No. 09-5236

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

DJAMEL AMEZIANE,

Petitioner-Appellee,

v.

BARACK H. OBAMA, et al.,

Respondents-Appellants.

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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION AND STATEMENT

This case involves exceptionally important questions concerning two issues: (1) the Court's jurisdiction to hear an appeal of a district court order permitting the public disclosure of unclassified information – namely, the fact that petitioner Djamel Ameziane, an Algerian detainee at Guantánamo Bay, has been approved for transfer or release by the Guantánamo Review Task Force – when that information is already in the public domain; and (2) the appropriate standard of review of a district court's routine exercise of discretion to interpret and apply a protective order crafted and entered in the district court in an initial exercise of discretion granted to the court by the All Writs Act, 28 U.S.C. § 1651.

The panel decision, reversing a district court order permitting Ameziane and his counsel to state publicly that he is cleared for transfer, exceeds this Court's jurisdiction because the issue of public disclosure is moot. The panel decision does not disturb the district court's finding – uncontested by the government – that Ameziane's clearance has already been disclosed and is currently in the public domain. The International Committee of the Red Cross and Ameziane's brother in Canada know that Ameziane has been cleared. Slip Op. at 5-6.[1] The panel decision nonetheless concludes the appeal is not moot because if the clearance

[1] The panel opinion is attached hereto as Exhibit A.

decision were unsealed and Ameziane's counsel were permitted to say publicly that he is cleared, their hearsay statements about his clearance would constitute an "official acknowledgement by the U.S. government" of his status. *Id.* at 8, 9, 18.

The panel's decision is based on the implicit assumption that the "official acknowledgement" doctrine, which provides a limited waiver exception to the withholding of classified information in cases brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, applies in this case even though it is neither a FOIA case nor involves classified information. The decision further assumes that Ameziane's private *pro bono* counsel have the ability to speak or make official disclosures on behalf of the United States, or act in any manner that would carry the imprimatur of official government action. Slip. Op. at 8. That assumption is based on a further assumption that because Ameziane's counsel are members of the bar of this Court and subject to "serious ethical obligations inherent in that position," their hearsay statements about Ameziane's clearance are more credible than hearsay statements by other third parties such as his brother. *Id.* However, the panel decision conflicts with authoritative decisions of this Court and other appellate courts which have considered the official acknowledgement doctrine. *See, e.g., Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (Ginsburg, J.) ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought."); *Hudson River Sloop*

Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (holding "official disclosures" do not include statements by private individuals who "perhaps deserve credit beyond that afforded the conclusions of those not formerly privy to official information").

The panel's *de novo* review of the district court order also conflicts with precedent affording district courts broad discretion to seal or not to seal judicial records, which the public ordinarily has the right to inspect and copy, based on the facts and circumstances of a particular case. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978) (district court order to seal or not to seal a judicial record is reviewed for abuse of discretion, "a discretion to be exercised in light of the relevant facts and circumstances of the particular case"); *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) ("It is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.") (citation omitted). The panel's holding that *de novo* review is appropriate because the district court erred in construing *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), to require a specific and distinct rationale for concealing Ameziane's clearance that is tied to the facts of his case, Slip Op. at 13, conflicts with the language of the *Parhat* decision requiring the government to provide a basis for withholding unclassified information that is "specific to the information it has designated in this case." 532 F.3d at 853. The panel further erred in holding

that the district court was required to defer entirely to the government's assessment of harm to foreign relations and national security that might (or might not) result from disclosure. Slip Op. at 15.

Accordingly, rehearing by the panel or the *en banc* Court is necessary.

PRIOR PROCEEDINGS AND DISPOSITION

Petitioner Ameziane has been imprisoned at Guantánamo Bay since February 2002. In February 2005, he filed a habeas corpus petition challenging the legality of his detention. He has yet to obtain a ruling on the merits of his petition.

In May 2009, Ameziane was approved for transfer from Guantánamo Bay by the Guantánamo Review Task Force. The district court promptly stayed and closed his habeas case, over his objections, based on his cleared status.[2]

The government attempted unilaterally to designate his cleared status as "protected" information pursuant to a protective order crafted and entered in the district court in an initial exercise of discretion granted to the court by the All

[2] The panel decision states that Ameziane was twice deemed ineligible for release. Slip Op. at 3. It is unclear to which determinations the panel is referring, absent a citation in the opinion, but the record shows he was approved for transfer in October 2008, based on a determination by the government that there are no longer any "military rationales" for his continued detention. App. 42. However, the government rescinded Ameziane's clearance after the district court initially refused to stay his habeas case because his clearance no longer served the exigencies of the government's litigation position. *See* Order, *In re Guantanamo Bay Detainee Litig.*, No. 08-MC-442 (TFH) (D.D.C. Jan. 21, 2009) (dkt. no. 1535-1) (listing Ameziane as not approved for transfer). Ameziane was cleared for a second time when the government was faced with imminent discovery and merits proceedings.

Writs Act, 28 U.S.C. § 1651. Ameziane objected to the designation, and moved to unseal his clearance. The government later filed an omnibus cross-motion to obtain a protected designation of his clearance and the clearance of other detainees. After conducting a fact-based inquiry, the district court granted Ameziane's motion and denied the government's cross-motion as to him. The court ruled that the "petitioner and his counsel may publicly disclose that he has been approved for transfer from Guantanamo by the Guantanamo Review Task Force." June 30, 2009 Order (Ex. B); *see also* July 8, 2009 Order (Ex. C).[3] The government appealed, and obtained a stay pending appeal from this Court on July 16, 2009.

In an opinion dated January 8, 2010, the panel reversed. The panel held it has jurisdiction to decide the appeal even though Ameziane's clearance has already entered the public domain. Although the Red Cross and Ameziane's brother know that Ameziane has been cleared, the government has not officially acknowledged his status. Slip Op. at 6. The panel reasoned that the appeal would not be moot if the district court's order would result in an official acknowledgement of his cleared status. *Id.* It further concluded that because Ameziane's counsel are "officer[s] of the court, subject to the serious ethical obligations inherent in that position . . . any statement by counsel that the Task Force has cleared Ameziane for transfer would be tantamount to, and a sufficient substitute for, official acknowledgement

[3] Exhibits B and C are included in the record at App. 86 and 120, respectively.

by the U.S. government." *Id.* at 8. The panel thus held that the appeal is not moot because it could grant "effectual relief" by reversing the district court and preventing an official government acknowledgement. *Id.* at 8, 9, 18.[4]

The panel then concluded that *de novo* review of the district court's order permitting public disclosure of Ameziane's cleared status is appropriate. *Id.* at 10. Applying that standard of review, the panel held that because the government has satisfied the requirements of *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), for obtaining a protected designation, "the district court was required to defer to the government's assessment of the harm to foreign relations and national security that would result from officially disclosing Ameziane's Task Force transfer decision." Slip Op. at 15. The panel specifically held that the district court erred by failing to accord "substantial weight and deference" to the declaration of Ambassador Daniel

[4] The panel correctly assumed that Ameziane does not seek to disclose the district court order. Slip Op. at 8. All that is at issue is whether Ameziane and his counsel may say publicly that he has been approved for transfer from Guantánamo Bay. *Id.* at 6-8; *see also* App. 80, 82, 87. Ameziane has never sought to disclose the district court order or other documents regarding his clearance. *See* Motion to Unseal at 1, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. June 11, 2009) (seeking to unseal "the mere fact that he has been 'approved for transfer from Guantánamo Bay'"). Any concern that disclosure of his clearance might result in disclosure of "all related or derivative documents" is based on a misreading of the district court order. *Compare* June 30, 2009 Order at 1 (Ex. B) (district court order noting consideration of government's omnibus motion to seal, which was styled as a "motion to confirm designation of the government's approval of petitioners for transfer and all related or derivative documents as 'protected'"), *with* Slip Op. at 6-7 (quoting same language in a way that suggests the court authorized disclosure of "all related or derivative documents" concerning Ameziane).

