IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIF el-MASHAD, et al. Petitioners, v. GEORGE W. BUSH, et al., Respondents.	)	Civil Action No. 1:05-CV-270 (JR)

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL MODIFICATION OF THE COURT'S APRIL 7, 2005 ORDER AND OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY

Petitioner Algazzar's opposition to respondents' motion to partially modify the Court's April 7 order relies on sensationalism instead of evidence. Rather than litigate about the actual policies and practices of the Department of Defense concerning transfers and repatriations from Guantanamo that senior government officials have explained in detail in sworn declarations, petitioner prefers to debate the propriety of a hypothetical parade of horribles. Thus, for example:

- Petitioner argues that his rights would be violated by "the torture of Mr. Algazzar, if carried out pursuant to a United States Government policy or aided and abetted by United States Government officials" (Petr's Opp. at 15) and that "the Court may act to prevent Mr. Algazzar from being rendered to Egypt for purposes of torture" (Petr's Opp. at 18 n.5), but ignores the sworn declarations explaining that the United States abhors torture and engages in a careful, deliberative policy to avoid returning detainees to countries where it is more likely than not that they will be tortured.

- Petitioner speculates that other rights of Algazzar's might be violated "[i]f Respondents' sudden desire to render Mr. Algazzar into the custody of Egyptian authorities is motivated by a wish to punish him" (Petr's Opp. at 15 n.3), but ignores respondents' explanation that "DoD has no interest in detaining enemy combatants longer than necessary" and that, far from trying to "punish" former detainees, respondents simply engage in a dialogue with the receiving government "to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent

determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies" (Waxman Decl. dated Oct. 14, 2005, ¶ 5).

- And petitioner repeatedly characterizes the repatriation of Algazzar as what he terms a "rendition," in which respondents are "simply attempting to use Egypt as a proxy for the United States" (Petr's Opp. at 2 and passim), but again ignores the plain statement that "the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States" (Waxman Decl. dated Oct. 14, 2005, ¶ 5).

Petitioner thus disregards the actual operative policies and facts governing transfers and repatriations from Guantanamo, and instead attempts to litigate about hypotheticals and conspiracy theories. But these hypotheticals and theories – supported by no evidence – fail to warrant the unprecedented and extraordinary step of blocking a repatriation of an alien captured abroad during wartime to his home country after diplomatic negotiations with that foreign government, in effect requiring the government to keep that foreign national whom it no longer wishes to detain in its custody indefinitely. Moreover, as we show below, the various legal theories that petitioner invokes to try to block a transfer do not withstand scrutiny. Finally, there is no basis for either fact-finding or the so-called "limited" discovery petitioner is seeking, and the Court should decline to authorize it.[1]

I. THERE IS NO VALID LEGAL BASIS FOR PREVENTING TRANSFER

Petitioner first contends that the "The Court Has Authority to Review Any Proposed Transfer to Protect its Habeas Jurisdiction." Petr's Opp. at 12-14. Respondents already addressed this purported basis for blocking a transfer in their opening brief. See Resps' Mot. at

[1] Because the issues raised by petitioner's opposition and by his separate motion to authorize discovery overlap so substantially, in the interest of efficiency respondents reply in support of their motion for partial modification of the stay and oppose petitioner's motion for discovery in this single brief.

7-8. As respondents previously explained, habeas corpus is a vehicle for testing the legality of detention by the United States. It stands the notion of habeas corpus on its head to argue that the jurisdiction of the Court to test the legality of United States custody could somehow support forbidding the United States from relinquishing custody if it sees fit to do so. See Almurbati v. Bush, 366 F. Supp. 2d 72, 78 (D.D.C. 2005); Al-Anazi v. Bush, 370 F. Supp. 2d 188, 198 (D.D.C. 2005).

Petitioner does not answer respondents' argument or discuss the cases respondents cite. Instead, petitioner cites three cases for his ipse dixit that the Court's habeas corpus jurisdiction requires the Court to prohibit his repatriation. First, petitioner cites Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004). While Rasul held that the Court has jurisdiction over habeas claims brought by Guantanamo detainees, it did not purport to confer any substantive rights, including the right to challenge a transfer or repatriation, on such detainees. Next, petitioner cites In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), but that case, as well, addresses only the ability of detainees to challenge the legality of their detention by the United States and does not suggest any substantive right to challenge a transfer or repatriation ending that detention.

