No. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN RE UNITED STATES OF AMERICA,

Petitioner

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ANDREW J. MALONEY
United States Attorney
Eastern District of
New York

JACQUES SEMMELMAN
Assistant U. S. Attorney
Eastern District of
New York

SARA CRISCITELLI
MURRAY R. STEIN
Attorneys
Department of Justice
Washington, D. C.

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IN RE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION
TO THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK (WEINSTEIN, J.)

The United States hereby petitions for a writ of mandamus to the United States District Court for the Eastern District of New York. The petition is taken from the district court's order in a pending habeas proceeding in an extradition case. The order authorizes an evidentiary hearing to inquire into the internal judicial procedures of the State of Israel and its due process protections. The hearing, in which the fugitive will call witnesses to testify about Israel's procedures, is currently set for June 12, 1989.

JURISDICTION

This Court has jurisdiction to issue a writ of mandamus to the district court under the All Writs Act, 28 U.S.C. 1651, and Rule 21 of the Federal Rules of Appellate Procedure.

QUESTION PRESENTED

Whether the district court has the authority in an extradition matter to hear evidence on the nature and adequacy of the internal judicial procedures of the requesting country.

RELIEF REQUESTED

The United States seeks an order directing the district court to not inquire further into the internal judicial procedures of the foreign government that is seeking the fugitive's return.

STATEMENT OF FACTS

1. The Offense in Israel and the Original Extradition Proceedings. The facts underlying the extradition are set forth in the opinion of the district court (Korman, J.) granting the government's application for the extradition to Israel of fugitive Mahmoud El Abed Ahmad, a.k.a. Mahmoud Abed Atta. [1/] See Matter of Extradition of Atta, 706 F.Supp. 1032 (E.D.N.Y. 1989). Briefly, in May 1986 a civilian bus travelling from the West Bank to Tel Aviv was bombed and strafed. The driver of the bus was killed and a passenger was wounded in the attack. The next day Abu Nidal, a Palestinian terrorist organization, claimed responsibility. Shortly afterwards, two Palestinians were arrested and charged with participating in the attack. They in turn implicated Ahmad and told authorities that Ahmad fled from the West Bank after the attack. From this information, Israel charged Ahmad in its civilian judicial process with various offenses arising out of the incident, including murder.

In early 1987, Israeli authorities learned that Ahmad was living in Venezuela, with whom Israel has no extradition treaty. In April 1987 Venezuela detained Ahmad on charges

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1/ Ahmad is a Palestinian by birth and a naturalized citizen of the United States.

relating to his involvement in the Abu Nidal Organization. The United States urged Venezuela to deport Ahmad to Israel, but that country deported him instead to the United States. Here, Ahmad was arrested pursuant to a provisional arrest warrant. In June 1987 Israel made a formal request for Ahmad's extradition under its extradition treaty with the United States (Convention on Extradition Between the Government of the United States and the Government of the State of Israel, Dec. 10, 1962, 14 U.S.T. 1707, T.I.A.S. No. 5476 (Treaty)). The United States thereafter filed an extradition complaint under 18 U.S.C. 3181 et seq. in the district court.

The matter was initially assigned to a federal magistrate who, after a hearing, concluded that Ahmad had been kidnapped from Venezuela and brought here illegally. In addition, the magistrate held that the attack on the Israeli bus was a "political act" for which extradition was prohibited under Art. VI, para. 4 of the Treaty. The magistrate accordingly denied the United States' request for Ahmad's extradition.

Thereafter, the United States filed a second extradition complaint on behalf of Israel. See United States v. Doherty, 786 F.2d 491, 501 (2d Cir. 1986) (denial of extradition certificate is not subject to appeal; government's recourse is to file another extradition complaint). After a second hearing in February 1989, the district court (Korman, J.) ordered Ahmad extradited to Israel. The court found that there was probable cause to believe that Ahmad participated in the bus attack (706 F.Supp. at 1050-1052), that Ahmad had not been illegally kid-

napped (id. at 1036-1038), and in a lengthy analysis that the attack was not a nonextraditable "political act" (id. at 1038-1050). The court granted Ahmad's request to stay the extradition order for 30 days in order to file a petition for a writ of habeas corpus under 28 U.S.C. 2241.

