of whether Ameziane is lawfully detained. *Cf. In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1209 (D.C. Cir. 2004) ("'the privilege question' here 'is separable from the merits of the underlying case'").

Finally, Ameziane argues that "the government will have adequate opportunity to present this issue for review once the case becomes final." Appellee's Br. at 31-32. However, an order to publicly release information is the quintessential type of order that is effectively *unreviewable* after final judgment. *See Copley Press*, 518 F.3d at 1025; *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). In making this point, Ameziane simply

reprises his mootness argument, which has no merit for the reasons explained above.

B. Even if this Court did not have jurisdiction under the collateral order doctrine, it should exercise mandamus jurisdiction pursuant to its supervisory authority given the conflicting decisions on this issue in the district court. *United States v. Hubbard*, 650 F.2d 293, 309 n. 62 (1980). Ameziane does not address this important role that should be played by this Court.

Mandamus relief is also needed to preserve the important foreign policy and national security interests at stake and which would be damaged absent immediate review. *Cf. In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). Ameziane cites *Doe*, claiming that the "mere invocation of foreign policy concerns does not provide a basis for mandamus review" (Appellee's Br. at 32); in fact, *Doe* was careful to recognize that its ruling did not contravene foreign policy concerns as expressed by the State Department. *See Doe*, 473 F.3d at 354 ("State Department" expressed concern about "extent . . . of discovery" and did not "request[] that the district court dismiss a case as a non-justiciable political question"; "if . . . the State Department has additional concerns . . . it is free to file further" information with the district court). Here, on the other hand, the State Department has identified the specific and significant foreign policy and national security interests that would be harmed by the district court order,

making mandamus review appropriate if this Court concludes there is no collateral order jurisdiction.

III. The District Court Order Declining to Seal The Task Force Information Should Be Reversed.

A. Ameziane Is Not Defending The Bulk of the Relief Granted by the District Court Order, And That Decision Calls For Reversal.

In arguing that this case is moot, Ameziane states that he "does not seek to disclose the District Court pleadings or transcripts regarding this issue, or the parties' appellate briefs, or any information regarding the government's attempts to repatriate him to Algeria." Appellee's Br. at 17. Instead, he claims, "all that is at issue in this appeal, is whether Ameziane 'may publicly disclose that he has been approved for transfer.'" *Id*. (quoting App. 87). Ameziane thereby makes clear that he is not defending the bulk of the relief granted by the district court order – namely, Ameziane is no longer challenging the sealing of any pleading or court record revealing the government's official acknowledgment that Ameziane has been approved for transfer.

Based on this concession, the district court order should be reversed. The district court order not only provided that "petitioner and his counsel may publicly disclose that he has been approved for transfer," the portion of the order that

Ameziane defends on appeal, it also "GRANTED" "petitioner's motion to unseal" that information where it was included in court records and unsealed "all related or derivative documents" that included that information, including any filings and statements by the government or the Court that confirmed Ameziane's status. App. 86. When the parties are in agreement that information should be protected – as is the case here with respect to the pleadings and transcripts that address the issue of Ameziane's Task Force status – the protective order generally allows that information to be protected. *See* App. 14 (if the "government . . . wish[es] to have the Court deem any document . . . 'protected,' government counsel shall disclose the information to qualified counsel for petitioners . . . and attempt to reach an agreement about the designation of the information"). And this Court has previously held, under a similar protective order, that it would seal information when the petitioner "does not object to the court's designation" and "advance[s] no countervailing factors that suggest the court should not protect the information." *Parhat v. Gates*, No. 06-1397, Mem. at 1 (D.C. Cir. Sept. 2, 2008) (attached as Addendum to Reply). Accordingly, because Ameziane does not support that portion of the district court's order unsealing court records, that portion of the order should be reversed without the need for further analysis.

B. The Government's Request Met The Standard Set by this Court in *Parhat* and *Bismullah*.

With respect to the entirety of the district court's order – including the portion Ameziane defends on appeal, which provides that Ameziane and counsel may publicly disclose the Task Force decision – Ameziane's arguments lack merit. He first argues that that the government failed to meet the standard set by this Court in *Parhat* and *Bismullah*. This claim is not correct. Instead, Ambassador Fried's declaration provides a detailed assessment of why a very narrow category of information – the decision of the Task Force to transfer a detainee – must be sealed to protect significant foreign policy and national security interests.

