UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SAMEH SAMI S. KHOUZAM
(A 75 795 693)

Petitioner,

v.

THOMAS HOGAN, as Warden, York County Prison, et. al.,

Respondents.

CIVIL NO. 3:CV-07-00992
(Judge Vanaskie)

ELECTRONIC FILING

PETITIONER'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The government's brief is most notable for what it does not say. It does not dispute Egypt's record of consistently engaging in torture, Egypt's past torture of Mr. Khouzam, or Egypt's prior violations of diplomatic assurances. Nor does it dispute the extensive evidence marshaled by Petitioner which demonstrates the inherent problems associated with monitoring compliance with such assurances. Instead, rather than making any effort to explain the basis for its determination that Egypt's assurances in Mr. Khouzam's case are sufficient to protect him from torture, the government simply argues that this Court "must defer to the Executive Branch's findings" on this issue and "may not probe further into the bases for or wisdom of [its] decision."

At the same time, the government makes the extraordinary assertion that Mr. Khouzam received all the process he was due, even though absent this Court's intervention – which the government continues to oppose -- Mr. Khouzam would have been removed without any process at all. In doing so, the government studiously ignores the cross-country evidence requested by this Court which demonstrates that the United States stands alone in providing no independent review of the sufficiency of assurances.

As set forth below, the government still has not demonstrated that the Secretary of State or his delegate performed their functions as required under the regulations. Moreover, this Court should reject the argument that it has no role to play in assessing the legality and sufficiency of the assurances. Based on the record before it, the Court should find that Mr. Khouzam's removal pursuant to such assurances would violate his rights under FARRA, the implementing regulations and due process because the assurances are not sufficiently reliable to protect him from torture. Alternatively, if this Court finds the record insufficiently developed to make such a finding, it should provide for additional factfinding. It should also reject the government's argument that Mr. Khouzam has received all the process he is due, and provide him with a meaningful opportunity to rebut the government's claim that the assurances are sufficient to protect him from torture, including the right to limited discovery and judicial review.

However, if the Court accepts the government's argument that the Court is powerless to assess the legality and sufficiency of assurances, due process concerns compel it either to construe FARRA and its implementing regulations as not authorizing the use of diplomatic assurances, or to strike the statute and regulations down as unconstitutional.

I. THIS COURT HAS JURISDICTION OVER ALL OF MR. KHOUZAM'S CLAIMS.

In this Court's prior decision, it properly concluded that it had habeas jurisdiction over this case. The Court also properly observed that under certain circumstances *factual* claims may not be reviewable in habeas, citing *INS v. St. Cyr*, 533 U.S. 289 (2001). The government has now seized on the Court's general observation about the scope of habeas review and argues that the Court lacks jurisdiction to determine whether the diplomatic assurance in Mr. Khouzam's case satisfies the "sufficiently reliable" standard set forth in the applicable regulations or whether the assurance suffices to establish under FARRA that there no longer are "substantial grounds" for believing that he is at risk of torture. Govt.'s Br. of Aug. 15, 2007, at 12-14, 39, 59 n.12.[1]

The government's contention that this Court lacks jurisdiction to determine whether the diplomatic assurance is sufficient within the meaning of the relevant regulations and statutes is demonstrably wrong for three independent reasons. First, and dispositively, the issue of whether or not the diplomatic assurance is sufficient within the meaning of the regulations and statutes is *not* a factual claim at all. Rather, it is a mixed question of law and

[1] The government does not suggest that the Court lacks habeas jurisdiction over any of Mr. Khouzam's other claims.

fact involving the *application* of regulatory and statutory standards ("sufficiently reliable" and "substantial grounds") to a given set of circumstances. As the Third Circuit has made unambiguously clear, this type of "application" question falls well within the scope of habeas jurisdiction. *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005) (noting habeas jurisdiction over "application of law"). *See* Section I.A, *infra.*

Second, *even* if the claim were factual, this Court would nonetheless have habeas jurisdiction. By the very terms of the habeas statute, and by historical practice, a district court always has jurisdiction under Section 2241 to make any necessary factual findings, including in immigration cases. The exception is where Congress enacts a separate preclusion statute prohibiting the courts from exercising their full jurisdiction – which was the situation in *St. Cyr* and *all* of the other cases on which the government relies. Unlike those cases, however, there is no preclusion statute that prohibits the Court from making factual findings in this case, and the government's efforts to identify one are unavailing. Thus, this Court has its *full* Section 2241 habeas jurisdiction and can make all necessary factual findings. *See* Section I.B, *infra*.

Finally, and critically, the decisions on which the government relies (including *St. Cyr*) are fundamentally different from Mr. Khouzam's case

because those cases *all* involved instances where the petitioner had some opportunity to present facts to an administrative body. Here, there has been no administrative hearing whatsoever and the government has cited no case that remotely suggests that a habeas court cannot fill that void and make factual findings in such circumstances. *See* Section I.C, *infra*.[2]

A. The Question Of Whether Diplomatic Assurances Are Sufficient Within The Meaning Of The Applicable Regulations And Statutes Is Not A Factual Question But Rather Involves The Application Of Law To Fact.

The government does not, and could not, contend that the application of law to fact is unreviewable in habeas. The Supreme Court, Third Circuit and other courts have consistently made clear that habeas jurisdiction encompasses the *application* of law to fact. These courts have further made clear that because claims involving the application of a statute or regulation to the circumstances of a case constitute *legal* claims, such claims must be reviewable in habeas – *even* where the courts' jurisdiction is limited solely to legal claims by a separate preclusion statute (which, in any event, does not exist here). *See INS v. St. Cyr*, 533 U.S. 289, 302 (2001) (habeas covers "application" of law to fact, even in the face of a preclusion statute limiting

[2] The government also suggests that the Court should not review whether the diplomatic assurance is sufficiently reliable because it is a political question implicating foreign relations. That is not an argument about the proper scope of habeas jurisdiction, and is accordingly addressed in a separate section of Petitioner's brief on justiciability.

jurisdiction); *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005) (noting habeas jurisdiction over "application of law to undisputed facts or adjudicated facts" even where a preclusion statute is applicable); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review and exercising jurisdiction over BIA's "application of law to fact" despite preclusion statute); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) ("[h]abeas relief is traditionally available to correct 'errors of law, including the erroneous *application* or interpretation of statutes'" even where a preclusion statute limits jurisdiction) (citing *St. Cyr,* 533 U.S. at 302); *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003) (the "application of the particular facts…to the relevant law falls within the permissible scope of habeas" even where a preclusion statute limits review); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (*Ramadan II*) (habeas jurisdiction encompasses the "application of statues and regulations" to the circumstances of a case despite preclusion statute); *Chen v. Dep't of Justice*, 471 F.3d 315, 327-28 (2d Cir. 2006) (*Chen II*) (explaining that habeas has historically covered the "*application*" of the law to the circumstances of a case, even in the face of a preclusion statute) (emphasis in original) (quoting *St. Cyr)*; *Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (holding that

habeas jurisdiction was available over Singh's claim "even if that claim does not raise a 'purely legal question of statutory interpretation,'" because habeas jurisdiction has historically encompassed the "application" of law to fact, even where a preclusion statute is applicable). *See also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 139-42 (2006) (habeas has traditionally covered the "application" of law to fact despite preclusion statutes).

The government suggests that petitioner is trying to disguise a factual claim as a legal claim. That is flatly incorrect. Mr. Khouzam's claim is a classic legal issue concerning the *application* of regulatory and statutory standards to the circumstances of his case. Specifically, the claims raised by Mr. Khouzam are whether, under the circumstances here, the government has satisfied the *legal* standards set forth in the applicable regulation ("sufficiently reliable"), and statute ("substantial grounds"). Courts routinely characterize this type of claim as legal, and review it in habeas (even in the face of a preclusion statute).

For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court rejected exactly the argument made here by the government. After holding that the executive could not legally subject non-citizens to immigration detention longer than is reasonably necessary to ensure their

removal, the court considered the government's further argument "that, even under our interpretation of the statute, a federal habeas court would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter." *Id*. at 699. The Court rejected this theory, holding that "[w]hether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority." *Id*. The Court then set forth a procedure for future habeas petitions, one that requires courts to consider the foreseeability of future removal in light of all the circumstances—including the likelihood that the administration will reach a repatriation agreement with the relevant country—as well as, in cases where removal is foreseeable, whether detention is necessitated by "the risk of the alien's committing further crimes." *Id*. at 600-701; *see also Abdel-Muhti v. Ashcroft*, 314 F.Supp.2d 418, 426 (M.D. Pa. 2004) (ordering petitioner released under *Zadvydas* after considering and rejecting government's arguments: 1) that a new repatriation agreement with Israel was likely to allow for petitioner's removal in the near future, and 2) that petitioner was refusing to cooperate with his removal).