2. Ahmad's Petition for a Writ of Habeas Corpus. Ahmad filed a petition under 28 U.S.C. 2241 for a writ of habeas corpus on March 3, 1989 (Addendum, pp. 16-22), which was assigned at random to District Judge Weinstein. As the final ground for the writ, [2/] Ahmad argued that in Israel he "will be faced with procedures and/or treatment that is 'antipathetic to a federal court's sense of decency.'" Addendum, p. 21. In conjunction with this claim, Ahmad noted that the issue was touched upon in the extradition hearing but was "outside the jurisdiction of the extradition hearing officers and was therefore not fully presented"; he further stated that "many of the events that serve to support these allegations have either first arisen or initially come to light since the onset of the extradition hearings in this matter." Ibid. Ahmad then requested a hearing "to fully demonstrate that if he is sent back to Israel at this time his chances of receiving even a modicum of due process within the Israeli judicial system are nonexistent" and that "he will be

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2/ Ahmad also claimed in his habeas petition that the charged offenses were political acts under the Treaty; that there was inadequate probable cause; that the second extradition complaint violated double jeopardy, res judicata, and "generally accepted principles of due process and fundamental fairness"; and that "returning [Ahmad] to Israel will constitute a violation of United States international treaty obligations and other accepted principles of international law."

subject to conditions of detention, torture and possible assassination in violation of the constitution as well as universally accepted principles of human rights and international law." Addendum, p. 22.

The United States opposed the petition. Particularly addressing Ahmad's final ground, the government relied primarily on the unbroken line of decisions holding that our courts may not inquire into or otherwise supervise the integrity of the requesting state's judicial system. Turning from the jurisdictional issue to the merits, the government noted the particular due process protections guaranteed under the Israeli system. Addendum, pp. 23-28.

In a reply to the United States' opposition, Ahmad urged at length that the district court conduct a hearing to "examine in detail the judicial procedures that Petitioner will likely face upon his extradition and planned trial in Israel" (Petitioner's Memorandum of Law In Support of the Petition for a Writ of Habeas Corpus, at Addendum, p. 30). Though he acknowledged the existence of the Rule of Non-Inquiry, Ahmad urged that the rule should not be observed upon a showing of "situations where the relator, upon extradition, would be subject to procedures or punishment . . . antipathetic to a federal court's sense of decency." Addendum, pp. 30-31, quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

Ahmad also asserted that if extradited "he will be undoubtedly tortured until he confesses the acts alleged, housed in horrendously indecent detention facilities, and indeed face the

possibility of assassination within the confines of his detention. If brought to trial, any symbolic procedural fairness is impossible and not even a semblance of due process of any kind can be anticipated." (Addendum, pp. 33-34). After alleging a systemic abuse of human rights by the State of Israel, Ahmad concluded that "he cannot receive a fair trial in Israel. The impossibility of a fair trial is manifest not only in the procedure that Petitioner will face but also in the conditions in Israel at the present time." Addendum, p.35. Among the conditions he cited was his "membership in an outlawed group" that "make[s] prejudice in an Israeli trial unavoidable." Addendum, p. 37.

3. The District Court's Order. On May 16, 1989, the district court, ruling from the bench, agreed to "consider the issue of * * * the nature of the [Israeli] judicial system that [Ahmad will] be exposed to." Addendum, p. 4. The court stated that "the federal courts * * * will not be used in order to extradite people where there is the probability that they will be subjected to conditions which do not meet minimum standards of due process as required now * * *." Addendum, p. 5. Without expressing a view on the Israeli judicial system, the court stated simply that it would "like to consider the matter." Ibid. Because the court recognized the government's strong objection to its order, it made clear that its decision amounted to a final order and invited the government to seek mandamus. Ibid.

REASON WHY MANDAMUS SHOULD BE GRANTED

THE DISTRICT COURT LACKS JURISDICTION TO EXAMINE THE JUDICIAL PROCEDURES OF THE REQUESTING COUNTRY IN A HABEAS CHALLENGE TO A FOREIGN EXTRADITION

The law is clear and unambiguous. A historic rule of non-inquiry, enunciated by the Supreme Court and consistently observed in this circuit, precludes courts, in the context of extradition proceedings, from reviewing the internal judicial procedures of the requesting country. Under its dictates, consequently, United States courts will not examine the processes by which the requesting state has amassed its probable cause or intends to secure the conviction of and punish the fugitive.

In a patent rejection of this long-standing rule, the district court has ordered an evidentiary hearing on "the nature of the [Israeli] judicial system" to evaluate that country's due process protections and determine whether those guarantees are sufficient under United States standards to permit Ahmad's extradition. The court's order exceeds its jurisdiction; it violates the proscription against inquiry by the Judicial Branch into the foreign state's processes; and it oversteps the very limited scope of habeas review of extradition orders. At the same time, it jeopardizes the government's obligations under the extradition treaty entered into by the Executive and Legislative Branches, and it interferes with the government's foreign policy responsibilities and interests.