Finally, petitioner's reliance on Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004), is misleading on several levels. Petitioner describes Abu Ali as "reject[ing] the Government's argument that habeas jurisdiction was lacking, where the United States had apparently arranged for a foreign nation to keep a detainee in custody at the United States' request." Petr's Opp. at 13. In making this argument, petitioner ignores not only the sworn statement of policy filed in this case that Guantanamo detainees such as this petitioner are "transferred entirely to the custody and control of the other government" and are "detained, if at all, by the foreign government

pursuant to its own laws and not on behalf of the United States" (Waxman Decl. ¶ 5), but also the fact that the December 2004 decision in Abu Ali expressly withheld the very findings petitioner attributes to it. See Abu Ali, 350 F. Supp. 2d at 68 (making clear that the Court was not finding that it had jurisdiction and was not holding that constructive custody had been established as a factual matter; rather, those determinations would be made at a later date). Indeed, Judge Bates later went to some length to repudiate attempts to use his decision in Abu Ali as authority for judicially regulating transfers and repatriations of alien enemy combatants from Guantanamo:

> Petitioners have cited this Court's decision in Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004), in which the Court held that jurisdiction could potentially exist over a habeas petition by a United States citizen detained in a Saudi prison who alleged that he was being held at the behest and ongoing direction of the United States, as an example of a case where the United States was using a foreign intermediary to avoid the jurisdiction of the United States courts. See Petr's'. Mem. ¶ 9. Abu Ali is not particularly instructive here. This Court's decision in Abu Ali was at the motion to dismiss stage, where the Court was obliged to accept petitioners' allegations of collusion between the United States and Saudi Arabia as true. Abu Ali, 350 F. Supp. 2d at 34-35. Here, petitioners bear the heavy burden of proving their entitlement to preliminary injunctive relief. Moreover, the petitioners in Abu Ali came forward with a variety of different types of information suggesting United States involvement in the detention, including newspaper articles quoting named United States officials, declarations containing the transcribed text of government documents, and affidavits regarding communications between petitioner's family and Saudi officials. Id. at 31-36. Here, petitioners have come forward with no information at all suggesting the collusive transfer of Guantanamo Bay detainees. In addition, although the United States chose not to respond to the evidence proffered by petitioner in that case, id. at 37-38, it has produced strong rebuttal evidence here. Finally, unlike the petitioners in this case, the detainee in Abu Ali was a United States citizen, a fact that featured prominently in the reasoning of that case. Id. at 37-41, 54- 65.

Al-Anazi, 370 F. Supp. 2d at 197 n.9 (denying motion for preliminary injunction requiring advance notice of transfer or repatriation of Guantanamo detainee).[2] Clearly, neither Abu Ali nor

[2] Further defeating petitioner's reliance on Judge Bates' preliminary decision in the Abu Ali habeas case, the District Judge presiding over the criminal trial of Mr. Abu Ali more recently

the other cases petitioner cites provide a coherent legal basis for the Court to preclude repatriation of a detainee according to the policies and practices expressed in respondents' declarations.

Petitioner's next argument is that petitioner Algazzar has rights under the United States Constitution that "includ[e] the right to be free from unlawful detention and torture." Petr's Opp. at 14. Even assuming arguendo that petitioner possesses some form of constitutional rights – as the Court is aware, the existence of any constitutional rights for enemy aliens captured outside the United States during wartime is precisely the issue currently before the Court of Appeals – such constitutional rights would hardly furnish a basis to block the return of an alien enemy combatant detainee to his home country pursuant to the policy described in respondents' declarations. After all, such a repatriation would in fact make the detainee permanently free from detention – lawful or unlawful – by the United States.[3] And, as respondents have explained, the United States abhors torture and employs policies and practices to guard against a detainee being

---

denied a motion to suppress, rejecting after an evidentiary hearing the theory that the foreign government in that case had been detaining Abu Ali as a "surrogate" for the United States in order to "circumvent" his rights. See United States v. Abu Ali, No. Crim. A. 05-53 GBL, 2005 WL 2838114, *44 (E.D. Va. Oct. 25, 2005) (finding that "U.S. and Saudi officials did not act in a 'joint venture' and that Saudi officials did not act as 'agents' of the United States in the arrest, detention, or interrogation of Mr. Abu Ali").