Similarly, in *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), the Second Circuit found habeas jurisdiction over a claim involving the *application* of a CAT regulation to the facts of the case (and did so in the face a preclusion statute). *Wang* involved a criminal alien who brought a habeas action to challenge the BIA's determination that, on the facts of his case, he failed to satisfy the legal standard set forth in the regulations governing the CAT, *i.e.*, that he was "more likely than not" to be tortured if returned to his home country. The government claimed that there was no habeas jurisdiction, arguing that the alien's claim was essentially a *factual* one – the precise argument the government makes here. 320 F.3d at 142. In rejecting the government's position, the Second Circuit first stated that "Wang does not merely contest the immigration court's factual determinations - he challenges its *application* of the facts to FARRA and the regulations adopted pursuant to FARRA." 320 F.3d at 142 (emphasis added). The Court then emphasized that "[i]n *St. Cyr*, the Supreme Court recognized that the Suspension Clause requires habeas review of claims based upon the erroneous *application* of statutes." *Id*. at 142-43 (emphasis added). Accordingly, the Court held that it had habeas jurisdiction over the alien's claim that the regulations had been misapplied to his case. *See also Singh v. Ashcroft,* 351 F.3d 435, 442 (9th Cir. 2003) ("adopt[ing] the Second

Circuit's well-reasoned analysis" in *Wang*, and rejecting the government's contention that only a "purely legal question of statutory interpretation" is reviewable in habeas).

In *Kamara v. Attorney General*, 420 F.3d 202, 209-11, 213-15 (3d Cir. 2005), likewise, the Third Circuit found habeas over the "application" of the CAT regulations to the petitioner's case. In doing so, the Court made clear that habeas allows a determination whether there has been a "proper application of the regulations." *Id*. at 213.

In short, the questions whether the assurance from Egypt satisfies the legal standards in the regulations and statute are not factual claims, but rather, raise legal issues involving the application of law to fact. In any event, the Court can resolve this case without definitively characterizing Mr. Khouzam's claims as either legal or factual. In the cases discussed above (and in the government's brief), there was a separate statute limiting the Court's jurisdiction to the minimum level of habeas jurisdiction guaranteed by the Suspension Clause, which encompassed legal, but not factual, claims. Accordingly, in those cases, it was necessary for the Court to make the point that the *application* of a regulation or statute raises a legal claim for purposes of habeas review. Here, however, there is no preclusion statute

limiting the Court's Section 2241 habeas statute. Thus, even if Mr. Khouzam's claims are deemed factual, they are reviewable.

B. In The Absence Of A Statute Affirmatively Limiting A Habeas Court's Section 2241 Jurisdiction, The Court Can Review The Factual Findings Of An Administrative Agency.

As Petitioner explained in his opening supplemental brief, the federal habeas statute explicitly contemplates that district courts will make factual findings. Pet.'s Br. of July 31, 2007, at 72; *see* 28 U.S.C. § 2243 (habeas provision directing court to "summarily hear and determine the facts, and dispose of the matter as law and justice require"); *id*. at § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit.").

The statutory text is thus dispositive that a habeas court has authority to make factual findings under Section 2241, and that statutory text contains no special limiting language for immigration cases. In fact, the government simply ignores that courts in the immigration area routinely review facts under their habeas jurisdiction. *See e.g.*, *Madu v. Attorney General*, 470 F.3d 1362, 1367-1368 (11th Cir. 2006) (transferring removal case back to district court with directions to hold evidentiary hearing on factual issue of whether petitioner voluntarily departed in time to avoid entry of valid removal order); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-83 (9th Cir. 2006) (ordering

habeas petitioner released after finding that ICE based its determination on "facially implausible evidence" and failed to consider petitioner's deteriorating health); *Taylor v. U.S.*, 396 F.3d 1322, 1327 n.5 (11th Cir. 2005) ("The writ of habeas corpus may be used to attack deportation proceedings when some essential finding of fact is unsupported by the evidence.") (citing *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923)) .

Notwithstanding the statutory text and case law, the government appears to be arguing that habeas courts lack inherent authority to review or find facts. In support of that position, the government relies on *St. Cyr*, and two Third Circuit decisions, *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), and *Jarbough v. Attorney General*, 483 F.3d 184 (3d Cir. 2007).

None of the government's cases remotely contradicts the uncontroversial point that a habeas court has authority to review and find facts under Section 2241. Rather, in each of those cases, there was a *separate* statutory provision that limited the court's jurisdiction to the constitutional minimum of habeas jurisdiction historically protected by the Suspension Clause. As noted, that constitutional minimum involved review of legal, but not purely factual, claims.

Specifically, both *St. Cyr* and *Auguste* involved an alien who was removable on the basis of a criminal conviction in the United States and thus fell within 8 U.S.C. 1252(a)(2)(C) – a provision that expressly limited jurisdiction in cases involving such aliens. *St. Cyr*, 533 U.S. at 311 ("Finally, § 1252(a)(2)(C), which concerns 'matters not subject to judicial review,' states: 'Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' certain enumerated criminal offenses." (alteration marks omitted)); *Auguste*, 395 F.3d at 137 ("As an alien convicted of an aggravated felony/drug trafficking crime and removable on such grounds, Auguste is statutorily barred from filing a petition for direct review from the BIA's decision to a court of appeals challenging his ineligibility for relief under the CAT." (citing 8 U.S.C. § 1252).[3] Likewise, in *Jarbough*, there was a specific statutory provision (8 U.S.C. § 1158(a)(3)) limiting jurisdiction for asylum applicants who missed the one-year filing deadline. 483 F.3d at 188 ("[Section] 1158(a)(3) stripped

[3] In *St. Cyr*, the alien was raising a "pure question of law," 533 U.S. at 293, and thus the Court's discussion of factual claims was dicta. The Court discussed factual claims in its historical analysis of the scope of habeas jurisdiction in cases where Congress had passed a provision making administrative immigration decisions "final" to the extent consistent with the Constitution, thereby eliminating review of factual claims. The Court's discussion in *St. Cyr* did not remotely suggest that in the absence of a separate statute limiting habeas jurisdiction, courts could not review both legal *and* factual claims.

us of jurisdiction to review a determination that an asylum petition was not filed within the one year limitations period, and that such period was not tolled by extraordinary circumstances." (quotation omitted)).

Here, there is no separate statutory provision that limits this Court's jurisdiction.[4] Thus, this Court has its full Section 2241 habeas jurisdiction and can review both legal and factual claims.

C. A District Court With Habeas Jurisdiction Can Make The Initial Factual Findings Where There Has Been No Prior Hearing.

Finally, the government's cases are all different in another critical respect. In each case, the petitioner had the benefit of an administrative hearing where an immigration judge (followed by the Board of Immigration Appeals) made factual findings. *See St. Cyr v. INS*, 229 F.3d 406, 408-09 (2d Cir. 2000); *Jarbough*, 483 F.3d at 187-88; *Auguste*, 395 F.3d at 128-137.

Thus, even though Congress had limited the courts' jurisdiction in those cases to reviewing legal claims, the petitioner was not left without *any*

[4] The government cryptically suggests that there are preclusion statutes at issue here, citing FARRA 2242(d), and INA § 242(a)(4). Govt.'s Br. of Aug. 15, 2007, at 12 n.3. However, those are not statutes limiting the scope of review, but rather, channeling provisions that generally require review in the courts of appeals. As this Court has already found, these channeling provisions do not preclude habeas review in the unique circumstances here, where petitioner has already filed a petition for review and the government's actions occurred after the petition for review. Section 242(g), also cited by the government (at 12 n.3) is plainly inapplicable and only applies to discretionary selective enforcement claims. *See* Pet.'s Br. of Jun. 1, 2007, at 11-12.

tribunal to raise factual claims. Yet, remarkably, that is precisely what the government is proposing here given that there has been no hearing below.