Fried, filed in numerous detainee cases, which states that disclosure of detainee clearance decisions might interfere with the closure of Guantánamo Bay. *Id.* at 17.

ARGUMENT

I. The Panel's Application of the "Official Acknowledgement" Doctrine Directly Conflicts with this Court's and Other Circuit Courts' Decisions

In cases involving challenges to the disclosure of information, once the information is disclosed the issue is moot. *See Exxon Corp. v. FTC*, 589 F.2d 582, 587 (D.C. Cir. 1978) ("Some of the information that the appellants sought to protect has already been disclosed, and this appeal is moot as to this material."); *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."). The government conceded this in its opening brief. Gvt. Br. at 20 ("[P]ublic disclosure of information directed by the [district court] order would moot any appeal.").

The panel notes there is nothing that prevents the Red Cross or Ameziane's brother from stating publicly that he is cleared. Slip Op. at 6. Yet, citing FOIA cases involving classified information, the panel concludes it may order "effectual relief" by preventing Ameziane's counsel from repeating the information which is already in the public domain. *Id.* at 8. The panel is wrong in three respects.

First, the panel's decision does not prohibit *disclosure* of Ameziane's clearance; rather it only prohibits his counsel from *repeating* the information on

the ground that repetition by a member of the bar would constitute an official acknowledgment binding the government. But counsels' repetition of information already in the public domain would not authorize or compel an official government acknowledgement any more than Ameziane's brother's disclosure of the same information would constitute an official disclosure. Ameziane, his attorneys and his family are all private citizens without power to "acknowledge" information on behalf of the United States. None speaks for the government or acts in a manner that would carry the imprimatur of official government action; and the government disclaimed any concern that Ameziane's counsel would be confused with government officials. App. 71. The government also remains free not to confirm or deny statements about Ameziane, whether made by his brother or his counsel.

Second, the official acknowledgement doctrine does not apply in the context of this case. The doctrine provides a limited waiver exception to the withholding of classified information in FOIA cases. The Executive has statutory authority under FOIA, and under the National Security Act of 1947, 50 U.S.C. § 401 *et seq.*, or other "withholding" statutes, to control the flow of properly classified national security information, and to prevent its public disclosure unless the information sought to be disclosed is specific and matches information already made public through an "official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). It is to that specific statutory authority to withhold classified

information which courts routinely defer in FOIA cases, unless withholding is waived by a prior official disclosure of the information by the government. *Cf. Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 958 (9th Cir.) (rejecting government analogy to official acknowledgement doctrine in non-FOIA case: "We find the government's resort to FOIA case law unpersuasive because the FOIA statutory framework takes for granted that 'classified' matters relating to national defense and foreign policy are . . . categorically exempt from disclosures"), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009).[5]

This is neither a FOIA case nor does it involve disclosure of classified information. Ameziane's clearance is unclassified and public; his counsel simply cannot repeat it publicly. There is no statutory or other legal authority for the government to control the flow of unclassified information to which a court must defer, and the government lacks any legitimate basis for censoring Ameziane's counsels' speech. *See McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) ("The government has no legitimate interest in censoring unclassified materials.").

Third, this Court has long held that statements by non-government officials do not constitute official acknowledgements by the government. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (Ginsburg, J.) ("[W]e do not deem

[5] Ameziane is aware of only one case where a circuit court has upheld an official acknowledgement finding. *See Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007).

'official' a disclosure made by someone other than the agency from which the information is being sought."). This Court has repeatedly rejected the reasoning of the panel in this case – *i.e.*, that disclosures by private individuals whose hearsay statements the public may have more reason to credit than statements by other third parties may be "tantamount" to official disclosures. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1134 (D.C. Cir. 1983) (rejecting claim that statements by former government officials are "tantamount" to official disclosures); *Military Audit Project v. Casey*, 656 F.2d 724, 743-44 (D.C. Cir. 1981) (same); *cf. Public Citizen v. Dep't of State*, 11 F.3d 198, 202-04 (D.C. Cir. 1993) (testimony by current government official is not official disclosure); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 838 n.13 (D.C. Cir. 2001) (distinguishing hearsay statements by government officials from document disclosures under FOIA).

The law is the same in other circuits which have addressed the official acknowledgement doctrine. *See Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989) (holding "official disclosures" do not include statements by private individuals who "perhaps deserve credit beyond that afforded the conclusions of those not formerly privy to official information"); *Wilson v. McConnell*, 501 F. Supp. 2d 545, 559 (S.D.N.Y. 2007) ("An official disclosure occurs only when the agency responsible for protecting the information discloses it."), *aff'd*, 586 F.3d 171, 189-91 (2d Cir. 2009); *Alfred A. Knopf, Inc. v.*

Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) (official disclosures limited to statements by "an official of the United States in a position to know of what he spoke"). Ameziane is aware of no appellate court that has held a statement by a private individual may constitute an official acknowledgement by the government.

Applying these decisions, district courts in this Circuit have consistently and uniformly held that official acknowledgements may be made only by Executive Branch officials who are specifically authorized to make such disclosures. *See Riquelme v. CIA*, 453 F. Supp. 2d 103, 115 n.15 (D.D.C. 2006) ("Our Circuit Court has indicated that it does not deem official a disclosure made by someone other than the agency from which the information is being sought.") (internal quotation marks omitted); *Edmonds v. Dep't of Justice*, 405 F. Supp. 2d 23, 31-32 (D.D.C. 2005) (disclosure of information from private counsel's notes does not constitute official disclosure); *The Washington Post Co. v. Dep't of Defense*, C.A. No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *24 (D.D.C. Feb. 24, 1987) (official acknowledgements limited to disclosures by "authoritative government sources"); *Peterzell v. CIA*, C.A. No. 85-2685, 1986 U.S. Dist. LEXIS 31001, at *5-6 (D.D.C. July 11, 1986) (same); *see also ACLU v. Dep't of Defense*, C.A. No. 08-437 (RCL), 2009 U.S. Dist. LEXIS 96467, at *11 (D.D.C. Oct. 16, 2009); *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984); *Holland v. CIA*, C.A. No. 91-1233, 1992 U.S. Dist. LEXIS 13196, at *19 (D.D.C. Aug. 31, 1992).