In *Parhat*, this Court explained that to establish that information should be protected, the government must "'give the court a basis for withholding' that is specific to the information that it has designated" and "offer [a] basis on which [the Court] may determine whether the information it has designated properly falls within the categories it has described." 532 F.3d at 852-53 (quoting *Bismullah*, 501 F.3d at 188).

Here, the government's showing satisfied this test. First, Ameziane does not dispute that there is a basis to determine that the information designated – the Task

Force decision to transfer a detainee – "properly falls within the categories . . . described." *Id*. Indeed, Ameziane acknowledges that this dispute regards only the "single unclassified fact that Ameziane has been approved for transfer." Appellee's Br. at 37. Thus, a primary concern of this Court in *Parhat* is not an issue that is present here. In *Parhat*, there was no "explanation tailored to the specific information at issue" thus requiring the Court, were it to grant the government's motion, to "accept the government's own designation[s]." *Parhat*, 532 F.3d at 853; *see id.* at 852 (government " had not yet submitted the designations of the information it regarded as falling into the protected categories"). Moreover, unlike the claim in *Parhat* which concerned the names of all government officials and any information designated as "Law Enforcement Sensitive," Ambassador Fried's declaration addresses the "specific information that it designated" here, *id.* at 853, namely, the decision of the Task Force to transfer a detainee.

Ameziane argues that Ambassador Fried's declaration is not sufficiently specific because it addresses Task Force transfer decisions in general, not the specific decision in Ameziane's case. This application of *Parhat* is faulty for two reasons. First, Ameziane's reasoning does not change the fact that the government's sealing request is quite narrowly tailored – it covers only a "single . . . fact" (Appelle's Br.

at 37) in this case. Even beyond this case, the request covers only a subset of the habeas cases, those where the Task Force has determined that a detainee should be transferred, not "all of the more than one hundred . . . cases." *Parhat*, 532 F.3d at 853. Thus, the request for sealing here is the type of narrow request that is more akin to the one this Court ultimately accepted as reasonable in the *Parhat* litigation itself, where the Court upheld the protection of, among other things, the "names and identifying information of United States government personnel . . . who are involved in law enforcement activities relating to the detention of enemy combatants." *Parhat*, Mem. at 1.

Second, this is not a case where the government has sought to protect information in "categories" determined to be "imprecise" (in the case of all information designated "Law Enforcement Sensitive") or overinclusive (in the case of the names of all government personnel, including some "who are so publicly associated with Guantanamo that protected status would plainly be unwarranted"). *Parhat*, 532 F.3d at 833. Here, on the other hand, the government's request is to protect a "single . . . fact" (Appellee's Br. at 37) in a subset of the habeas cases. Ambassador Fried's declaration addressed why this particular fact, if publicly released, would harm the government's coordinated repatriation and resettlement

effort. He identified the special challenges posed by detainees who, for one reason or another, cannot "responsibly [be] returned to their home countries." App. 45. The sensitive negotiations that could lead to resettlement of those detainees could be derailed if "large numbers of individuals (acting through, *inter alia* counsel or non-government organizations) approach the same group of governments at the same time seeking resettlement." App. 46. If those groups have in hand the "formal U.S. government decisions resulting from review by the Guantanamo Review Task Force, it could confuse, undermine, or jeopardize our diplomatic efforts with those countries and could put at risk our ability to move as many people to safe and responsible locations as might otherwise be the case." App. 46.

Ameziane argues that this explanation is not sufficiently specific because the declaration "fails to mention Ameziane or his efforts to obtain resettlement in Canada." Appellee's Br. at 37. In fact, as we explained in our opening brief (pp. 28-30), the concerns addressed by Ambassador Fried apply squarely to this case. Ameziane is a citizen of Algeria, and the United States believes he can be repatriated to Algeria. Ameziane's counsel, however, is engaging in private resettlement efforts in both Canada and France. App. 64. This is precisely the concern addressed by Ambassador Fried: "many of the detainees" are seeking resettlement in "certain

European countries" and the "capacity [of Europe] to absorb detainees is limited." App. 46. Thus, "it is important to the U.S. goal of closing Guantanamo" (*id.*) – a goal Ameziane recognizes as "significant" (Appellee's Br. at 34) – "to be able to focus diplomatic discussions with those countries on detainees for whom there is a compelling reason not to return them to their home countries." App. 46. Ameziane entirely ignores the reality that he is seeking resettlement in France, a part of Europe, which was specifically identified by Ambassador Fried. App. 46. He is therefore wrong to claim that the declaration "does not provide any specific information tailored to . . . the countries where he has sought resettlement." Appellee's Br. at 40-42. In sum, the concerns described in Ambassador Fried's declaration apply squarely in this case.