In sum, the government's jurisdictional position runs counter to the basic thrust of habeas jurisdiction, which is to ensure that no person – citizen or noncitizen – is erroneously deprived of his or her liberty. If the government could unilaterally determine the facts in a case – without even an administrative hearing – the courts' historic habeas jurisdiction could be largely negated. Indeed, habeas jurisdiction would be of little consequence to Mr. Khouzam if the government is not required to create an administrative procedure to find the facts in these "diplomatic assurance" cases *and* the Court were also prohibited from determining on its own whether this government's unilateral assurances met the "sufficiently reliable" standard set forth in the regulations or the applicable statutory standard under FARRA. *See U.S. ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860 (2d Cir. 1943) (in immigration habeas, holding that district court erred in failing to order a hearing on "material fact" of petitioner's nationality); *Jung Woon Kay v. Carr*, 88 F.2d 297, 298 (9th Cir. 1937) (rejecting government's argument that immigration officer's finding of fact should have been conclusive and district court should not have held an evidentiary hearing; finding hearing

appropriate in light of numerous factual discrepancies). *See generally*, Pet.'s Br. of July 31, 2007, at 71-72.

II. ALL OF PETITIONER'S CLAIMS ARE JUSTICIABLE.

Woven throughout the government's brief is their claim that this Court "must defer to the Executive Branch's findings on the ultimate issue presented here," because "the Executive's exclusive authority to conduct foreign relations" places these findings beyond the reach of the judiciary. *See, e.g.,* Govt. Br. of Aug. 15, 2007, at 1, 62. But the United States has an absolute legal obligation under CAT and FARRA not to return any individual to a country where he faces a likelihood of torture. This obligation is enforceable in the courts, and to carry out their enforcement role, courts must be able to consider the validity of any diplomatic assurances offered to rebut a previous finding of likely torture. Any other interpretation would eviscerate the vital protection established in CAT and FARRA.

Indeed, courts have long had the authority to meaningfully review factual and legal determinations of claims arising under CAT (as well as under asylum and withholding provisions) even though these cases can affect foreign relations. *See Mostafa v. Ashcroft*, 395 F.3d 622, 625 (6th Cir. 2005) (vacating and remanding denial of CAT relief where BIA's opinion

"fail[ed] to give adequate consideration to the country conditions in Iran"); *Poradisova v. Gonzales*, 420 F.3d 70, 81-82 (2d Cir. 2005) (holding that materials submitted in support of a motion to reopen based on changed country conditions in Belarus was "sufficient to meet the Poradisovs' burden on their motion"); *Manzur v. DHS*, --F.3d --, 2007 WL 2028135 (2nd Cir. Jul 16, 2007) (in reviewing denial of asylum, withholding, and CAT relief, engaging in probing review of IJ's factfinding analysis and citing numerous deficiencies supporting remand); *Tchemkou v. Gonzales*, __ F.3d __, 2007 WL 2177968 (7th Cir. 2007) (holding that evidence compelled finding of past, and likely future, persecution and torture by Cameroonian government); *Kantoni v. Gonzales*, 461 F.3d 894, 898 (7th Cir. Aug 28, 2006) (finding that Togolese government's undisputed actions clearly amounted to politically motivated persecution).

Nothing about diplomatic assurances alters the well-established role of the courts in enforcing protections against persecution and torture, certainly not in this particular case. *See Khouzam*, 2007 WL 1746367, at *8 ("[T]his case does not present issues of national security or compelling foreign policy interests sufficient to counsel against adjudication of Petitioner's claims."). Individuals are routinely granted asylum, withholding, or removal with respect to countries, such as Egypt, with which

the U.S. has a strategic relationship. In fact, Egypt had the fourth highest rate of asylum grants between 2000-2005 (after Burma, Afghanistan, and Uzbekistan). Of 1821 applicants, 1224 were granted – a 67.2% grant rate. *See Asylum Denial Rates by Nationality*, available at http://trac.syr.edu/immigration/reports/160/include/nat_denial_0005.html.[5] Agencies and the courts make findings of government persecution and torture, moreover, notwithstanding that the governments of these countries deny engaging in such acts, *see, e.g.*, 2006 State Department Report on Egypt at 2.

No doubt it sometimes irks other countries when the United States executive or judiciary discredits their denials. *See US Asylum Offer for Falun Gong member infuriates Beijing*, South China Morning Post, Nov. 10, 1999, at 7, 1999 WLNR 3269979 (describing Chinese foreign ministry official's warning that "bilateral ties" between the U.S. and China would be jeopardized if the U.S. continued to grant asylum to Falun Gong practitioners). But the entire premise of the treaty and domestic laws committing us to protect individuals from torture and persecution is that such protection ought to be absolute, not contingent on the right alignment

[5] This report also reflects that nationals from other close allies of the United States are routinely granted asylum. For example, in the years 2000-2005, there were 917 grants with respect to Pakistan, 118 grants with respect to Turkey, 105 grants with respect to Jordan, and 40 grants with respect to Israel.

of political interests. As the Supreme Court cautioned in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *See also Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 471 (D.C. Fla. 1980) ("[T]he pervasive influence of the political question doctrine in fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action. To the contrary, individual rights are protected carefully, although within a framework that takes account of the broad substantive powers of the other branches."), *aff'd*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1039-41 (5th Cir. 1982); *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984) (an "area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action.").

In addition, courts play an important role in enforcing treaty obligations, a role that necessarily involves them in matters touching on foreign policy. *See Gross v. German Foundation Indus. Initiative*, 456 F.3d 363, 377 (3d Cir. 2006) ("'[U]nder the Constitution, one of the Judiciary's

characteristic roles is to interpret statutes[, treaties, and executive agreements],' and 'we cannot shirk this responsibility merely because our decision may have significant political overtones' . . . [or may have a] negative impact on foreign relations . . ." (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)); *Haitian Refugee Center*, 503 F. Supp. at 470-73 (rejecting similar non-justiciability defense, and holding that due process, as well as United States treaty obligations, required court to independently assess conditions in Haiti rather than defer the State Department's assessment).

As the court of appeals warned in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985), the "political question doctrine is a tempting refuge from the adjudication of difficult constitutional claims. Its shifting contours and uncertain underpinnings make it susceptible to indiscriminate and overbroad application to claims properly before the federal courts . . . [yet] it is clear that the doctrine is, at best, a narrow one." Also highly relevant is that court's statement that:

> The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry. The Executive's foreign relations prerogatives are subject to constitutional limitation; no agreement with a foreign country

> can confer upon the Executive Branch any power greater than those bounded by the Constitution.

Id. at 1515;[6] *see also Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) ("[J]udges should not reflexively invoke [the political question and act of state] doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.").

Notably, the government has not even tried to explain the foreign policy interests at stake in Mr. Khouzam's removal. Surely, an individual immigration decision does not become a matter of foreign policy simply because DHS decides to involve the Department of State. *Cf. Rafeedie v. INS*, 880 F.2d 506, 523 (D.C. Cir. 1989) (declining to accept INS's conclusory statement that, to protect national security, it had to summarily exclude Rafeedie based on undisclosed evidence). Indeed, in *Zadvydas v. Davis*, the Supreme Court rejected similar arguments made by the government with respect to repatriation. 533 U.S. 678, 696 (2001) (rejecting government's argument that court should abstain from hearing detention case to avoid "interfer[ing] with 'sensitive' repatriation negotiations").

Nor can Mr. Khouzam's removal have become purely a matter of foreign policy simply because Egypt supposedly has assured the government

[6] Although Ramirez de Arellano was a citizen, the principle expressed in this passage—that the prudential justiciability doctrine must be limited by the courts' necessary role in ensuring due process—applies with full force here.

that it will not torture Mr. Khouzam. Egypt has always denied that it engages in persecution or torture. *See* 2006 State Department Report on Egypt at 2; Neela Banerjee, *Coptic Christian Fights Deportation to Egypt , Fearing Torture*, N.Y. Times, June 6, 2007, 2007 WLNR 10506353, at A16 (quoting Embassy official denying that Egypt practices torture). That has never stopped our administrative and judicial courts from evaluating the objective evidence and routinely granting asylum to Egyptian nationals.

In their supplemental brief, the government quotes, out of context, a number of cases with language about deference on immigration matters. None of these support their position that this case is beyond judicial competence. In *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005), a divided Supreme Court refused to read into the law a requirement that the country to which an alien faced removal must first accept his return, and in so doing noted that removal decisions "may implicate" foreign policy, *id*. at 348. The court, however, was careful to say that the proposed rule was not necessary "to ensure that the Attorney General will give appropriate consideration to conditions in the country of removal," because non-citizens have a right to apply for asylum, withholding, CAT relief, or temporary protection. *Id*. at 349. Nor did the petitioner claim any due process violation, as petitioner does here.