If the panel decision in this case were to stand, it would represent an unprecedented departure from this Court's bright-line rule that statements by private individuals do not constitute, and are not tantamount to, official acknowledgements by the government. The departure would open the door to expansion of the official acknowledgement doctrine beyond the FOIA context and cases involving classified information. It would also cause unnecessary confusion as litigants sought to expand the waiver doctrine to challenge the government's withholding of information under FOIA or other withholding provisions. In addition, district courts would be required for the first time to make qualitative judgments about which private individuals might be capable of making official acknowledgements by or on behalf of the government, and under what circumstances such disclosures would waive government objections to further disclosures, thereby substantially altering the current legal landscape.

II. The Panel Erred by Reviewing the District Court Order *De Novo*

The panel reviewed *de novo* the district court order permitting Ameziane and his counsel to disclose his cleared status. Slip Op. at 10. The panel held that the district court erred by requiring "a specific and distinct rationale addressed to each detainee's situation" in order to obtain a protected designation in a particular case. *Id.* at 13. The panel also held that the district court "was required to defer to the government's assessment of the harm to foreign relations and national security that

would result from officially disclosing Ameziane's Task Force transfer decision," as articulated in the declaration of Ambassador Fried. *Id.* at 15. The panel held the district court was not authorized to reject the Fried Declaration even though it found the factual premises of the declaration inapplicable to this case. *Id.* at 16-17.

Contrary to the panel's *de novo* review, the Supreme Court has held that district court orders to seal or not to seal judicial records are reviewed for abuse of discretion. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978). And contrary to the panel's rejection of a fact-specific approach to deciding whether Ameziane's clearance may disclosed, the Supreme Court has concluded that district court discretion should be exercised "in light of the relevant facts and circumstances of the particular case" rather than on a generalized basis. *Id.*

The panel decision also conflicts with this Court's decisions holding that courts have discretion to seal or not to seal a judicial record, which the public ordinarily has the right to inspect and copy. *See Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007); *Parhat v. Gates*, 532 F.3d 834, 853 (D.C. Cir. 2008). In contrast to the panel's holding that *Parhat* allows for "categorized requests" to seal unclassified information in "appropriate circumstances," Slip Op. at 12, *Parhat* requires the government to provide a basis for withholding "specific to the information it has designated in this case," and to submit "pleadings specifically explaining why protected status is required for the information that has been

marked." 532 F.3d at 853 (rejecting motion applicable to several detainees). Further, *Parhat* precludes the designation of information in the public domain. *Id.*

The need for district courts to determine on a case-by-case basis whether unclassified information should be protected is consistent with the protective order scheme created and entered by the district court in a separate exercise of its discretion. Again, there is no statutory or legal basis for withholding unclassified information; but for the district court's entry of a discretionary protective order (an order which creates and defines the category "protected information"), there is no question Ameziane's clearance would be widely known to the public.

However, despite the discretionary nature of the protective order scheme, the panel suggests that district courts lack any authority to find the Fried Declaration inadequate or unpersuasive to support the concealment of a detainee's clearance, even where, as here, the court conducted a fact-based inquiry and concluded the factual premises of the Fried Declaration do not apply. *See* July 8, 2009 Order (Ex. C). Thus, if the panel decision were permitted to stand, it would deprive district courts of any meaningful role in determining whether to seal unclassified information as "protected" (again, a category created and defined by the district court in its protective order), effectively affording the government unilateral power to seal information. That result would be contrary to *Bismullah* and *Parhat*.

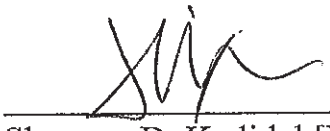
Finally, to the extent deference was owed to the Executive, the district court properly afforded such deference by applying the procedures set forth in the protective order for obtaining a protected designation and by accounting for the appropriate separation of powers. App. 14, 123 ("[T]he Court is mindful that the judiciary may not involve itself in matters left solely within the province of the executive. It is, however, the judiciary's duty to decide whether unclassified information should be protected based on a careful consideration of the specific circumstances and unique facts presented by each case.") (citations omitted).

CONCLUSION

Rehearing by the panel or the *en banc* Court should be granted.

Date: February 22, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2010, I caused the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to be hand-delivered to the Court for filing under seal, and to be served on counsel of record listed below via email and overnight mail:

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ADDENDUM

EXHIBIT A

UNDER SEAL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 8, 2009 Decided January 8, 2010

No. 09-5236

DJAMEL AMEZIANE, DETAINEE, GUANTANAMO BAY NAVAL STATION, GUANTANAMO BAY CUBA,
APPELLEE

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cv-00392-UNA)

August E. Flentje, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Douglas N. Letter* and *Robert M. Loeb*, Attorneys.

J. Wells Dixon argued the cause for appellee. With him on the brief were *Shayana D. Kadidal* and *Pardiss Kebriaei*.

Before: GINSBURG, BROWN and GRIFFITH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: This case presents another variation on the detainee theme, raising questions about what information concerning a detainee's status can be protected from public disclosure when the detainee is anxious to reveal it. These questions arise because the government, having decided that Djamel Ameziane may be released from detention at Guantanamo Bay, has sought to designate the decision of the Guantanamo Review Task Force as "protected" information under the governing protective order. The government wants to send Ameziane back to his native country, Algeria. Ameziane does not want to go. He wants to use his Task Force transfer decision to aid him in petitioning venues he deems more attractive, like Canada or France, for resettlement. The government—fearing that dozens of detainees going into business for themselves, utilizing Task Force transfer decisions to make their own best deals, would interfere with sensitive diplomatic efforts to relocate large numbers of detainees—moved to protect all Task Force transfer decisions from premature public disclosure. The district court sided with Ameziane and the government appealed. We reverse.

I

Ameziane, an Algerian citizen, has been held at the U.S. Naval Base at Guantanamo Bay, Cuba since 2002. In 2005, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. This action was subject to a protective order governing common procedural issues in all Guantanamo habeas cases. *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. 2008) (Protective Order). Under the Protective Order, "protected" information may not be disclosed to anyone other than the petitioner's counsel and the

court, unless the government authorizes wider disclosure. *Id.* at 151 (¶ 35). To designate information as protected, the government must attempt to reach an agreement with the petitioner's counsel, and if that fails, file a motion with the court. *Id.* (¶ 34).

On January 22, 2009, the President issued an Executive Order directing the closure of the Guantanamo detention facility "as soon as practicable, and no later than 1 year from the date of this order," and requiring "[t]he Secretary of State [to] expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order." Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898–99 (Jan. 22, 2009). The Executive Order also established the Guantanamo Review Task Force (Task Force) and mandated immediate review of all detainees to "determine, on a rolling basis and as promptly as possible . . . whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States." *Id.* at 4899.