[3] To the extent that petitioner's theory is that his alleged right under the United States Constitution "to be free from unlawful detention" includes a right to be free from any future detention by the sovereign government in his own country "pursuant to its own laws and not on behalf of the United States" (Waxman Decl. ¶ 5), such a theory would be mistaken, because it is beyond cavil that the United States Constitution does not govern actions by foreign sovereigns in respect of their own citizens.

transferred to a country where it is more likely than not that he would be tortured.[4]

Petitioner next turns to his alleged rights under various international law claims to avoid being returned to his home country. Specifically, petitioner advances arguments based on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), and Article 33 of the United Nations Convention Relating to the Status of Refugees ("Refugee Convention"). Petr's Opp. at 16-20.

It is clear that the CAT, in and of itself, does not confer judicially enforceable rights. The United States Senate conditioned its advice and consent to the CAT upon a Resolution of Ratification declaring "that the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990); S. Exec. Rep. 101-30, at 31. The Senate Report regarding the CAT, to which the Resolution of Ratification was appended, included the Executive's analysis that the term "competent authorities" in Article 3 of the CAT "appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. . . . Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in

[4] Petitioner denigrates the "more likely than not" standard and the officials who apply it with his caricature of an "unnamed official conclud[ing] at some time . . . that Mr. Algazzar 'probably' would not be tortured upon his return." Petr's Opp. at 9-10. Petitioner overlooks that the "more likely than not" standard is not respondents' creation, but rather is precisely the formulation that the United States Senate adopted as a condition of ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Resolution of Ratification, 136 Cong. Rec. S17486, S17492 (Oct. 27, 1990) ("The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention: . . . . That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean "'if it is more likely than not that he would be tortured.'").

domestic courts." S. Exec. Rep. 101-30, at 17-18 (emphasis added).

Petitioner does not appear to dispute that the CAT itself does not give rise to judicially enforceable rights, but does contend that he enjoys judicially enforceable rights created by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), Pub. L. No. 105-277, 112 Stat. 2681-822 (1998), which implemented the CAT. A simple review of the FARR Act, however, plainly reveals no language therein conferring judicial review for a claim such as that being made here. Moreover, § 2242(d) of the FARR Act expressly provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a) [prohibiting the return of persons when there are substantial grounds for believing they will be tortured], except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252)." FARR Act § 2242(d). This case does not involve such a final order of removal. Therefore, "nothing in [the FARR Act] shall be construed as providing any court jurisdiction to consider or review" petitioner's claims herein. Id.; see O.K. v. Bush, 377 F. Supp. 2d at 118 n.17 ("[A]s this Court explained in Al-Anazi, FARRA is expressly limited to claims arising out of a final order of removal. . . . FARRA is quite explicit that no legal rights can be derived from its rules outside of the removal setting, by analogy or otherwise."); Al-Anazi v. Bush, 370 F. Supp. 2d at 194.[5]

[5] Seemingly at odds with his reliance on the FARR Act in text, Petitioner freely admits in a footnote that § 2242(d) of the FARR Act "purports to confine review of CAT claims to the specific context of a final order of deportation" (Petr's Opp. at 17 n.4) – which this case is not. Relying on out-of-Circuit authority dealing exclusively with the immigration context of aliens resisting removal or deportation, he then grasps at other arguments, contending that the FARR

Petitioner's claims with respect to the Refugee Convention (Petr's Opp. at 18-20) are equally lacking in merit. The United States is not a party to the Refugee Convention, but undertook many of the same obligations by acceding to the United Nations Protocol relating to the Status of Refugees ("Refugee Protocol") since the Refugee Protocol incorporates the substantive provisions of Articles 2 through 34 of the Refugee Convention. See generally Castellano-Chacon v. INS, 341 F.3d 533, 544 (6th Cir. 2003). The Refugee Protocol, however, "is not judicially enforceable law in the United States." Id. at 544 (citing, inter alia, INS v. Stevic, 467 U.S. 407, 428 n.22 (1984)); see also Reyes-Sanchez v. Ashcroft, 261 F. Supp. 2d 276, 288-89 (S.D.N.Y. 2003) (habeas case). Moreover, the Supreme Court has made clear that neither the Refugee Convention, the Refugee Protocol, nor the statute implementing the Refugee Protocol applies outside the United States. Sale v. Haitian Centers Council, Inc., 509 U.S. 184 (1993) (involving, among others, Haitians at Guantanamo).