Similarly, in support of their argument that this Court may not review their determination, the government quotes the second half of a sentence from *Dia v. Ashcroft*, 353 F.3d 228, 238 (3d Cir. 2003), to the effect that agencies should be free to fashion their own procedures, while conveniently omitting the first half of the sentence, which qualifies that this rule of deference only applies "absent constitutional constraints or extremely compelling circumstances." *See* Govt.'s Br. of Aug. 15, 2007, at 55. In *Dia*, there were no constitutional issues or compelling circumstances because petitioner merely challenged a streamlined procedure under which the BIA could summarily affirm IJ written decisions, thereby making the IJ decision the agency decision subject to judicial review. As the court found, the agency's chosen procedure did not violate Dia's right to "'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id*. at 239 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976)). Here, by contrast, the government is attempting to remove Mr. Khouzam without any of the process deemed sufficient in *Dia*, i.e., notice of the government's evidence plus an opportunity to present evidence to an impartial adjudicator with the opportunity for substantive judicial review.

In *United States v. Kin-Hong*, 110 F.3d 103, 106, 112 (1st Cir. 1997), also relied on by the government, the First Circuit cited principles of

deference to support the limited holding, prior to the enactment of FARRA, that in extradition cases, absent concerns that a defendant will be prosecuted "on account of his race, religion, nationality, or political opinion" or any "constitutional issue of denial of due process," courts should not "rewrite[e] the treaties which the President and the Senate have approved." Notably, the court made plain that "[n]one of [the deference] principles, including non-inquiry, may be regarded as an absolute," and that these principles would have to be reexamined "in any case where the relator, upon extradition, would be subject to procedures or punishment . . . antipathetic to a federal court's sense of decency" (quotation marks omitted). The court found that Kin-Hong presented no such concerns because he was wanted for an economic crime and his extradition was requested by Hong Kong, "one of this country's most trusted treaty partners." *Id*. at 112.[7] None of these cases supports the government's position that this court may not inquire into the

[7] The government's reliance on *Kin-Hong*, moreover, is symptomatic of its general approach of focusing on extradition cases and on the Department of State's role in obtaining diplomatic assurances to cast its decision as fundamentally a matter of foreign policy and therefore, so it further argues, beyond judicial competence. *See* Govt.'s Br. of Aug. 15, 2007, at 48-49, 51, 55. The fact remains, however, that while recognizing the unique foreign policy dimension of *extradition* by placing it under Department of State auspices, the Administration and Congress designated DOJ (now DHS)—an agency with no foreign policy expertise—as the responsible agency in *removal* cases such as Mr. Khouzam's. *See* Senate Exec. Report 101-30 at 37, attached as addendum to Govt.'s Br. of Aug. 15, 2007. Thus, the mere fact that the government is attempting to use diplomatic assurances as a basis for removing Mr. Khouzam does not render its actions non-justiciable foreign policymaking.

legality of the government's attempt to summarily revoke Mr. Khouzam's CAT relief and remove him, without an opportunity to be heard, to a country whose government previously tortured him, was found likely to torture him in the future, and is known to systematically practice torture, even where it has made diplomatic assurances.

Finally, in their section arguing against any discovery, the government asserts in passing that there could be no manageable standards for assessing the validity of diplomatic assurances. Govt.'s Br. of Aug. 15, 2007, at 61. This is incorrect. Courts in other countries routinely review assurances, and have devised clear standards for doing so, including assessment of: a country's historical and present human rights record and history of compliance with diplomatic assurances; the authority of the authors and their ability to control all relevant actors; and the availability of reliable monitoring. *See* Pet.'s Br. of July 31, 2007, Exh. 1-7. Special Advocate Nicholas Blake, for example, described Britain's procedure as follows:

> The Commission will usually examine the specific terms of the assurance and what they relate to against the specific background of human rights abuse in the relevant country. It will examine whether there is both an abiding interest and an ability in the persons who gave the assurance to enforce them. See, e.g., Y, at paragraph 374; Othman, at paragraph 501 ("This is an agreement which we accept has been supported and agreed to not just at the highest level but also by the GID which has to operate within it."). It will examine whether the assurances are capable of verification whether by formal monitoring arrangements or otherwise. It will examine any evidence

> of contemporary breaches of other arrangements, assurances or international obligations, and can examine whether expectation of how someone will be treated have been supported. See, e.g., U v Secretary of State for the Home Department, [2007] SC/32/2005 (Special Immigration Appeals Commission), at paragraph 37 ("The clear view of Mr Layden that there was absolutely no reason to believe that 'H' would be arrested or detained for a prolonged period of time if deported to Algeria has shown to be mistaken."). It will examine the guidance of noted human rights commentators as to the weight to be attached to arrangements or assurances in general or in respect of the particular country. See, e.g., DD & AS, at paragraphs 236 (describing Prof. El-Kikhia's portrayal of the monitoring body as insufficiently independent of the Libyan regime) and 371 (rejecting assurances in part because of insufficiency of the monitoring body).

Blake Decl., Ex. 1 to Pet.'s Brief of Jul. 31, 2007, at ¶ 47. These issues are not different in kind from the issues courts must address in reviewing routine asylum and CAT claims, *see supra*.[8]

Thus, the reliability of Egypt's diplomatic assurances is a justiciable issue, and the government's cases do not show otherwise. However, should this Court agree with the government that its current practice with respect to diplomatic assurances affords no manageable standards for review, the appropriate solution would be to strike down the government's reliance on diplomatic assurances *per se*, in light of the serious constitutional problems

[8] In the past, when concerned about courts impinging on executive foreign policy judgments but equally concerned about the individual interests at stake, the Supreme Court has crafted a "manageable standard" by means of a presumption. *See Zadvydas*, 533 U.S. at 700-01 (creating presumption that detention beyond six months is unreasonable to limit the need for close inquiry into executive judments).

that would otherwise be presented if meaningful judicial review of such assurances was precluded. *See infra*. *Cf. Zadvydas*, 533 U.S. at 689 (construing statute to avoid constitutional problem).[9]

As a fallback position, the government argues that if petitioner's claims are justiciable they are subject to extremely deferential review under the "facially legitimate and bona fide" standard, citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Govt.'s Br. of Aug. 15, 2007 at 57-59. This standard has typically been used to uphold legislative and executive decisions concerning admission and exclusion, where the plenary power of the political branches over immigration matters is at its height. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787 (1977) (applying "facially legitimate and bona fide" standard in admission context); *Moret v. Karn*, 746 F.2d 989 (3d Cir. 1984) (applying "facially legitimate and bona fide" standard to evaluate discretionary parole of non-citizen seeking admission); *Azzouka v. Meese*, 820 F.2d 585 (2d Cir. 1987) (applying standard to discretionary exclusion finding). Here, however, the question is not admission—to which Petitioner admittedly has no claim—but rather Petitioner's mandatory statutory

[9] Another way to avoid the justiciability problem would be to order the government to come up with a statutorily and constitutionally adequate administrative procedure for assessing the assurances. However, this would not address the need for some form of independent review. *See infra* Sections IV.B & C.

entitlement to deferral of removal under CAT. The government cites to no authority that allows the government to deprive an individual of a mandatory statutory entitlement, particularly one that protects a right as significant as the one at stake here, based on a mere "facially legitimate and bona fide reason." In any event, even the facially and bona fide standard requires an examination of the factual record. *See, e.g.*, *Moret*, 746 F.2d at 993 & n.3; *Marczak v. Greene*, 971 F.2d 510, 515-18 (10th Cir. 1992); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-83 (9th Cir. 2006). Thus, the government's decision cannot withstand even this deferential review, especially as the government refuses to share the evidence on which they base their decision.[10]

[10] The government's citation to *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) and *Reno v. American-Arab Anti-Discrimination Committee et al.* [*AAADC*], 525 U.S. 471 (1999), as extensions of *Kleindienst*'s "facially legitimate and bona fide" test is perplexing. *Lopez-Mendoza* simply applies an ordinary Fourth Amendment weighing of interests to conclude that the exclusionary rule should not be applied to bar the removal of an unlawfully arrested non-citizen. *AAADC* rejected a selective enforcement claim by non-citizens affiliation with groups classified as terrorist organizations, but preserved the possibility of such claims in cases of egregious discrimination. Neither case mentioned *Kleindienst* or applied a "facially legitimate and bona fide" standard.

III. THE GOVERNMENT'S RELIANCE ON DIPLOMATIC ASSURANCES IN THIS CASE VIOLATES FARRA, THE IMPLEMENTING REGULATIONS, AND DUE PROCESS BECAUSE THESE ASSURANCES ARE NOT SUFFICIENTLY RELIABLE TO PROTECT AGAINST A VIOLATION OF CAT ART. 3.