Although Ameziane had twice been deemed ineligible for release, on May 8, 2009, the Task Force issued a decision approving him for transfer. On June 15, the government filed a coordinated motion in the subset of Guantanamo habeas cases involving petitioners who had been issued transfer decisions, seeking to designate those decisions as "protected" information. In support of the motion, the government submitted a declaration by Ambassador Daniel Fried, the Special Envoy for the Closure of the Guantanamo Bay Detention Facility. Ambassador Fried explained that if these petitioners, in an effort to be resettled in European countries of their choice, all "approach the same small group of governments at the same time, particularly if they relay information about formal U.S. government decisions resulting

from review by the . . . 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 [detainees] to safe and responsible locations as might otherwise be the case." Fried Decl. ¶ 5.

At a hearing on June 30, the district court denied the government's motion to protect Ameziane's Task Force transfer decision. The court concluded the government had failed to make a "particularized showing" because the Fried Declaration had "nothing . . . to do with this case in particular," and protested that allowing Ameziane to disclose "this one piece of information" to foreign governments would not "interfere in anything." Transcript of Motion Hearing at 29, *Ameziane v. Obama*, No. 05-cv-392 (D.D.C. June 30, 2009) (June 30 Tr.). The court accused the government of "stand[ing] in the way of any possible, possible hope of something better for [Ameziane]" by seeking to repatriate him to Algeria rather than allowing him to use his Task Force transfer decision to advocate for resettlement in Canada or France. *Id.* at 30. The court issued a written order including a one-week stay. Order, *Ameziane v. Obama*, No. 05-cv-392 (D.D.C. June 30, 2009) (June 30 Order).

On July 7, the government sought to extend the stay for an additional week; the district court rejected the request, *see* Transcript of Motion Hearing at 28–29, *Ameziane v. Obama*, No. 05-cv-392 (D.D.C. July 7, 2009); and the government filed an interlocutory appeal and moved this court for an emergency stay of the district court's order.

The district court issued a written opinion explaining the refusal to extend its stay. Mem. Op. & Order, *Ameziane v. Obama*, No. 05-cv-392 (D.D.C July 8, 2009) (July 8 Op.). The court stated "[t]he government's rationale for protecting

[Ameziane's] clearance status [was] riddled with contradictions." *Id.* at 5. It disregarded the Fried Declaration because it "provide[d] no specificity as to why Ameziane's cleared status must be protected or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries." *Id.* at 6. The court was not "convinced" by the government's "speculative and conclusory" national security concerns. *Id.* at 7. "Most importantly," the court determined, "the record demonstrates that protecting [Ameziane's] clearance status would serve little purpose" because "both the Red Cross and [his] brother in Canada are already aware that [he] has been cleared for transfer." *Id.*

On July 16, we granted a stay pending appeal.

II

We first consider whether we lack subject-matter jurisdiction because the dispute is moot or, alternatively, because the district court's order was not a final decision from which the government could immediately appeal.

A

Ameziane argues this appeal is moot because the Red Cross and his brother in Canada already know he has been cleared for transfer. "'Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.'" *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). However,

a case is not moot unless it is "'impossible for the court to grant any effectual relief whatever.'" *Cody v. Cox*, 509 F.3d 606, 608 (D.C. Cir. 2007) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted)).

Although the Red Cross and Ameziane's brother may claim to know that Ameziane has been cleared for transfer, the government has not officially acknowledged his cleared status. "[I]n the arena of . . . foreign relations there can be a critical difference between official and unofficial disclosures." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *see also Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("[E]ven if a fact . . . is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security."). Presumably, nothing prevents the Red Cross or Ameziane's brother—or any other third party not bound by the Protective Order—from telling foreign governments that Ameziane has been cleared for transfer by the U.S. government. However, in the absence of any official acknowledgement, these foreign governments would be left guessing as to whether such information is true. *See Military Audit Project v. Casey*, 656 F.2d 724, 743–45 (D.C. Cir. 1981). Whereas third-party hearsay is likely to be dismissed as mere rumor or self-serving speculation, foreign governments are substantially more likely to rely on an official statement by the U.S. government.

Thus, this appeal is not moot if the district court's order would result in an official acknowledgement of Ameziane's cleared status. It would. The district court ordered, first, "that petitioner's motion to unseal" the "government's approval of petitioner[] for transfer and all related or

derivative documents" would be granted; second, "that the government's motion to designate petitioner's clearance for transfer . . . as 'protected' information" would be denied; and third, that "petitioner and his counsel may publicly disclose that he has been approved for transfer from Guantanamo by the . . . Task Force." June 30 Order at 1–2.

As an initial matter, in this court, Ameziane has decided not to defend much of the district court's order: "[Ameziane] 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. . . . [A]ll that is at issue in this appeal, is whether Ameziane 'may publicly disclose that he has been approved for transfer from Guantanamo by the . . . Task Force.'" Appellee's Br. 17 (quoting June 30 Order at 2). Accordingly, since both parties agree "the District Court pleadings [and] transcripts regarding this issue," "the parties' appellate briefs," and "any information regarding the government's attempts to repatriate him to Algeria" should be protected, *id.*, the district court's order is reversed to the extent it unsealed and declined to protect such material.

There remains one key document that, if unsealed, would clearly constitute an official acknowledgement of Ameziane's cleared status: the district court order itself. However, there is some ambiguity whether Ameziane seeks to unseal this order. He quotes from the order in arguing his entitlement to "'publicly disclose that he has been approved for transfer,'" Appellee's Br. 17 (quoting June 30 Order at 2), thus suggesting Ameziane's counsel intends to point to the order itself in negotiations with foreign governments, perhaps to corroborate his claim that Ameziane has been cleared for transfer.

Yet, at oral argument, Ameziane's counsel stated he was "not seeking the unsealing of records." Transcript of Oral Argument at 15:13–16. It is not clear whether this reference to "records" included the district court order, or whether it referred only to the documents listed in Ameziane's brief and discussed above. But even assuming the district court order will remain sealed, this appeal is not moot. Counsel stated unambiguously that he sought "to be able to say that Mr. Ameziane has been approved for transfer by the Task Force." *Id.* at 15:22–25, 16:1–3. Ameziane's counsel is an officer of the court, subject to the serious ethical obligations inherent in that position. Although foreign governments would be unlikely to rely on a claim by a third party—or even by Ameziane himself—that Ameziane has been cleared for transfer, the same is not true with respect to a similar representation made by counsel. As an officer of the court, any statement by counsel that the Task Force has cleared Ameziane for transfer would be tantamount to, and a sufficient substitute for, official acknowledgement by the U.S. government. Accordingly, this appeal is not moot because we can grant "effectual relief" by reversing the district court and thereby preventing official acknowledgement of Ameziane's cleared status—either from the order itself, or from disclosures by counsel that the order permits him to make.

B

Nor do we lack jurisdiction because the district court's order was not "final." Courts of appeals have jurisdiction of appeals from "all final decisions" of district courts. 28 U.S.C. § 1291. Pursuant to the collateral order doctrine, an interlocutory order qualifies as "final" under § 1291 if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a

final judgment. *See Will v. Hallock*, 546 U.S. 345, 349 (2006).