Moreover, contrary to Ameziane's suggestion (Appellee's Br. at 37), there is no requirement that Ameziane be addressed by name in the declaration to qualify for protected status when the facts described in the declaration apply squarely to Ameziane's case. This Court in *Parhat* ultimately authorized the protection of the names of certain government officials on a categorical basis. *Parhat*, Mem. at 1. This is because the government's rationale was categorical as applied to two groups of people: people "involved in law enforcement activities relating to the detention"

and people who "participated in Parhat's CSRT proceedings" but had not "been publicly disclosed." *Id.* The rationale here – that the Task Force decision should be protected because Ameziane's private efforts to obtain resettlement implicate the precise foreign policy concerns raised by Ambassador Fried – is no more categorical than that approved by this Court in *Parhat*. Accordingly, the type of harm identified by Ambassador Fried, namely the "confusion and mixed messages" created when detainees approach resettlement countries with official U.S. government information (App. 47), is of its nature categorical and the district court erred in concluding that the "government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected." App. 86.[2]

Ameziane also argues that the Fried Declaration fails to "provide any specific information" regarding "diplomatic efforts regarding his home country of Algeria." Appellee's Br. at 40. But there is no serious dispute in this case that Ameziane's resistance to being returned to Algeria is both the reason he remains at Guantanamo

[2] Ameziane argues that some cases might "involv[e] detainees who do not . . . have resettlement concerns." Appellee's Br. at 37. That fact is of no consequence in this appeal, where Ameziane admits he has serious concerns with repatriation and is therefore seeking resettlement. Moreover, the argument ignores other aspects of Ambassador Fried's declaration that address detainees approved for transfer and where release of the Task Force information would raise other sorts of foreign policy concerns. *See* App. 47-48.

and the source of the concern identified in Ambassador Fried's declaration – *i.e.*, that the United States seeks his repatriation, but Ameziane would prefer to be resettled to a third country. App. 46. Were there any doubt (and there was not), Ambassador Fried has since made it plain that Ameziane and the other Algerian "detainees . . . can be repatriated to their country of nationality consistent with our policies on post-transfer treatment." App. 146. Accordingly, Ameziane's desire not to be repatriated places him squarely in the middle of the diplomatic concerns identified by Ambassador Fried.[3]

In sum, as Chief Judge Lamberth concluded, the diplomatic needs identified by Ambassador Fried, which are necessary to further the national security and foreign policy interests identified by the President in closing Guantanamo, are "sufficiently specific and . . . constitute[] a 'significant interest' under the Protective Order." Add. 16 (footnote omitted); *see* Add. to Reply at 4-5 (finding Judge Lamberth's reasoning

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[3] In a footnote, Ameziane argues that the Task Force decisions should not be protected because the Defense Department publicly disclosed decisions to release detainees made by Administrative Review Boards. Appellee's Br. at 44. Ambassador Fried specifically addressed this distinction, explaining that "in my judgment the current circumstances and diplomatic climate render it necessary to maintain control over dissemination . . to enhance the . . . efforts to repatriate and transfer detainees as soon as practicable" in light of "the pace at which the Executive Order review must proceed in order to meet the [one year] deadline set by the President." App. 45-46.

persuasive), 10 (same), 14 (same).

C. Ambassador Fried's Assessment That Release Would Harm Significant Interests Is Entitled To Substantial Deference.

Ambassador Fried's assessment of the diplomatic difficulties that would be created by public release of the Task Force decision is entitled to substantial deference. Ameziane's overstated portrayal of the government's argument – that "complete deference to the Executive" is required (Appellee's Br. at 48; *id*. at 52 (government not entitled to "total . . . deference") – as well as his suggestion that the district court need not defer to Ambassador Fried's assessment – are both in error.