As previously set forth, Egypt's diplomatic assurances in this case are insufficiently reliable for two reasons. First, Egyptian assurances are per se unreliable on account of Egypt's record of consistently engaging in torture. Second, even without such a per se rule, the record before this Court – including the Second Circuit and BIA findings that Mr. Khouzam is more likely than not to face torture in Egypt – provides ample evidence that, under the circumstances here, no assurances from Egypt could suffice to protect him from likely torture. However, if this Court is unable to conclude on the record before it that the diplomatic assurances in Mr. Khouzam's case are insufficient, it should allow for limited discovery to supplement the record.

The government has no response to the wealth of authority cited in Petitioner's brief that supports these arguments, including affidavits from numerous experts. *See* Pet.'s Br. of July 31, 2007, at 21-39. It does not respond to the jurisprudence of the Committee Against Torture, the courts of other countries and other authorities prohibiting reliance on diplomatic assurances from States like Egypt which systematically violate CAT provisions. *See id*. at 22-26. Nor does it respond to extensive evidence of

Egypt's consistent use of torture (including on Mr. Khouzam), Egypt's prior breach of diplomatic assurances in the cases of Alzery and Agiza, *id*. at 26-34, and the well-established fact that diplomatic assurances are insufficient for protecting against torture even in the presence of monitoring mechanisms, as evidenced in the case of Maher Arar. *Id*. at 34-35. While the government appears to concede that it shared information relating to Mr. Khouzam's CAT claim with the government of Egypt, and that diplomatic assurances necessitate the sharing of such information, it provides no explanation for why this would not put Mr. Khouzam at further risk of retaliation and torture at the hands of Egyptian officials. *See* Govt.'s Br. of Aug. 15, 2007 at 50.

Instead, the government argues that CAT and international authority are not binding on this Court, Govt.'s Br. of Aug 15, 2007 at 22, 30, that the Executive Branch is "entitled to deference in its interpretation of FARRA and CAT" as well as the implementing regulations, *id*. at 41, and that nothing in FARRA and its implementing regulations precludes the government from relying on diplomatic assurances in this case.[11] *See id*. at

[11] Contrary to the government's characterization of his position, Petitioner does *not* argue that FARRA's delegation of authority to the Executive branch was "impermissibly broad" and a "violation of the non-delegation doctrine." Govt.'s Br. of Aug. 15, 2007 at 33. Indeed, Petitioner has argued that FARRA enunciates an intelligible principle in (i) setting forth an absolute non-refoulement obligation, *see* FARRA § 2242(a); (ii) requiring that regulations "implement the obligations of the United States under

38-39. This Court should reject those arguments for the reasons set forth below.

A. International Law Must Inform This Court's Construction of CAT and FARRA.

The government argues that the decisions of international tribunals and committees have no binding effect, *see* Govt.'s Br. of Aug. 15, 2007 at 22, and moreover, because CAT is not self-executing, this Court must not look to the treaty in construing FARRA. *See id*. at 30. The government misses the point. For, as demonstrated below, regardless of whether international authority is binding on the United States or whether CAT is self executing, it is well-established that this Court must look to such authority for its construction of FARRA.

First, Congress explicitly imported CAT's terms into FARRA by (i) requiring FARRA's terms to have the same "meaning given those terms in the Convention," FARRA § 2242(f)(2); and (ii) requiring that regulations "implement the obligations of the United States under Article 3" of CAT, "subject to any reservations, understandings, declarations or provisions" ("RUD"s) contained in the United States Senate resolution of ratification of

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Article 3" of CAT, FARRA § 2242(b), and requiring its terms to have the same "meaning given those terms in the Convention," FARRA § 2242(f)(2); and (iii) contemplating judicial review of CAT claims, FARRA § 2242(d). Pet.'s Br. of July 31, 2007 at 18-19.

the treaty. FARRA § 2242(b). As previously noted, the only RUD relating specifically to Article 3 of CAT is a reservation that states 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.'" *See* Pet.'s Br. of Jun. 11, 2007, at 27 n. 9. Accordingly, at a minimum, CAT is relevant for construing FARRA where, as here, there is no RUD on the subject of diplomatic assurances. *See Auguste*, 395 F.3d at 143 ("[C]ourts should interpret treaties so as to give a meaning consistent with the shared expectations of the contracting parties," and "look to the drafting history . . . as well as the intent of the other signatory parties" but where the "President and the Senate express a shared consensus on the meaning of a treaty as part of the ratification process that meaning is to govern in the domestic context"). Moreover, the regulations themselves require diplomatic assurances to be "sufficiently reliable to allow . . . removal . . . consistent *with Article 3 of the Convention Against Torture*." 8 C.F.R. § 1208.18(c)(2) (emphasis added).

Notably, the Third Circuit Court of Appeals has looked to the text of CAT—and to the opinion of the Committee Against Torture--in construing FARRA and its implementing regulations. *See Kamara*, 420 F.3d at 201

(looking to CAT art. 1 and the opinion of the Committee Against Torture for the meaning of the term "public official" in 8 C.F.R. § 1208.18(a)). It is appropriate for this Court to do the same. Indeed, the government concedes that CAT has relevance "insofar as it may aid in the proper construction of the statute." Govt.'s Br. of Aug. 15, 2007 at 31.[12]

Second, even if FARRA had not explicitly incorporated CAT, it is appropriate for this Court to look to international law in construing FARRA. Indeed, the Supreme Court has specifically recognized that "[i]t has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). *See also Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143 (2006) (Ginsburg, J. & Breyer, J., concurring in part and

[12] The government makes no mention of *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-38 (1987), in which the Supreme Court affirmatively relied on the U.N. Protocol Relating to the Status of Refugees and the Handbook construing the Protocol in determining the meaning of a provision of the Refugee Act of 1980 which Congress enacted to bring United States refugee law into conformance with the Protocol. *See* Pet.'s Br. of July 31, 2007 at 22 n.3. *INS v. Aguirre-Aguirre*, which the government cites, similarly acknowledges that the U.N. Handbook was a "useful interpretive aid," and "provide[d] some guidance in construing the provisions added to the INA by the Refugee Act." 526 U.S. 415, 427 (1978). The decisions of the Committee Against Torture, and its instructions to the United States on diplomatic assurances certainly carry more weight than the U.N. Handbook which, unlike the Committee, "itself disclaims [binding] force," and states that interpretation is "incumbent upon the Contracting State." *Id*. at 428.

concurring in the judgement), *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815-16 (Scalia, J., dissenting). *See also* Pet.'s Br. of June 11, 2007. The Third Circuit has also looked to other international agreements in determining the scope of claims under the Convention Against Torture. *See Zubeda v. Ashcroft*, 333 F.3d 463, 479-80, n.19 (3d Cir. 2003) ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world . . . an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.") (citing *inter alia*, Universal Declaration of Human Rights, General Assembly Resolution, 217(III)(A)(Dec. 10, 1948), and American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc 21, rev.2. (English ed. 1975)).

B. The Government's Construction of FARRA And The Diplomatic Assurance Regulations Is Not Entitled To Deference.

The government argues that the Executive Branch is "entitled to deference in its interpretation of FARRA and CAT" as well as the implementing regulations. Govt.'s Br. of Aug. 15, 2007, at 41. As previously noted, however, FARRA and CAT are "clear" for *Chevron*

purposes in that they prohibit reliance on assurances from countries like Egypt that consistently engage in torture. *See* Pet.'s Br. of July 31, 2007, at 19-20. This Court need therefore look no further.

Rather than address Petitioner's arguments regarding CAT and FARRA, the government falls back on summary assertions regarding its prerogative to obtain and assess assurances. *See* Govt.'s Br. of Aug 15, 2007, at 17-18. But even assuming this to be the case, the mere fact that assurances may be permissible in certain circumstances does not render them appropriate here. Indeed, in providing for such assurances, the Attorney General specifically explained that they would be used only in "rare" cases. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8484 (Feb. 19, 1999).[13] The government's utter failure to provide any explanation for why assurances are appropriate in Mr. Khouzam's case calls into question whether the government in fact *has* a reasoned basis for its conclusion.