These conditions, though "stringent," *see id.*, are satisfied in this case. As Ameziane concedes, the first requirement is satisfied because the district court's order conclusively determined that his Task Force transfer decision would not be protected under the Protective Order. Second, this issue is entirely separate from the merits of Ameziane's habeas action. The public disclosure of Ameziane's Task Force transfer decision has no relevance to the underlying question on the merits, *i.e.*, whether he has been lawfully detained. And given the foreign relations and national security concerns raised in the Fried Declaration, we have no difficulty finding this issue sufficiently "important" to warrant immediate appellate review. *See Al Odah v. United States*, 559 F.3d 539, 543–44 (D.C. Cir. 2009) (holding that order mandating disclosure of classified information to habeas petitioners' counsel was "an important issue entirely separate from the merits of this case"). Finally, the district court's order would be effectively unreviewable on appeal from a final judgment because once the government's official acknowledgement of Ameziane's cleared status is revealed publicly, the disclosure cannot be undone. *See id.* at 544. Thus, we have subject-matter jurisdiction.

III

While we review a district court's decision to seal or unseal documents, or to issue or refuse to issue a protective order, for abuse of discretion, we review de novo any errors of law upon which the court relied in exercising its discretion. *See, e.g., United States v. Mejia*, 448 F.3d 436, 456–57 (D.C. Cir. 2006) (reviewing issuance of protective order de novo rather than for abuse of discretion because court applied

incorrect legal standard); *United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) (reviewing decision to unseal guilty plea de novo rather than for abuse of discretion because court's decision was premised on legal error); *see also Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Here, the district court's explanations indicate de novo review is appropriate.

A

It is "our customary policy" to accord "deference to the President in matters of foreign affairs." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005). And "consistent with our rule of deference, it is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Bismullah v. Gates*, 501 F.3d 178, 187–88 (D.C. Cir. 2007) (internal quotation marks omitted), *vacated on other grounds*, *Gates v. Bismullah*, 128 S. Ct. 2960 (2008).

But detainee cases are unique. Because of the independent role carved out for the judiciary, and our concomitant obligation to balance the needs of the government against the rights of the detainee, and also to preserve to the extent feasible the traditional right of public access to judicial records grounded in the First Amendment, we exercise greater caution in deciding to defer. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2276–77 (2008). In the context of requests by the government to protect sensitive information, we have explained the showing the government must make to trigger judicial deference.

In *Bismullah v. Gates*, we rejected the government's assertion of unilateral authority to designate information as "protected" and held "the Government must give the court a basis for withholding . . . from public view" nonclassified information it seeks to protect. 501 F.3d at 188. In *Parhat v. Gates*, we explained that a valid "basis for withholding" would include, at a minimum, a "specific," "tailored" rationale for protecting a general category of information, and a precise designation of each particular item of information that purportedly "falls within the categor[y] . . . described." 532 F.3d 834, 853 (D.C. Cir. 2008). In other words, the government first must demonstrate *what kind* of information requires protection and *why*, and then must show exactly *what* information in the case at hand it seeks to protect.

In *Parhat*, the government failed to satisfy this twofold showing. The government began by describing two broad categories—"(1) any names and/or identifying information of United States Government personnel, and (2) any sensitive law enforcement information"—and provided a "rationale for protection [that was] brief" and "relie[d] solely on spare, generic assertions of the need to protect information in the two categories." *Id.* at 852–53 (internal quotation marks omitted). For instance, the government merely asserted in conclusory fashion that disclosing information in the first category would "heighten[]" the risks to the safety of U.S. government personnel, and that disclosing information in the second category would "harm the Government's ongoing law enforcement activities related to the global war against al Qaeda and its supporters." *Id.* at 852. These "generic claims" failed to satisfy the government's burden of providing "an explanation tailored to the specific information at issue." *Id.* at 853.

Second, the government consigned all government personnel mentioned in the record to the first category, and simply marked documents "Law Enforcement Sensitive" or "LES" to designate the second category. *Id.* at 852–53. We found both sets of designations imprecise and overinclusive. For instance, "some 'U.S. Government personnel' . . . [were] so publicly associated with Guantanamo that protected status would plainly be unwarranted." *Id.* at 853. And we noted that the term "Law Enforcement Sensitive" was so vague that "at least seven different federal agencies define[d] it differently." *Id.* Thus, even if the government had provided sufficient rationales for protecting information in the two categories, it nonetheless failed to make its designations with sufficient precision to allow the court to "determine whether the information it ha[d] designated properly f[ell] within the categories it ha[d] described." *Id.*

Here, the district court failed properly to apply *Parhat*'s two-part standard. Rather than evaluating the government's proposed category and proffered rationale, and then determining whether Ameziane's Task Force transfer decision fell into that category, the court faulted Ambassador Fried for "provid[ing] no specificity as to why *Ameziane's* cleared status must be protected or why *his* counsel should be prohibited from using the information to advocate for his resettlement in other countries." July 8 Op. at 6 (emphasis added). Similarly, in its oral ruling, the court found the government had failed to make a "particularized showing" because the Fried Declaration had "nothing . . . to do with this case in particular." June 30 Tr. at 29. However, *Parhat* did not require the government to provide a rationale for protection that was so specific as to preclude any generalized categorization. Rather, *Parhat* left room for categorized requests in appropriate circumstances. Of course, the narrower the category for which the government seeks

protection, the more likely the government's rationale will be sufficiently tailored. But the district court erred by construing *Parhat* to require a specific and distinct rationale addressed to each detainee's situation.

There is a sharp contrast between the government's showing in this case and its showing in *Parhat*. Unlike the two broad categories outlined in *Parhat*, here the government requested protection for a single, limited category: Task Force transfer decisions and all related or derivative documents. *See* July 8 Op. at 2. And unlike the "spare, generic assertions" with which the government justified its request in *Parhat*, 532 F.3d at 853, here the government provided a detailed rationale tailored specifically to the information in the narrow category.

The Fried Declaration logically explained why failing to protect Task Force transfer decisions was likely to harm the government's foreign relations and national security interests. To close down Guantanamo, as Executive Order 13,492 commands, the government faces not just the task of deciding which detainees may be released, but also the formidable hurdle of determining where to send those who are cleared for transfer. Fried Decl. ¶¶ 1–4. Because of U.S. policies barring the transfer of detainees to countries where they face torture, "there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who . . . cannot be safely and/or responsibly returned to their home countries." *Id.* ¶ 3. At the same time, since our foreign allies—particularly in Europe, where many detainees wish to be sent—have limited "capacity to absorb detainees . . ., it is important to the U.S. goal of closing Guantanamo 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." *Id.* ¶ 5. This goal would be

frustrated if "dozens of detainees approach the same small group of governments at the same time, . . . relay[ing] information about formal U.S. government decisions resulting from review by the . . . Task Force." *Id.* A "coherent diplomatic strategy"—a necessity if the government is going to "move as many [detainees] to safe and responsible locations" as possible—requires that the government "retain the prerogative to 'speak with one voice.'" *Id.* ¶¶ 4–6. But permitting persons not authorized to speak on behalf of the government to "convey[] official U.S. Government information to a foreign country regarding the transfer status of a particular petitioner . . . has the potential to create confusion and mixed messages." *Id.* ¶ 6. Because this detailed rationale was tailored specifically to the narrow category of information for which the government requested protection, the government satisfied the first showing required by *Parhat*.