For these reasons, the Court should grant the petition for mandamus and direct the district court to discontinue its inquiry into Israel's internal judicial processes.

A. The Rule of Non-Inquiry Precludes the District Court's Review of Israel's Judicial Procedures. The practice of judicial non-inquiry into the processes of a foreign government finds its origins in Neely v. Henkel, 180 U.S. 109 (1901). In that decision, a fugitive challenged the constitutionality of the federal extradition statute on the ground that it did not "secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution * * * ." Rejecting these claims, the Court stated (180 U.S. at 122-123):

> Allusion is here made to the provisions of the Federal Constitution relating to the writ of habeas corpus[,] bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country.
>
> In connection with the above proposition we are reminded of the fact that appellant is a citizen of the United States. But such citizenship does not * * * entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. By the [extradition statute] the appellant cannot be extradited except upon the order of a judge * * * and then only upon evidence establishing probable cause to believe him guilty of the offence charged; and when tried in the country to which he is sent, he is secured by the same act 'a fair and impartial trial' -- not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed.

The Supreme Court in a later decision reiterated that the courts do not examine the foreign state's processes in an extradition proceeding. Though that case involved a challenge to the probable cause showing, the Court spoke more broadly: "if

there is presented * * * such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. We are bound by the existence of an extradition treaty to assume that the trial will be fair." Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

This Court similarly recognizes that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." Jhirad v. Ferrandina, 536 F.2d 478, 484-485 (2d Cir.), cert. denied, 429 U.S. 833 (1976). See also Sindona v. Grant, 619 F.2d 167, 174-175 (2d Cir. 1980). In a lengthy and seminal discussion of the issue, this Court explained:

> [W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. There is nothing in [two Supreme Court decisions and two lower court cases] indicating that the foreign proceedings must conform to American concepts of due process. * * * * The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government. The right of international extradition is solely the creature of treaty * * * *. We regard it as significant that the procedures which will occur in the demanding country subject to extradition were not listed as a matter of a federal court's consideration in [a number of Supreme Court decisions].

Gallina v. Fraser, 278 F.2d at 78-79, citations omitted.

The Second Circuit's approach is consistent not only with the Supreme Court's view, but also with the views of the other circuits that have addressed the issue. For example, the U.S. Court of Appeals for the District of Columbia rejected the

fugitive's challenge to extradition, holding instead that:

> What we learn from Neely is that a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials. We do not believe that that teaching has been eroded by time * * * *.

Holmes v. Laird, 459 F.2d 1211, 1219 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972). The Fourth Circuit dismissed the claim that the Judicial Branch could inquire into internal matters within the requesting state, noting that the Executive Branch has the sole discretion to deny extradition "when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977). The Sixth Circuit, in an analogous situation, recognized that however uneasy the court may feel about extraditing a fugitive for a crime committed decades before, "we conceive it our obligation to do so." Argento v. Horn, 241 F.2d 258, 263-264 (6th Cir. 1957). Similarly, the Seventh and Ninth Circuits declined to examine the foreign government's procedural requirements for two reasons, without specifically citing to the Rule of Non-Inquiry. Those courts based their judicial abstention on respect for the foreign government's sovereignty -- a notion similar to the foreign policy concerns underlying the Rule -- as well as the chance that the court would erroneously interpret and construe the law of a country whose legal system is not based on common law principles. Matter of Assarsson, 635 F.2d 1237, 1244 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981); Emami v. United

States District Court, 834 F.2d 1444, 1449 (9th Cir. 1987).

The Rule of Non-Inquiry is thus uniformly observed by the federal courts. It is also consistent with the very limited scope of habeas review of international extradition orders. As the Supreme Court stated, "[t]he alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and * * * whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Fernandez v. Phillips, 268 U.S. 311, 312 (1925); see also Jhirad v. Ferrandina, 536 F.2d at 482. Plainly, the narrow scope of habeas review in extradition cases -- with its explicitly limited inquiry that does not include an examination of the judicial system of the requesting country -- precludes the examination the district court proposes to undertake here.

B. Ahmad's Submissions Concerning Israeli Military Judicial Procedures Have no Bearing on the Civilian Process and Thus are Insufficient to Justify the Court's Examination of Israel's Judicial System. Relying on dictum in Gallina v. Fraser, 278 F.2d at 79, Ahmad urged the district court to disregard the Rule of Non-Inquiry on the ground that "extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency.'" Ibid.; see also Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980). Presumably, the district court also relied on the Gallina statement in determining that it had the authority to inquire into Israel's judicial system. Contrary

to the court's and Ahmad's view, Gallina does not justify the kind of inquiry that the court has signalled here.