Act nonetheless is enforceable in habeas. The immigration cases upon which petitioner relies, however, involve the outcomes of a process under specific immigration regulations promulgated pursuant to subsection (b) of the FARR Act to implement the policy reflected in subsection (a) of the FARR Act – regulations that do not apply here. See, e.g., Ogbudimkpa v. Ashcroft, 342 F.3d 207, 216 (3d Cir. 2003) (petitioner's challenge was to "the IJ's application of the regulations to his case"); Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir. 2003) (referring to "authorizing legislation and implementing regulations"). To the extent petitioner purports to rely directly on subsection (a) of the FARR Act, a general statement of "the policy of the United States" does not itself "create a cause of action or any judicially enforceable rights" that would "authorize[] an injunction," Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988), either of its own accord or through habeas. Petitioner further suggests that, regardless of the FARR Act, CAT claims are cognizable through habeas corpus. Under the controlling law of this Circuit, however, "treaty-based individual rights" that are not otherwise judicially enforceable do not become judicially enforceable simply by being invoked through habeas corpus. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), cert. granted, 74 U.S.L.W. 3108 (Nov. 7, 2005); accord Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003); Wesson v. U.S. Penitentiary Beaumont, 305 F.3d 343, 348 (5th Cir. 2002); United States v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002).

II. THE RULE OF NON-INQUIRY BARS JUDICIAL REVIEW OF THE UNITED STATES' DIPLOMATIC DIALOGUE WITH OTHER NATIONS AND ITS FOREIGN AFFAIRS ASSESSMENTS

Ironically, the most compelling argument for why the Rule of Non-Inquiry should apply here is to be found in petitioner's own submissions: what he seeks is a full-fledged, discovery-intensive, plenary judicial inquiry into the United States' diplomatic affairs, at the conclusion of which he asks the Court to substitute its own views about the conditions of Egypt's justice system and whether officials of Egypt's government can be trusted for those of the competent authorities in the Executive Branch. See Petr's Opp. at 18 (calling for a "probing examination"), 24-25 (asking that respondents be required to submit "evidence of what those discussions [with Egyptian authorities] entailed or what, if any, assurances were actually provided"); Petr's Opp. for "Limited" Discovery at Proposed Doc. Req. No. 3 (seeking "[a]ll documents that address, discuss, contain, or describe any communication or correspondence" between the United States and Egypt relating to transfer of Algazzar); id. at Doc. Req. No. 5 ("[a]ll documents that address, discuss, contain, or describe any 'assurances' . . . requested by or provided to the United States Government"), id. at Proposed 30(b)(6) Depo. Notice (seeking testimony on same topics); id. at Interrog. No. 4 ("Identify and describe any 'dialog' . . . between the United States Government and any other entity that refers or relates to Algazzar.").

In stark contrast to the fact-intensive approach petitioner invites this Court to embark upon, the courts have uniformly eschewed inquiry into "'the fairness of a requesting nation's justice system'" and "'the procedures or treatment which await a surrendered fugitive in the requesting country.'" United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)); see Al-Anazi, 370

F. Supp. 2d at 194 (holding that this "well-established line of cases in the extradition context" "counsel[s] even further against judicial interference" in transfers and repatriations of Guantanamo detainees). For example, in Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990), a United States citizen was extradited from the United States to Israel to stand trial for an alleged terrorist attack. While the district court upheld the extradition only after receiving testimony and extensive documentation – akin to the "limited" discovery for which petitioner in this case presently seeks authorization – concerning Israel's law enforcement system and treatment of prisoners, the Second Circuit held that such inquiry was wholly improper. "The interests of international comity are ill-served," the Second Circuit explained, "by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced." Id. at 1067. "It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." Id. Accord Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980) (refusing to bar extradition based on allegations that appellant "may be tortured or killed if surrendered to Mexico," because "the degree of risk to [Escobedo's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch" (internal quotation marks omitted)); Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977); Matter of Extradition of Sandhu, 886 F. Supp. 318, 321-23 (S.D.N.Y. 1993); Hoxha v. Levi, 371 F. Supp. 2d 651, 659-61 (E.D. Pa. 2005) (holding that allegations that individual would be tortured after extradition to Albania were solely for the Secretary of State to weigh, and not an appropriate subject for judicial inquiry), on appeal, No. 05-3149 (3d Cir.). See generally Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 Cornell L. Rev. 1198 (1991).