The government argues defensively that Petitioner is attempting to have the Court rewrite regulations which do "not provide for automatic CAT protection where evidence of such violations exist," or "limit[] the countries

[13] *See also* U.S. Response to List of Issues of the Committee Against Torture to be Considered During the Examination of the Second Periodic Report of the United States of America, at 46 (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf.

from which the DHS Secretary and the Secretary of State may obtain and credit assurances." Govt.'s Br. of Aug. 15, 2007 at 18. But Petitioner's reading of the regulations is entirely consistent with their requirement that diplomatic assurances be "sufficiently reliable." In any event, even without a per se rule barring diplomatic assurances from countries that consistently engage in torture, there is more than enough in the record here for this Court to conclude that no assurances from Egypt could possibly be "sufficiently reliable" to protect Mr. Khouzam in this case. *See* Pet.'s Br. of July 31, 2007 at 37-38 (setting forth factors specific to Mr. Khouzam's case that render diplomatic assurances particularly unreliable).

Notably while the government ignores all international authority previously cited by Petitioner, *see* Pet.'s Br., of July 15, 2007, at 21-39 (*citing inter alia*, the CAT Committee's instruction that the U.S. not rely on diplomatic assurances from States which systematically violate CAT, and *Agiza v. Sweden*, in which the Committee found that Egyptian assurances did not guard against the "manifest risk" of torture), it chooses instead to cite to a single CAT Committee case which does not even involve diplomatic assurances. *See* Govt.'s Br. of Aug. 15, 2007 at 21 (citing *Elmi v. Australia*, U.N. Doc. CAT/C/22/D/120/1998 (1999)). Likewise, the government relies on *Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003), another case which

does not concern diplomatic assurances. While the government cites to dicta from *Zubeda* for the proposition that there is no per se rule requiring CAT relief for certain countries, that case has no bearing on whether a per se rule is appropriate when considering diplomatic assurances to remove someone who has already has been granted CAT relief.

Even if this Court were to find that FARRA and CAT are not "clear," and that *Chevron* deference therefore applies,[14] the Supreme Court has held that such deference is not absolute and may yield to other rules of interpretation. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg*., 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). As previously demonstrated, the government's construction of FARRA and its implementing regulations is entitled to no deference as that construction

[14] As recognized by the Third Circuit, it is questionable whether *Chevron* deference even applies to the Executive Branch's interpretation to treaties. *See Auguste*, 395 F.3d at 145 ("Whether agencies are to be given *Chevron* deference when interpreting and implementing treaties is an unsettled topic"). Although *Auguste* involved the construction of a CAT regulation, it did not need to reach this issue because there was no ambiguity in Congress's intent in that case.

would raise serious constitutional problems. *See* Pet.'s Br. of July 31, 2007 at 20, 57-71.[15]

In addition, the *Charming Betsy* maxim of statutory construction requires this Court to construe FARRA not "to violate the law of nations, if any other possible construction remains," *Charming Betsy*, 2 Cranch at 118. As previously set forth, international law prohibits return to a country like Egypt pursuant to diplomatic assurances. *See* Pet.'s Br. of July 31, 2007, at 18-48. Accordingly, were the Court to afford the government the deference it seeks in its interpretation of FARRA, it would be adopting an "impermissible" construction of FARRA and its regulations that would plainly violate the law of nations.[16]

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[15] The government's only response to Petitioner's substantive due process claim makes no sense. It argues that this case raises no substantive due process issue because the government's "factual finding" that Egypt's assurances are "sufficiently reliable" to render his removal legal under CAT and FARRA "must be accepted." Govt.'s Br. of Aug. 11, 2007, at 59 n.12. But, notwithstanding the government's attempt to cast this as a "factual finding," whether the diplomatic assurances suffice to render his removal legal is indisputably a legal question, albeit one that involves the application of law to facts. As set forth *supra*, this Court clearly has authority to review such mixed questions. In addition, even if the decision could be viewed as a "factual finding," this Court is under no obligation to adopt such a finding, especially where it arose from a legally and constitutionally defective process as Petitioner alleges here. *See infra*. As set forth *supra*, habeas courts do in fact review facts. Indeed, this court has already rejected any notion that it need adopt the government's so-called "factfinding." *See Khouzam v. Hogan*,--F.Supp.2d--, 2007 WL 1746367 (M.D. Pa. June 15, 2007), at *9 ("[N]o showing has been made by Respondents that removal based upon diplomatic assurances by a country known to have engaged in torture is consistent with the CAT."); *id*. at *10 ("The record reveals a probability of torture upon Khouzam's return to Egypt.").

[16] *Succar v. Ashcroft*, 394 F.3d 8, 21 (1st Cir. 2005), cited by the government, *see* Govt.'s Br. of Aug. 15, 2007 at 37, confirms that an

IV. THE GOVERNMENT'S RELIANCE ON DIPLOMATIC ASSURANCES IN THIS CASE VIOLATES FARRA, IMPLEMENTING REGULATIONS, AND DUE PROCESS BECAUSE IT HAS NOT PROVIDED AN ADEQUATE PROCEDURE.

Although this Court specifically requested evidence of cross-country procedures on diplomatic assurances, the government ignores all of the evidence Petitioner has provided. This evidence demonstrates that the United States stands alone in providing no opportunity for independent review of the adequacy of such assurances. As set forth above, the government's claim that this cross-country evidence is irrelevant and that it is entitled to virtually unlimited deference in construing CAT and FARRA is without merit. *See* Section III. *supra*. Moreover, the Supreme Court has specifically recognized foreign and international law as persuasive authority

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impermissible construction of the statute cannot stand under *Chevron*. The government also argues that FARRA should not be construed as restricting the Executive's authority to promulgate regulations permitting the consideration of diplomatic assurances. Govt.'s Br. of Aug. 15, 2007 at 32, 36. In arguing for limitless agency authority, the government mistakenly relies in this context to cases that except the President from judicial review on the grounds*, inter alia*, that he is not an "agency." *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1971) (holding, in light of separation of powers and the "unique constitutional position" of the President that the he was not an "agency" within the meaning of the Administrative Procedure Act ("APA") while noting that his actions "may still be reviewed for constitutionality"); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (refusing to hold, in absence of affirmative evidence, that President is an "agency" within the meaning of the APA); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 111-14 (1948) (holding that those decisions of Civil Aeronautics Board which were subject to approval by the President were exempt from judicial review). Those cases are inapposite because powers unique to the President are not at issue here. Similarly inapposite is the case pertaining to federal-state relations, which are not at issue here. *United States v. Bass*, 404 U.S. 336, 349 (1971).

in domestic cases, including those involving constitutional jurisprudence. *See* Pet.'s Br. of July 31, 2007, at 48. n. 15.

A. The Government Did Not Comply With The Regulations' Requirement That It Act Only On Diplomatic Assurances Obtained, Forwarded, And Consulted On By The Secretary of State.

As a threshold matter, DHS violated its own regulations by relying on diplomatic assurances that were not "obtained," "forwarded" and "consulted" on by the Secretary of State herself. *See* Pet.'s Br of July 31, 2007 at 7-12. The government rests its argument to the contrary on a statute that provides general authority to the State Department to delegate the Secretary of State's duties, and two subsequent general "Delegations of Authority" that do not pertain specifically to diplomatic assurances. *See* Govt.'s Br. of Aug. 15, 2007, at 4-10. However, the general delegations relied upon by the government cannot displace the more specific language of the Justice Department regulations. This is especially so because the Secretary of State's role in negotiating and crediting diplomatic assurances is clearly adjudicative and not administrative in nature. *See Krug v. Lincoln Nat'l Life Ins. Co.*, 245 F.2d 848, 852 (5th Cir. 1957) (administrative agency cannot delegate quasi-judicial functions); *Relco, Inc. v. Consumer Prod. Safety Comm'n*, 391 F. Supp. 841, 845 (S.D.Tex.1975) ("administrative

adjudications" may not be delegated). Notably, unlike the Justice Department, the State Department has to date never promulgated any regulations relating specifically to diplomatic assurances. Yet, in the government's view, merely by virtue of successive general subdelegations of authority -- untailored to the specific context of diplomatic assurances -- the State Department's actions on diplomatic assurances could be delegated to an official far below the rank of Secretary of State, an outcome wholly inconsistent with CAT and FARRA.

In any event, assuming *arguendo* that the government were correct, and that the functions specified for the Secretary of State by the diplomatic assurance regulations were properly delegated to the Under Secretary for Political Affairs, Nicholas Burns, there is no evidence that Burns actually carried out these functions. As noted above, the diplomatic assurance regulations specifically require that DHS determine "in *consultation with the Secretary of State*, whether the assurances are sufficiently reliable." 8 C.F.R. § 1208.18(c)(2) (emphasis added). The government's declarants make no mention of Burns having consulted with DHS. (Indeed, they do not even say that Burns "obtained" the assurances, as required by 8 C.F.R. § 1208.18(c)(1).) *See* Harris Decl. attached as Ex. I to Govt's Br. of Aug. 15, 2007; Memo to File of Julie Myers, attached as Ex. E to Govt.'s Br. of June

1, 2007; Decl. of James J. Jeffrey, attached as Ex. H to Govt.'s Br. of June 1, 2007. Thus, the government is wrong in claiming that it is "undisputed" that Burns, as the Secretary of State's delegate, performed the functions required under the applicable regulations. *See* Govt.'s Br. of Aug. 15, 2007 at 11.