The government also satisfied the second part of the *Parhat* standard because we face no difficulty "determin[ing] whether the information [the government] has designated properly falls within the categor[y] it has described." *Parhat*, 532 F.3d at 853. The government designated for protection a precise item of information—Ameziane's transfer decision—that indisputably falls into the narrow category of Task Force transfer decisions. Indeed, this case fits squarely within the government's rationale for protection. Although the government has determined Ameziane can safely be repatriated to Algeria, he is seeking to obtain resettlement in Canada or France, and wishes to utilize his Task Force transfer decision to aid him in petitioning these foreign governments. As the Fried Declaration explains, permitting Ameziane to make such use of the government's official information would interfere with the Secretary of State's efforts to focus the Canadian and French governments on

accepting detainees who, unlike Ameziane, cannot safely be repatriated to their home countries. Thus, the government met its burden for protection under *Parhat*.

B

Because the government satisfied *Parhat*, the district court was required to defer to the government's assessment of the harm to foreign relations and national security that would result from officially disclosing Ameziane's Task Force transfer decision. As we explained in *Fitzgibbon*, the failure to give deference when it is due is error. 911 F.2d at 755. There, pursuant to a Freedom of Information Act request, the district court ordered the CIA to disclose information about a former CIA station location, over the CIA's objection that such disclosure would cause harm to national security. *Id.* at 758–59. We faulted the district court for "essentially perform[ing] its own calculus as to whether or not harm to the national security . . . would result from disclosure" of the information, and held it should have "accord[ed] substantial weight and deference" to the Executive Branch's "determination of possible harm." *Id.* at 766. Thus, "declin[ing] to adopt the abuse-of-discretion review that [the plaintiff] urge[d] upon us," we reversed. *Id.*

Here, the district court simply declared:

> I don't understand how [declining to protect Ameziane's Task Force transfer decision] will interfere in anything. . . . I don't know why in the world the only thing that the government can see is Algeria here. . . . But if [Ameziane] is able to do better than what the government is doing, I say fine. He has now been there seven years thanks to the United States government. Why they want to stand

> in the way of any possible, possible hope of something better for him baffles me. . . . This gentleman has the perhaps glimmer of hope that something could get slightly better and he won't be prosecuted again in Canada. Why should we stand in the way after the way we've treated him for these seven years?

June 30 Tr. at 29–30; *see also* July 8 Op. at 7 (rejecting as "speculative and conclusory" government's "arguments that the release of [Ameziane's] clearance status would cause significant harm to the interests of the government"). It is not entirely clear why the district court found the Fried Declaration so baffling. As discussed above, it provided a detailed and logical explanation of the impact of premature disclosure on the government's foreign relations and national security interests. *Parhat* did not free courts to substitute their own policy judgments for those of the executive. The district court was not entitled to toss the Fried Declaration aside merely because it disagreed with its premise. Deference required acknowledging that the State Department, not the judiciary, is tasked with undertaking the diplomatic negotiations necessary to close down Guantanamo, and that the Executive Branch officials bearing this responsibility possess far greater resources and aptitude than the judiciary for determining what will aid, and what will undermine, their mission. The district court's inability to "understand" how permitting Ameziane to disclose his Task Force transfer decision to foreign governments "will interfere in anything," June 30 Tr. at 29, did not license the court to "perform[] its own calculus as to whether or not harm to the national security . . . would result from [the] disclosure," *Fitzgibbon*, 911 F.2d at 766.

In particular, the district court erred by elevating Ameziane's interest in being resettled in a country of his choice over the government's interest in repatriating or resettling as many detainees as possible as quickly as practicable in order to close Guantanamo as the President directed. Such prioritizing was an executive prerogative, and it was "not within the role of the [district] court[] to second-guess executive judgments made in furtherance of that branch's proper role." *Bismullah*, 501 F.3d at 187–88 (internal quotation marks omitted). Crucially, this does not mean Ameziane never will have the opportunity to share his Task Force transfer decision with Canada, France, or other countries he wishes to petition for resettlement. Rather, it means only that those foreign governments must contact the U.S. government and obtain the information through official channels. In this way, Ameziane's eagerness to be sent to a country of his choice will not undermine the Executive Branch's prerogative to "speak with one voice" in diplomatic affairs. *See* Fried Decl. ¶ 6. The failure to accord "substantial weight and deference," *Fitzgibbon*, 911 F.2d at 766, to the government's assessment of its foreign relations and national security interests was error.

C

Finally, the district court erred by basing its ruling on an inappropriate factor. The court held that the "[m]ost important[]" factor weighing against the government's request for protection was that "protecting [Ameziane's] clearance status would serve little purpose" because "both the Red Cross and [his] brother in Canada are already aware that [he] has been cleared for transfer." July 8 Op. at 7. The first problem with the district court's approach is the incentive it gives detainees to violate the Protective Order. Why honor confidentiality restrictions imposed by the court if ignoring

them will be rewarded? Moreover, as discussed above, there is a distinction between third parties claiming to have knowledge of certain information, and an official acknowledgement of the truth of that information by the U.S. government. *See Fitzgibbon*, 911 F.2d at 765 (observing the "critical difference between official and unofficial disclosures" in the "arena of . . . foreign relations"); *Afshar*, 702 F.2d at 1130 (noting that "official acknowledgment by an authoritative source" of a fact that "is the subject of widespread media and public speculation" may "be new information that could cause damage to the national security"). For the same reason that a "public record" is generally admissible as evidence, *see* FED. R. EVID. 803(8), while other hearsay is not, *see* FED. R. EVID. 802, an official acknowledgment of a fact is far more reliable than a third party's statement of the same fact. This is doubly true in the world of diplomatic relations.

Indeed, any suggestion the government's official acknowledgment—either from the district court's order itself or from Ameziane's counsel in his capacity as an officer of the court—would not produce a material change in circumstances is belied by Ameziane's vigorous defense of the district court's ruling. It is evident that while the Canadian and French governments would pay scant attention to Ameziane's brother's claim that Ameziane has been cleared for transfer, they would be substantially more interested in hearing this same news from a person or entity speaking on behalf of the U.S. government. Thus, while it would have been proper to consider whether the government already had publicly acknowledged Ameziane's clearance for transfer, it was error to rely on third parties' purported knowledge of his cleared status.

IV

For the foregoing reasons, the government's motion to designate Ameziane's Task Force transfer decision as "protected" information under the Protective Order should have been granted. Thus, the order of the district court is

Reversed.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE,	
Petitioner,	
v.	**Civil Action No. 05-392 (ESH)**
BARACK OBAMA, *et al.*,	**FILED UNDER SEAL**
Respondents.	