Petitioner argues that the Rule of Non-Inquiry is irrelevant here, insisting that it "depends entirely on the existence of an extradition treaty" and applies only in the extradition setting. Petr's Opp. at 20. While it is true that the type of circumstances requiring application of the Rule of Non-Inquiry have tended to arise most frequently in the extradition setting, it is wrong to infer that as a result the Rule of Non-Inquiry is somehow exclusive or subsidiary to the extradition statute. First, the text of the extradition statute itself does not mention the Rule of Non-Inquiry, casting doubt on any inference that it was specially designed to operate exclusively in tandem with the extradition statute. Second, the cases that embody the Rule of Non-Inquiry make clear that it rests on separation-of-powers principles about the functions of the different branches of government, and on the proposition that it is not the role of the Judiciary to conduct foreign affairs or to probe the judgments of the Executive in foreign affairs matters. These foundational principles transcend the statutory extradition framework and do not lose their vitality simply because the foreign affairs judgments in question occurred in a context other than a statutory extradition.

Petitioner postulates that application of the Rule of Non-Inquiry in the extradition setting is conditioned on the prior judicial involvement of a federal district judge, magistrate judge, or state court judge who determines whether the offense is extraditable and whether there is probable cause to support the charged offense. Petr's Opp. at 21; see 18 U.S.C. § 3184. The cases petitioner cites do not draw any such connection,[6] however, and the extraditability and

[6] The general comment in Lo Duca v. United States, 93 F.3d 1100, 1103 (2d Cir.), cert. denied, 519 U.S. 1007 (1996), that extradition "interpose[s] the judiciary between the executive and the individual" was in a context – a constitutional challenge by an extraditee to a particular provision in the extradition statute – that had nothing to do with the Rule of Non-Inquiry or the issue of whether it may apply in situations other than extradition.

probable cause determinations are narrow, discrete inquiries that do not entail judicial examination of the type of matters covered by the Rule of Non-Inquiry. See, e.g., Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993) ("The inquiry conducted by an 'extradition magistrate' is limited."). Indeed, petitioner's proposed discovery requests and comments about what proceedings should ensue reveal that he has in mind a searching examination of exactly the type of diplomatic and foreign policy matters classically covered by the Rule of Non-Inquiry, not the much more narrow determination that a judicial officer would make in an extradition. If credited, petitioner's position would result in an absurd situation in which an alien captured abroad during wartime and held abroad as an enemy combatant would receive far more expansive judicial review before he could be repatriated, than a fugitive, even one who was a citizen or resident of the United States, would receive before he could be arrested within this country and extradited to a foreign country for the sole purpose of facing certain trial there.[7]

To support his argument that the Rule of Non-Inquiry is not applicable here, petitioner argues that language from a First Circuit decision establishes that "the existence of [an extradition treaty] 'indicate[s] that, at least in some general sense, the executive and legislative branches consider the treaty partners' justice system sufficiently fair to justify sending accused persons there for trial.'" Petr's Opp. at 20 (quoting In re Extradition of Howard, 996 F.2d 1320, 1329 (1st Cir. 1993)). In a later case, however, the First Circuit rejected precisely the argument

[7] To the extent that petitioner may contend that the only possible way to return him to his home country would be pursuant to an extradition treaty or statute, such a contention would be without merit. See United States v. Alvarez-Machain, 504 U.S. 655 (1992); Ker v. Illinois, 119 U.S. 436 (1886); Coumou v. United States, 107 F.3d 290, 295 (5th Cir. 1997) (reversing lower court's holding, 1995 WL 2292, *11 (E.D. La. Jan. 3, 1995), that "[n]or did the United States, or its officers or agents, have the discretion to deliver an arrested person to the government of Haiti, unless the extradition laws of the United States were followed").

that petitioner is making here, stating that "[n]or is it true, as Liu suggests, that the rule of non-inquiry is only appropriate where the existence of a treaty reflects a substantive judgment about the fairness of another nation's procedures." Kin-Hong, 110 F.3d at 111 n.13. The First Circuit further noted that "[t]he rule of non-inquiry expresses no judgment about a foreign nation's ability and willingness to provide justice." Id. (emphasis in original). Moreover, while pretermitting the question "[w]hether the doctrine is constitutionally mandated" as "immaterial here," the First Circuit cited an analogy to the act-of-state doctrine and described the doctrine using grand language invoking the separation of powers:

> The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers. It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.

Id. at 110-11 (citation omitted). This language, imbued as it is with constitutional significance, is hardly consistent with the notion that the Rule of Non-Inquiry is some sort of peculiar idiosyncrasy narrowly tied to the extradition statute. See also Matter of Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995) ("Undergirding this principle is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."); Sandhu, 886 F. Supp. at 321 ("The rule of non-inquiry arises from recognition that the executive branch has exclusive jurisdiction over the country's foreign affairs.").