In fact, the government is correct in urging that substantial deference should have been accorded to Ambassador Fried's assessment of the harm caused by the public release of the Task Force decisions on his diplomatic efforts to resettle and repatriate Guantanamo detainees within the time frame set out by the President's Executive Order. App. 44-45. Ambassador Fried has a leading role in the diplomatic efforts aimed at resettling and repatriating Guantanamo detainees that have been approved for transfer or release, and he is conducting sensitive negotiations as part of that effort. App. 45. He is easily the person with the most knowledge and experience with the functioning of that effort and the diplomatic challenges presented

by it. *See National Cable & Telecommunications Ass'n v. F.C.C.*, 567 F.3d 659, 669 (D.C. Cir. 2009) ("we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency").

At the same time, his resettlement and repatriation negotiations constitute a core foreign relations function, and the nation's "foreign policy [is] the province and responsibility of the Executive." *Haig v. Agee*, 453 U.S. 280, 293-94 (1981). Accordingly, deference is warranted both because of Ambassador Fried's expertise and the impact of the disclosure on the nation's diplomatic negotiations, where the "U.S. government [must] retain the prerogative to 'speak with one voice.'" App. 47; *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (in "this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation").

This does not mean, as Ameziane suggests, that the court must "accept the government's proffered harms at face value." Appellee's Br. at 48. Indeed, all of Ameziane's arguments on this point are oriented to show that the court has *some* role to play in assessing the harm here, *id.* at 48-52, a role that the government does not dispute. *See Bismullah*, 501 F.3d at 188. Instead, the court should have assessed the harm identified by Ambassador Fried, provided that assessment substantial deference

for the reasons just explained, and determined whether the harm constitutes a "significant interest[]" under the Protective Order. We submit that the district court failed to afford sufficient deference to that assessment, and thereby abused its discretion.

Ironically, while Ameziane attacks the standard of review and the level of deference that is appropriate, he *nowhere* explains how the central interest identified by Ambassador Fried is either illegitimate or insignificant. Ameziane does not dispute Ambassador Fried's basic premise: that the United States has a limited ability to resettle detainees and, therefore, those efforts must focus on those detainees who cannot be repatriated. Thus, this is not even a case where deference to Ambassador Fried's assessments of harm need be considered because Ameziane does not dispute them.[4]

Ameziane does, on the other hand, claim that revealing the Task Force information will not itself cause *additional* harm to foreign relations beyond

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[4] Ameziane does emphatically dispute whether he can safely be repatriated (Appellee's Br. at 9-10), a dispute that is being addressed by the district court and is of no moment here. In any event, as we explained in our opening brief, the types of concerns raised by Ameziane are those on which the government's contrary assessment (App. 145-59) cannot be challenged under binding precedent of this Court. Appellant's Br. at 42 (citing *Kiyemba*, 561 F.3d at 514).

counsel's current diplomatic endeavors because "the government has no power to prevent Ameziane's counsel from continuing to communicate with foreign governments . . . to find a country for resettlement." Appellee's Br. at 42. But by identifying harm that is not within the government's control – his private resettlement negotiations that are in conflict with the government's effort to repatriate him – Ameziane has, if anything, *confirmed* the legitimacy of the harm identified by Ambassador Fried. And here, Ambassador Fried specifically noted that when counsel "approach[es] the same small group of governments . . . particularly if they relay information about formal U.S. government decisions resulting from review by the Guantanamo Review Task Force, it could confuse, undermine, or jeopardize our diplomatic efforts with those countries." App. 46.

D. No Public or Private Interest Would Be Served By Publicly Releasing the Task Force Decision.

As we explained in our opening brief (pp. 36-40), there is no countervailing public or private interest at stake here that would outweigh the significant foreign policy and national security interests identified by Ambassador Fried.[5] Ameziane

[5] Petitioner claims this argument is waived because it has been "raised for the first time on appeal." Appellee's Br. at 54. If anything, however, the presence of public or private interest in public disclosure – interests that are not cited in the text of the protective order – would tend to militate in favor of disclosure in cases, unlike this

argues in favor of a general public interest in the transparency of habeas proceedings (Appellee's Br. at 55), an interest that the government does not dispute. Appellant's Br. at 37.

But there is no similar public interest in revealing the Task Force decision as part of this litigation. As we explained in the opening brief, the decision is entirely collateral to the merits of the dispute and therefore does not "play[] a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Ameziane argues that there is a public interest in "the operations of the Task Force created by Executive Order 13,492." Appellee's Br. at 55. The operation of the Task Force, however, is not at issue in this habeas litigation – instead, the legality of detention is the issue.