B. The Government Has Violated Its Regulations By Not Following A Meaningful And Fair Procedure For Determining Whether The Assurances Are Sufficiently Reliable.

Even if this Court were to find that the Secretary of State's delegate did properly obtain and consult on diplomatic assurances, it must still find that the government has not made a meaningful "determination" on the reliability of those assurances, as is required by 8 C.F.R. § 1208.18(c)(2). As previously noted, the regulations and due process require that the procedure by which such a "determination" is reached should be meaningful and fair. *See* Section IV.C *infra*. The government concedes that assurances must be subjected to "serious" and "careful review" and "evaluation," *see* Govt.'s Br. of Aug. 15, 2007 at 15-16, but it makes no attempt to demonstrate that it subjected the assurances at issue here to such scrutiny. Indeed, the three declarations submitted by the government are notable for their lack of any detail whatsoever on the procedure or basis for crediting Egyptian assurances in this particular case. *See* Decl. of James J. Jeffrey,

attached as Ex. H to Govt.'s Br. of June 1, 2007; Decl. of Robert K. Harris attached as Ex. I to Govt.'s Br. of Aug. 15, 2007; Memo to File of Julie Myers, attached as Ex. E to Govt.'s Br. of June 1, 2007.

Instead, the government argues that this Court should not presume, that the officials involved "did not carefully evaluate this case," in light of the presumption of regularity afforded to agency officials. Govt.'s Br. of Aug. 15, 2007 at 16. However, given the government's total lack of transparency with respect to the basis for its decision to revoke Mr. Khouzam's CAT grant, it is highly questionable whether any "presumption of regularity" should attach here. Indeed, just recently, the D.C. Circuit observed in reviewing the determinations of the Combatant Status Review Tribunals for Guantanamo detainees, that it is "not at all clear" that an agency's actions are entitled to a presumption of regularity where "the transparent features of the ordinary administrative process" are absent. *Bismullah v. Gates* -- F.3d --, 2007 WL 2067938, at *6 (D.C. Cir. 2007).

In any event, any such presumption is "not irrebuttable." *See id.* Petitioner has clearly met that burden here. Particularly in light of prior administrative and judicial findings that Mr. Khouzam is more likely than not to be tortured in Egypt, and other undisputed evidence pertaining to the unreliability of diplomatic assurances (both in general and with specific

respect to Egypt), the government now bears the burden of showing at least some basis for its contrary conclusion. The government's wholly conclusory and self serving statements are insufficient to meet this burden.[17]

Furthermore, the presumption of regularity can be rebutted by a showing of bias on the part of the agency. *Natural Resources Def. Council, Inc. v. Securities and Exchange Commission*, 606 F.2d 1031, 1050, n. 23 (D.C. Cir. 1979). The government's conduct in this case at a minimum raises such questions. *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004) (noting that the court was "troubled by the government's tactics" in this case, namely that "two weeks after oral argument" -- during which the court "expressed doubts as to the soundness" of the government's position – the government agreed to stipulate to a vacatur of its prior decision denying Mr. Khouzam CAT relief, noting that this conduct "suggest[ed] that [the government was] trying to avoid" having the court rule on the issue of

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[17] In fact, the government has provided no evidence whatsoever that either the DHS Secretary or Under Secretary Nicholas Burns "carefully evaluat[ed]" this case. ICE Assistant Secretary Julie Myers's Memorandum to File states summarily that "[a]fter consulting with the Department of State and taking into account all relevant considerations, including human rights practices in Egypt, I determined . . . that the assurances were sufficiently reliable . . . ." With respect to the Secretary of State's delegate, Nicholas Burns, the government's declarant Robert Harris merely states that Burns "determined and signed a letter to the Deputy Secretary of the Department of Homeland Security, Michael P. Jackson, formally conveying the Department of State's view that the assurances received . . . were of sufficient reliability . . ." Harris Decl., attached as Ex. I to Govt.'s Br. of Aug 15, 2007. The Declaration of James Jeffrey is similarly deficient in that it provides no detail on the procedure or basis for crediting assurances. *See* Decl. of James J. Jeffrey, attached as Ex. H to Govt.'s Br. of June 1, 2007.

whether or not Mr. Khouzam was entitled to deferral of removal under the Convention Against Torture). *See also* Pet.'s Br. of July 31, 2007 at 37-38 (explaining that Mr. Khouzam is at particular risk of torture because the United States government shared information relating to his CAT claim with the government of Egypt and may have shared information about his asylum claim as well).[18]

Finally, the presumption of regularity does not "shield [the agency's] action from a thorough, probing, in-depth review." *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 178 (3rd Cir. 2000) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-417 (1971)).

[18] Notably, the government has provided no response to Petitioner's claim that information relating to his asylum claim was previously shared with the Egyptian government. With respect to the CAT application, the government argues that 8 C.F.R. § 208.6 restricts disclosure to third parties of information contained in an asylum application and does not similarly restrict disclosure of information relating to CAT claims, *see* Govt.'s Br. of Aug. 15, 2007 at 50 n.10, but offers no reasons for why the risk of retaliation ensuing from the sharing of CAT claim information would be any different from that ensuing from the sharing of asylum related information. *See Velasco v. I.N.S.,* 87 Fed.Appx. 35, 38 (9th Cir. 2004) (concluding, without making a distinction between asylum and CAT claims, that 8 C.F.R. § 208.6 had not been violated in the context of CAT proceedings because "the information revealed nothing regarding the nature of Velasco's application for relief"). In addition, the government errs in relying on 8 C.F.R. § 208.6(c)(2) as a basis for arguing that the confidentiality provisions do not apply. Section 208.6(c)(2) states that the confidentiality provisions do not apply to "any disclosure to any Federal, State, or local court in the United States considering any legal action." That section is not relevant where, as here, Petitioner is challenging disclosure of his CAT information to the Egyptian government, and not to any court. Finally, the U.S. government has not demonstrated that it may avail of 8 C.F.R. § 208.6(a) as the basis for justifying disclosure of Petitioner's CAT claim to the Egyptian government—the U.S. government has not demonstrated that such disclosure was based on the exercise of the "discretion of the Attorney General."

C. The Government's Failure To Provide Adequate Procedures Violates Petitioner's Right To Due Process.

As petitioner has previously argued, the government violated his right to due process by revoking his CAT relief without notice and by attempting to summarily remove him to a country where he was previously tortured and where the government is known to systematically practice torture and to violate its own diplomatic assurances.

The government's Supplemental Brief in Opposition to the Petition fails to address petitioner's argument that due process requires, at a minimum, notice of the government's evidence, an opportunity to contest that evidence before an impartial adjudicator, and, if that adjudicator is an agency official, a record of the adjudication sufficient to allow for judicial review. Instead, the government persists in arguing that petitioner has no rights whatsoever, an argument this court has already rejected, *see Khouzam v. Hogan*, --F. Supp.2d --, 2007 WL 1746367 (M.D. Pa. June 15, 2007), at *9. As a fall-back, the government asserts that petitioner received all due process—indeed "an extraordinary amount of process under the circumstances," Govt.'s Br. of Aug. 15, 2007, at 48—simply because "two of the highest level officials in the United States Government" were

involved in the decision to revoke his CAT relief, *id*. at 50. Both arguments are meritless.

To begin with, the government rehashes the issue of whether Mr. Khouzam is somehow not a "person" under the Fifth Amendment simply because he has been paroled into the country—by judicial order, pursuant to an affirmative entitlement—rather than formally admitted. As this court found, however, while Mr. Khouzam may not have a protectable interest in residing here, he does have a protectable interest, arising from FARRA's mandate, in not being sent to a country where he faces likely torture, *see Khouzam*, 2007 WL 1746367, at *9. Broad dicta from a 1953 national security case, *Mezei v. Shaughnessy*, 345 U.S. 206 (1953), no matter how many times the government quotes it, cannot trump subsequent, direct statements of law from the Supreme Court and lower courts in this circuit and others making clear that Mr. Khouzam has due process rights. *See* Pet.'s Br. of June 11, 2007 at 49-55.[19]

[19] As previously argued in that section, the government's cases—*Mezei v. Shaughnessy*, 345 U.S. 206 (1953), *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984)—stand only for the proposition that an alien seeking admission at the border has no rights with respect to his application for admission or his temporary entry to the country, via parole, pending such application. These cases have no application to this case, where the interest at stake is not Petitioner's right to admission or entry, but rather his unequivocal right under both treaty and statute not to be removed to a country where he is more likely than not to be tortured.