Indeed, the D.C. Circuit invoked a concept equivalent to the Rule of Non-Inquiry, even

though it did not use that exact terminology, in a situation that did not constitute an extradition, holding that it was improper for the Judiciary to examine allegations of unfairness in a foreign nation's trial of U.S. citizens. Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972). "Nor do we pass upon appellants' contention that their sentences unjustly deprive them of their liberty," the Court of Appeals explained, "but simply note that such a claim has long been addressable to the President." Id. at 1225; see also id. at 1215 ("Surely, in situations like this, '[t]he controlling considerations are the interacting interests of the United States and foreign countries, and in assessing them we must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations.'" (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383 (1959))).

Finally, petitioner appears to argue that the Supreme Court's decisions in Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004), and Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), somehow abolished the Rule of Non-Inquiry and the separation of powers. Petr's Opp. at 22-23. Quite clearly, those two decisions, each of which involved the use of the writ of habeas corpus (in Hamdi, by a citizen detained within the United States) to challenge detention by the United States, do not even intimate that there is an appropriate judicial role in reviewing or prohibiting a repatriation of an enemy alien in which the United States is relinquishing custody. Moreover, the issues before the Court in those cases did not involve the United States' diplomatic dialogue and foreign affairs assessments, which are the central focus of the Rule of Non-Inquiry. Thus, petitioner's contention that Hamdi and Rasul dictate the answer to the discrete issue presently before this Court is specious.

III. PETITIONER'S REQUESTS FOR DISCOVERY AND FACT-FINDING SHOULD BE DENIED

The third section of petitioner's opposition brief (see Petr's Opp. at 23-31) and petitioner's separate motion for "limited" discovery both rest on a common, and faulty, premise about how this case should proceed. Petitioner assumes that, in order for petitioner's repatriation to go forward, respondents must divulge to petitioner's counsel and the Court the details of their diplomatic dialogue and foreign policy judgments and petitioner must have an opportunity to test and impeach those facts, at the conclusion of which the Court would make its own assessment of the foreign affairs situation and the final decision about whether repatriation is appropriate.

As we have just explained, see supra Section II, the Court is without jurisdiction to undertake such an evidentiary inquiry because the very matters petitioner wishes to dispute – diplomatic relations, judgments about the reliability and credibility of diplomatic assurances, and the assessment of conditions in a foreign country – are reserved to the Executive Branch. Moreover, as set forth above, see supra Section I, petitioner has yet to come forward with any valid legal claim or theory to support blocking the repatriation of petitioner. The Court is well equipped to rule on the pending motion on the basis of the arguments in the parties' written submissions. Petitioner's request for fact-finding and discovery should be denied.[8]

---

[8] Discovery is disfavored in habeas corpus cases and not allowed except by leave of court for good cause shown. See Harris v. Nelson, 294 U.S. 286, 296-97 (1969) (discovery is "ill-suited to the special problems and character of [habeas] proceedings" and tends to "be exceedingly burdensome and vexatious" in such cases). Petitioner fails to show good cause for propounding unfathomably broad discovery requests in aid of an evidentiary inquiry that should never occur in the first place. It also is worth noting that many of the requests, by their terms, call for material that goes to the heart of the United States's diplomatic confidences, as well as material clearly covered by the deliberative process privilege. See Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (referring to absolute privilege against disclosure of information that would result in "disruption of diplomatic relations with foreign governments."), cert. denied, 465

Dated: November 14, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Robert J. Katerberg
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
EDWARD H. WHITE
ROBERT J. KATERBERG
ANDREW I. WARDEN
NICHOLAS J. PATTERSON
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 616-8298
Fax: (202) 616-8460

Attorneys for Respondents

U.S. 1038 (1984). Indeed, discovery both underscores and would aggravate the serious separation of powers problems posed by petitioner's suggested approach for proceeding. See, e.g., Cheney v. United States Dist. Ct. for the Dist. of Columbia, 124 S. Ct. 2576, 2586-88 (2004) (noting availability of mandamus to restrain discovery that interferes with the ability of a coequal branch of Government to perform its constitutional functions). Of course, respondents reserve the right to interpose their general and specific objections on a request-by-request basis if and when the draft discovery requests attached to petitioner's motion are authorized and propounded.