ORDER

Upon consideration of petitioner's sealed motion to unseal or, in the alternative, for a hearing to address whether to lift the stay, respondents' sealed motion to confirm designation of the government's approval of petitioners for transfer and all related or derivative documents as "protected," and respondents' sealed June 23, 2009 status report, and for the reasons stated in court during the hearing held today, it is

ORDERED that petitioner's motion to unseal is **GRANTED**. It is

FURTHER ORDERED that the government's motion to designate petitioner's clearance for transfer by the Guantanamo Review Task Force as "protected" information under Paragraph 34 of the Protective Order is **DENIED**. The government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected, or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries. As the D.C. Circuit admonished in *Parhat v. Gates*, the government cannot rely "solely on spare, generic assertions of the need to protect information." 532 F.3d 834, 852-53

(D.C. Cir. 2008). Without "an explanation tailored to the specific information at issue," this Court has "no way to determine whether [Ameziane's transfer clearance] warrants protection – other than to accept the government's own designation," which would usurp the Court's discretion to seal a judicial record. *Parhat*, 532 F.3d at 853; *see also Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) ("It is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy. Therefore, insofar as a party seeks to file with the court nonclassified information the Government believes should be 'protected,' the Government must give the court a basis for withholding it from public view."). Accordingly, petitioner and his counsel may publicly disclose that he has been approved for transfer from Guantanamo by the Guantanamo Review Task Force. It is

FURTHER ORDERED that this Order shall be stayed until the close of business on July 7, 2009 unless a stay is issued by the D.C. Circuit Court of Appeals.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

DATE: June 30, 2009

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE,

Petitioner,

v.

BARACK OBAMA, *et al.*,

Respondents.

Civil Action No. 05-392 (ESH)

FILED UNDER SEAL

MEMORANDUM OPINION AND ORDER

Before the Court is the government's emergency motion to stay the Court's June 30, 2009 Order. For the reasons stated herein as well as those set forth at the hearings on June 30 and July 7, 2009, and in the Court's June 30, 2009 Order, the government's motion is DENIED.

PROCEDURAL BACKGROUND

On May 21, 2009, the government gave notice that the Guantanamo Review Task Force had completed its review of petitioner's case, and that as a result of that review, petitioner had been approved for transfer from Guantanamo Bay to a foreign country.[1] In its e-mail notification to the Court, the government indicated that it had designated petitioner's clearance status as "protected information" in accordance with the protective order governing the Guantanamo habeas cases. *See* Protective Order and Procedures for Counsel Access to Detainees at the United States Navel Base at Guantanamo Bay, Cuba, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Sept. 11, 2008) (Dkt. No. 409).

[1] Accordingly, an administrative stay of petitioner's habeas case was entered on May 27, 2009.

Three weeks passed without any motion by the government to designate petitioner's clearance status as protected. On June 11, 2009, petitioner filed a motion to unseal petitioner's clearance status or, in the alternative, for a hearing to address whether to lift the stay in his habeas case.

On June 15, 2009, the government filed an identical motion in twenty-two different Guantanamo cases, seeking to confirm its protected designation of the government's approval of these petitioners for transfer and all related and derivative documents. In addition, in response to the Court's Order requiring the government to provide a status report detailing the specific steps that have been and are being taken to effectuate petitioner's transfer, the government filed a status report on June 23, 2009, indicating the government's desire to return petitioner to Algeria, although it has yet to even begin discussions with that country ostensibly because of the Order entered by Judge Hogan on October 29, 2008, enjoining petitioner's transfer to Algeria.

On June 30, 2009, the Court heard argument on the issue of whether petitioner's clearance for transfer from Guantanamo Bay should be deemed protected. The Court granted petitioner's motion to unseal his clearance, denied the government's cross-motion to designate his clearance as protected, and issued an Order stating that "petitioner and his counsel may publicly disclose that he has been approved for transfer from Guantanamo by the Guantanamo Review Task Force." *See* Order (June 30, 2009) (Dkt. No. 223).

The government orally requested a two-week stay of the Court's Order in order to seek relief from the Court of Appeals. The Court granted that request in part, and stayed its Order for one week so that the government could pursue an appeal. The Court's Order specified that it would stayed only "until the close of business on July 7, 2009 unless a stay is entered by the D.C. Circuit Court of Appeals." *See* Order (June 30, 2009) (Dkt. No. 223).

The government did not immediately appeal the decision. Instead, it waited until mid-day on July 7, 2009, the very date the stay was set to expire, to file its appeal. At or about 11:30 a.m. on July 7, the government also filed a motion for an indefinite stay pending resolution of its appeal, or, alternatively, for another one-week stay.[2] Petitioner filed an opposition less than two hours later, and the Court held a hearing at 2:30 p.m. that same day.

ANALYSIS

To prevail on a motion for a stay pending appeal, a party must show: (1) a likelihood of prevailing on the merits of its appeal; (2) that it will suffer irreparable injury absent the stay; (3) that the non-moving party will not be harmed by the issuance of a stay; and (4) that the public interest will be served by a stay. *Al Maqaleh v. Gates*, __ F. Supp. 2d __, 2009 WL 1528847, *3 (D.D.C. June 1, 2009) (citing *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003)).

The Court has already considered and rejected the government's arguments to protect petitioner's clearance status. For those reasons, and for the reasons stated below, the Court concludes that the government is not likely to prevail on appeal, the government has not shown irreparable injury, the stay will further prejudice this detainee's ability to be released from detention at Guantanamo Bay, and the public has an interest in having access to this information in this case. It therefore again denies the government's request for an additional stay.

"It is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy. Therefore, insofar as a party seeks to file with the court nonclassified information the Government believes should be 'protected,' the

[2] The government has failed to provide a convincing reason as to why it waited a full seven days before filing its appeal. *See* D.C. Circuit Handbook of Practice and Internal Procedures 32 (2009) ("Where counsel or a party gives only a vague or general explanation as to why [an "emergency motion"] was not filed at least 7 calendar days before the date of the requested court action, the Court may conclude that expedited consideration of the motion is unwarranted.").

Government must give the court a basis for withholding it from public view." *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007). The government has no power to unilaterally designate information as protected. *See* Mem. Op. at 2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. June 1, 2009) (Dkt. No. 1780) ("[T]he Protective Order permits the government *to ask the Court* to designate unclassified information as 'protected,' thereby shielding such information from the public.") (emphasis added).

Paragraph 34 of the protective order governing the Guantanamo Bay habeas cases requires the government to notify habeas counsel if it seeks to designate information as protected. If the parties cannot agree – as is the case here – then the government is required to file a motion asking the Court to order the designation. *See* Protective Order and Procedures for Counsel Access to Detainees at the United States Navel Base at Guantanamo Bay, Cuba, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Sept. 11, 2008) (Dkt. No. 409).

In making determinations regarding protected designations, the Court is mindful that the judiciary may not involve itself in matters left solely within the province of the executive. *See El-Shifa Pharmacuetical Industries Co. v. United States*, 559 F.3d 578, 582 (D.C. Cir. 2009) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). It is, however, the judiciary's duty to decide whether unclassified information should be protected based on a careful consideration of the specific circumstances and unique facts presented by each case. In doing so, the Court recognizes that "public access plays a significant positive role in the functioning" of habeas proceedings. Mem. Opin. at 14, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH)

(D.D.C. June 1, 2009) ("Opening the judicial process ensures actual fairness as well as the appearance of fairness.").