As new authority, the government cites to a cryptic statement in a case involving university tenure denial, *Kovats v. Rutgers*, 822 F.2d 1303, 1314 (3d Cir. 1987), that "the Supreme Court has made clear that promises of specific procedures do not create interests protected by the Due Process clause." The government fails to mention that the Supreme Court decision *Kovats* references here is *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), which, as petitioner noted in his opening brief, Pet.'s Br. of Jun. 1, 2007, at 50, held that the establishment of a procedure *does* give rise to a protectable interests if it places "substantive limits on official discretion." Since FARRA not only "limits" but in fact *eliminates* Executive discretion to remove an individual to any country where he is more likely than not to be tortured, it certainly gives rise to due process rights under *Olim* and hence under *Kovats*. Moreover, the government's proposed reading of *Kovatz* conflicts with the Third Circuit's more recent, and far more topical, holding in *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996) that even stowaways had due process rights arising out of the Refugee Act.[20] Petitioner, then, clearly

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[20] The government's citation to *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984), Gvmt.'s Supp. Brief of Aug. 15, 2007, at 46, is similarly misleading. Although that court rejected a due process claim by non-citizen detainees challenging their detention, the court allowed the challenge to proceed on statutory grounds. More importantly, far from affirming the Eleventh Circuit's constitutional analysis, as the government implies, the Supreme Court held that the lower court should never have reached the constitutional issue, thereby invalidating that dicta. *See Jean v. Nelson*, 472 U.S. 846, 854-55, 857 (1985).

has due process rights with respect to CAT relief, rights that are heightened by that fact that Mr. Khouzam was *granted* CAT relief after both the BIA and the Second Circuit found that the Egyptian government was more likely than not to torture him.

The government next argues that it has complied with procedural due process because, in this case, the Department of State intervened directly "on Petitioner's behalf." Govt.'s Supp. Br. of Aug. 15, 2007, at 48, 51. The government's position wholly fails to address petitioner's earlier argument, supported by substantial authority, that due process requires, at a minimum, notice of the government's evidence and an opportunity to contest that evidence before an impartial adjudicator. *See* Pet's Br. of July 31, 2007, at 62-67. The government attempts to argue that Mr. Khouzam's due process claim is moot, "because DHS provided notice to Petitioner of the Secretary's action" and Mr. Khouzam "in fact submitted over a hundred pages of exhibits allegedly relevant to the reliability of the assurances" in support of his habeas petition. Govt.'s Br. of Aug. 15, 2007, at 60. But the "notice" provided by the government—a one-paragraph letter issued when Mr. Khouzam was detained without warning and only days before the government intended to remove him, and which provided no specifics of the

basis for the government's decision and no opportunity to contest the decision—bears no resemblance to notice in the constitutional sense.[21]

Alternatively, the government suggests that, because it provided due process with respect to petitioner's initial CAT application, there was no need for further process in revoking his relief. *See id.* at 53-54 ("Respondent received this full range of process.") This argument is absurd, as is the government's claim that the "form and level of process" afforded in diplomatic assurances cases "is clearly not afforded in most asylum or CAT cases." Govt.'s Br. of Aug. 15, 2007, at 16. The result of the full process Mr. Khouzam received is that he was found to be entitled to CAT relief. The government now seeks to undo that result with no additional notice, hearing, or review. However fair a process may look on its own, it becomes a sham if its result can be summarily reversed at any time.

In addition to failing to address petitioner's argument concerning the due process requirements of notice and an opportunity to be heard, the government also fails to address petitioner's argument that it has presented no reliable evidence to support its decision. *Id*. at 67-70.[22] Petitioner's

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[21] Moreover, it is frivolous to suggest, as the government does, that Mr. Khouzam's case should be dismissed at the outset because he already has had a meaningful opportunity to be heard, when the government has strenuously objected to this Court even considering such evidence.

[22] In addition to the problem of politicization, the State Department determination relied on by respondents suffers from the further defect that

opening supplemental brief cited to a number of cases holding that DHS may not rely uncritically on State Department reports or individualized assessments[23] because the State Department has foreign policy interests that color its assessments. In response, the government falls back on their assertion that high level officials conferred over these assurances, without explaining why "a direct intercession and diplomatic effort by the Department of State" to obtain assurances and subsequent assessment of these assurances, Govt.'s Br. of Aug. 15, 2007, at 48-49, should be deemed any less politicized, and therefore unreliable as evidence, than a country report or opinion letter.[24]

The government's argument that an agency process satisfies the Constitution merely because it is carried out by high-level officials has no

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the Department has failed to promulgate any regulations governing its acquisition and assessment of assurances, despite FARRA's mandatory directive to do so within 120 days of its enactment. *See* FARRA § 2242(b); *see supra* Section III.A.

[23] Contrary to respondents' representation, *see* Govt.'s Br. of Aug. 15, 2007, at 48, two of petitioner's cases, *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 408 (3d Cir. 2003); *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968), involve individualized assessments prepared by the Department of State.

[24] Respondents add that "more to the point," the Department of State's actions fall within its powers to conduct foreign affairs. R. Brief at 48-49. It is unclear to petitioner what point this goes to, but he notes that, with the exception of one wholly irrelevant case, *U.S. v. Baez*, 349 F.3d 90 (2d Cir. 2003), that merely refers to a fugitive having been was extradited *to* the United States pursuant to assurances, the cases respondent cites in this passage are all pre-CAT and pre-FARRA and therefore in no way bear on petitioner's due process rights arising from FARRA. Moreover, as argued in *infra* n.7, the ratification history of CAT distinguishes between extradition cases, recognized to implicate foreign relations, and removal cases such as Mr. Khouzam's.

support in the law. In fact, just this argument was rejected by the D.C. Circuit in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001):

> As to the second factor, that is, the risk of erroneous deprivation, the Secretary again offers an analysis of questionable relevance. The government reminds us that the Secretary must, under the statute, consult with the Attorney General and the Secretary of Treasury before designating a foreign terrorist organization, 8 U.S.C. § 1189(c)(4), and must notify congressional leaders seven days before designating such an organization, *id.* § 1189(a)(2)(A). While we understand the Secretary's point that more heads are likely to reach a sounder result, the application of that facially commonsensical notion to due process questions is, to put it charitably, unclear. The United States functions with a unitary executive, created in Article II of the Constitution and constrained by the Fifth Amendment from depriving anyone protected by that Amendment of life, liberty or property without due process of law. The involvement of more than one of the servants of that unitary executive in commencing a deprivation does not create an apparent substitute for the notice requirement inherent in the constitutional norm.

Id. at 206-07. The government attempts to buttress its position by referring to the rarity with which these assurances are pursued, arguing that the "selection process" for assurances "itself is a level of process clearly not afforded aliens in most asylum or CAT cases." Govt.'s Br. of Aug. 15, 2007, at 49.[25] This argument is simply another instance of the government's

[25] Respondents' acknowledgment that they rarely pursue diplomatic assurances supports petitioner's argument that, under the *Mathews* factors, the court would not greatly burden the government by requiring some modicum of an orderly procedure in such cases. *See* Pet's Br. of July 31, 2007, at 60.

demanding blind trust from the court by referring in awed tones to a "selection process" of which it presents no record.

The government's demand for blind faith is wholly inappropriate, given Mr. Khouzam's crucial interest "in bodily integrity and human dignity," an interest that is at risk in his removal to Egypt. *Khouzam*, 2007 WL 1746367, at *8, 10. It is all the more inappropriate in that, however senior the agency officials were who decided to credit Egypt's assurances and however rarely they choose to do so, the agency attempting to revoke Mr. Khouzam's CAT protection is still the very same agency that initially attempted to remove Mr. Khouzam to a country where he faced probable torture without even bothering to obtain diplomatic assurances. The need for an independent adjudicator to review this agency decision could not be clearer.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of habeas corpus, set aside the government's revocation of his deferral of removal, and order his immediate release under reasonable conditions of supervision.

Date: August 22, 2007 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Amrit Singh, certify that a true and complete copy of the foregoing submission, has been served in opposing counsel through the Court's ECF electronic docket system.

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