Ameziane claims that there is at the very least a private interest in disclosure given that the Task Force decision has "operated to deprive him of his

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one, where there are such interests. Thus, we do not understand why waiver analysis would be applicable. *Cf. Yee v. Escondido*, 503 U.S. 519, 534 (1992) (once a "claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"). Moreover, the district court ruled in part based on its assessment of the public interest, App. 123, making it fully appropriate to address the issue. In any event, because this case concerns the public's right to access the material at issue (Ameziane, after all, already has access to the information), it makes sense to reference that case law as providing relevant guideposts to the analysis.

constitutionally-protected right to petition for habeas relief." Appellee's Br. at 56. It is ironic that Ameziane makes this assertion, given that the primary barrier to his release is the injunction barring his repatriation. Moreover, as we explained in our opening brief (pp. 39-40), the public interest is served by providing transfer information to the habeas court – without necessitating the damage that would be caused by public disclosure – so that the court may consider whether to focus the court's limited resources on those habeas cases that must be resolved through litigation.

Ameziane also argues that the "concealment of his clearance wrongly implies that he is too dangerous to release." Appellee's Br. at 57. But, as the government explained in its opening brief (p. 41), if this issue is a concern for those countries with which Ameziane is negotiating resettlement, nothing prevents those nations from seeking the Task Force information directly from the United States government. Such a State-to-State communication eliminates the "confusion and mixed messages" that Ambassador Fried identified as the harm of releasing the Task Force decision and helps serve the important foreign policy interest that the United States "speak with one voice" in its negotiations with foreign powers. App. 47; *Curtiss-Wright*, 299 U.S. at 319. Moreover, once Ameziane's transfer is effectuated and sensitive foreign

policy negotiations have been concluded, nothing prevents the district court from reevaluating the decision to seal the information.

Finally, Ameziane argues that the information should not be sealed because it puts him in an unequal position as compared to a detainee who has prevailed in his case – where a judicial decision granting the writ would not be sealed. *See* Appellee's Br. at 43, 56. But just as Ameziane's private diplomacy efforts make Ambassador Fried's task more challenging (App. 46), a public court decision granting the writ also has the potential to complicate the diplomatic effort. Both actions, however, are appropriately beyond the Executive Branch's control in these circumstances. That fact, however, should not preclude the government from advising a habeas petitioner and the habeas court of the decision to transfer without also requiring that information to be publicly revealed. Such a notification can, as we have explained, allow the court to consider whether to conserve limited resources needed to provide "detainees . . . a prompt habeas corpus hearing." *Boumediene*, 128 S. Ct. at 2275. Protected notification can also serve to benefit a habeas petitioner. Some petitioners have agreed to stay their cases once a Task Force decision is confidentially disclosed to the court. The confidential disclosure enables the detainees and the government to move beyond the dispute over legality of detention

and align their interests in effectuating repatriation or resettlement. *See* App. 47 ("petitioner's counsel" has a "role to play in the transfer process" and in many cases the "U.S. government [and] . . . petitioners' counsel . . . seek to work collaboratively" in that process).[6] Thus, there is a public interest in allowing the Executive Branch to notify the court and the habeas petitioner of the transfer decision without requiring that it be publicly disclosed. Moreover, there is a public interest in affording Ambassador Fried maximum ability to pursue a *global* approach to repatriating and resettling all the detainees at Guantanamo Bay who have been approved for transfer, over promoting solely the interests of Ameziane at the expense of others.[7]

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[6] Some petitioners may welcome sealed notification because it will enable them to avoid litigation of the merits, where there is a risk the writ could be denied or a court opinion could complicate transfer.

[7] Contrary to Ameziane's claim, the government has not "manipulated" his clearance status as a "litigation tactic." Appellee's Br. at 58. In fact, the Department of Defense Administrative Review Board process had not approved petitioner for transfer. Instead, petitioner had been identified as a possible candidate for transfer and notice of that intent to transfer was disclosed to the court under seal. The notice was provided to comply with the district court's order requiring 30 days notice prior to transfer, and the transfer could not be effectuated due to the district court's injunction.

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CONCLUSION

For the foregoing reasons, and the reasons explained in the opening brief, the district court's order should be reversed.

Respectfully submitted,

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September 8, 2009

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6979 words (which does not exceed the applicable 7,000 word limit).

_____
August E. Flentje

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CERTIFICATE OF SERVICE

I hereby certify that on this September 11, 2009, I caused copies of the foregoing corrected reply brief to be served upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to lead counsel for each case:

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ADDENDUM

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