The government's rationale for protecting petitioner's clearance status is riddled with contradictions. On one hand, the government argues that release of petitioner's clearance status would lead to widespread release of the clearance status of all detainees which would in turn frustrate the government's diplomatic efforts. Yet, the government has previously permitted the fact that a petitioner has been cleared for transfer to be public without apparent concern for its global impact. For example, in *Batarfi et al. v. Gates*, Civ. No. 05-409 (EGS), the government released the petitioner's clearance status to the public – a fact which was subsequently noted in unsealed orders by the court. *See, e.g.*, Order (Mar. 30, 2009) (EGS) ("Petitioner has been approved for transfer from Guantanamo Bay."). In *Omer and Yoyej v. Obama et al.*, Civ. No. 05-2386 (RBW), Judge Walton issued a decision denying the government's request to protect the fact that the petitioners have been approved for transfer, but the government chose not to appeal that decision. *See, e.g.*, Order (June 4, 2009) (RBW). Notably, one of those petitioners is an Algerian.

Moreover, when a petitioner held at Guantanamo Bay is granted habeas relief, that information immediately becomes public. There is no rational distinction between the public disclosure of court decisions ordering the release of the detainee and the public disclosure of transfer clearance notices. Petitioner's case was stayed because of the government's decision to clear him for transfer, and the public has an interest in understanding why petitioner's habeas case is not proceeding promptly, as required by *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) ("The detainees in these cases are entitled to a prompt habeas corpus hearing."). There is no practical reason to keep clearance approval secret from the public simply because it has been

granted by the government instead of the Court, nor should petitioner potentially be put in a worse position by being cleared for transfer than by having an adjudication of his habeas case.

This Court has already conducted a fact-based inquiry to determine whether the information sought to be protected is supported by specific and valid reasons, and the Court must again reject the government's attempt to file an identical motion and generalized declarations in twenty-two cases that fails to address any of the specific factors related to petitioner's individual circumstances. As the D.C. Circuit admonished in *Parhat v. Gates*, the government cannot rely "solely on spare, generic assertions of the need to protect information." 532 F.3d 834, 852-53 (D.C. Cir. 2008). Despite this admonition, the government provides no specificity as to why Ameziane's cleared status must be protected or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries. Without "an explanation tailored to the specific information at issue," this Court has "no way to determine whether [Ameziane's transfer clearance] warrants protection – other than to accept the government's own designation," which would usurp the Court's discretion to seal a judicial record. *Parhat*, 532 F.3d at 853.

In addition, petitioner will be prejudiced by the nondisclosure his clearance status. Petitioner has been imprisoned at Guantanamo for more than seven years. His counsel is currently engaged in resettlement discussions with two potential host countries, including the country where family members live and where petitioner previously lived. Both countries have expressed an interest in whether petitioner has been cleared for transfer. Notice of petitioner's transfer clearance would likely advance those discussions and secure a more speedy release of petitioner. Moreover, petitioner's habeas case has been stayed on account of his transfer clearance, and it would be unfair if he were in a worse position to advocate for his resettlement

to foreign countries than if his habeas case had proceeded and he was ordered released by this Court.

Nor is the Court convinced by the government's speculative and conclusory arguments that the release of petitioner's clearance status would cause significant harm to the interests of the government. If disclosure of the clearance decisions constituted a security threat, then the government could have designated that information as classified, which, of course, it did not.[3] Moreover, protecting petitioner's clearance status will do little to prevent petitioner's counsel from soliciting other countries to accept him because, as the government admits, petitioner's counsel is free to communicate directly with foreign governments to advocate for his resettlement irrespective of this Court's June 30, 2009 Order.

Most importantly, the record demonstrates that protecting petitioner's clearance status would serve little purpose because that information has already been made public. As counsel indicated, both the Red Cross and petitioner's brother in Canada are already aware that petitioner has been cleared for transfer. The fact that the information is already in the public domain counsels against protection. *See, e.g., Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("[M]aterials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.")

Finally, permitting the government to take additional time to pursue its appeal would be contrary to the Supreme Court's directive that "the costs of delay can no longer be borne by those who are held in custody," *see Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) ("The

[3] The Executive has "authority to classify and control access to information bearing on national security," and the Supreme Court has stated that "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 762 (D.C. Cir. 1990). The government has determined petitioner's clearance status does *not* need to be classified.

detainees in these cases are entitled to a prompt habeas corpus hearing."), especially given the lack of any compelling reason for the government's delay in seeking an appeal. In this regard, the government claims that Judge Lamberth's July 2, 2009 decision in *Mattan v. Obama et al.*, Civ. No. 09-745 (RCL), granting the government's motion for protected designation, was the reason for its delay. This argument cannot withstand scrutiny. First, Judge Lamberth issued his ruling on July 2. Second, his decision did not, as argued by the government, create a new split among the district judges since Judge Kessler had issued a similar decision weeks earlier, which the government could have relied upon in its appeal. Moreover, the different decisions arose not from "serious legal questions," as the government asserts, but from unique factual circumstances that distinguish the instant case from Judge Lamberth's. Here, petitioner's clearance status has already been publicly disclosed both to a family member and to a nonprofit organization; petitioner's counsel is engaged in serious discussions with two potential host countries who have requested notice of his clearance; and petitioner's summary judgment motion had already been decided and his habeas case was moving swiftly to a full-blown merits hearing before it was stayed on account of the government's transfer decision.

The government waited more than three weeks before it filed its motion in support of protected designation, and then it waited a full week before filing its appeal of the Court's June 30, 2009 decision denying that motion. The Court previously provided the government the relief that it seeks here – a temporary stay to allow the government to seek further relief from the Court of Appeals – but the government failed to take advantage of that Order. There is no reason for this Court to grant an additional stay.

CONCLUSION

For the foregoing reasons, the Court denies the government's request for a stay of the June 30, 2009 Order.

ELLEN SEGAL HUVELLE
United States District Judge

DATE: July 8, 2009

EXHIBIT D

CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*

Pursuant to Circuit Rule 28(a)(1)(A), the Petitioner certifies as follows:

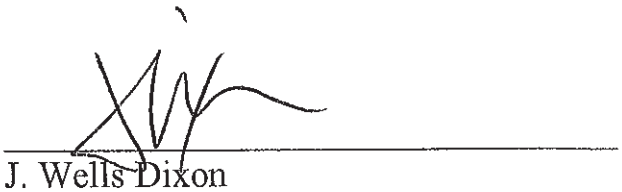
A. Parties

Petitioner is Djamel Ameziane, a prisoner at the United States Naval Station at Guantánamo Bay, Cuba. He is a citizen of Algeria.

Respondents are Barack H. Obama, President of the United States of America; Robert M. Gates, Secretary of Defense of the United States of America; the Commander of Joint Task Force-GTMO; and the Commander of the Joint Detention Operations Group, Joint Task Force-GTMO.

B. *Amici Curiae*

There are no *amici curiae.*



J. Wells Dixon