We question first whether the dictum in Gallina permits the sort of wholesale inquiry into the requesting country's procedures that the district court seemingly contemplates. Indeed, as Judge Friendly, writing for the Court, later explained, Gallina holds expressly that "the federal courts may not 'inquire into the procedures which await the relator upon extradition.' 278 F.2d at 78." Judge Friendly continued that "[t]he fact that Gallina also added the caveat that some situations were imaginable in which a 'federal court might wish to reexamine the principle of exclusive executive discretion, id. at 79, falls well short of a command to do so here." Sindona v. Grant, 619 F.2d at 175. In other words, Gallina did not create or endorse a new rule, but merely enunciated the possibility that such a change might be imposed in appropriate circumstances. Hence, that case does not stand for the proposition that the courts currently have the authority to ignore "the principle of exclusive executive discretion." Absent any indication from a higher court that the long-standing principle is no longer valid, Gallina provides no basis for the district court to depart from it.[3/]

Additionally, assuming that Gallina provided some support

3/ As the Ninth Circuit noted several years ago, Gallina's "exception has yet to be employed in an extradition case" (Arnsbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)), and nothing decided since 1983 has rendered invalid that observation. Moreover, Gallina did not involve an unrestricted examination into all aspects of the foreign state's system of justice; rather, it focused in a very limited manner on the singular practice of prosecuting in absentia.

for the district court to examine the requesting state's internal processes, the Court's explanation in Sindona and its emphasis in that case on Gallina's expression of the non-inquiry rule diminishes even further the minimal significance of that dictum. But, even assuming that a very limited exception to the Rule of Non-Inquiry might exist in extradition proceedings and that it could, in an appropriate case, support an inquiry into all aspects of the foreign government's judicial processes, the intrusion of such a judicial examination on our treaty obligations and the Executive Branch's discretion requires at least a threshold showing that the foreign system is suspect. In this case, Ahmad's challenge to the Israeli judicial process was entirely based on the alleged unfairness of the military judicial procedures followed on the West Bank. He made no showing, however, that the procedures observed in Israel's civilian courts -- in which he has been charged and will be tried (according to a guarantee provided in a diplomatic note by Israel and submitted to the district court) -- are in any way "antipathetic to a federal court's sense of decency." In short, nothing in the papers filed by Ahmad makes a threshold showing sufficient to trigger an evidentiary hearing on the "nature of the [Israeli] judicial system."

Even if the district court has some narrow leeway under the Second Circuit's dictum to ignore the Rule of Non-Inquiry, its determination to do so in this case is thus wholly unwarranted. Whether the Rule is an inflexible command to the courts to abstain from reviewing other countries' internal procedures -- as

the Supreme Court suggested in Neely v. Henkel -- or is subject to a very limited exception for the case that offends the court's "sense of decency" -- as the dictum in Gallina v. Fraser might suggest -- nothing in this case supports the inquiry proposed by Ahamad and acceded to by the district court. Consequently, the court's order opening the matter for judicial examination is, even if not a violation of the clear limits of judicial authority, a patent abuse of its discretion.

C. **The District Court's Order is Reviewable by Mandamus.** We recognize that mandamus "'is meant to be used only in the exceptional case.'" In re Von Bulow, 828 F.2d 94, 96 (2d Cir. 1987), quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). Thus, "'[t]he traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Mallard v. United States District Court for the Southern District of Iowa, et al., No. 87-1490 (S. Ct., May 1, 1989), slip op. 13, quoting Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943). The requested writ of mandamus meets those standards and is appropriate here to prohibit the district court from exceeding its prescribed authority.

Our courts may not inquire into the internal judicial proceedings of other nations or to determine if the requesting country's system comports with our notions of procedural due process. As this Court explained, one of the "touchstones * * * of

review by mandamus" is the "usurpation of power" by the district court. Von Bulow, supra, 828 F.2d at 97. The district court has no jurisdiction to ignore the Rule of Non-Inquiry, to examine Israel's judicial system and, implicitly, to disregard our obligations under the extradition treaty on a finding that the foreign system somehow falls short of our standards. The Court accordingly should confine the district court's authority and bar its intended exercise of oversight into Israel's system of justice; the district court's usurpation of this power makes mandamus appropriate.

The other touchstones of mandamus review noted by the Court in Von Bulow, supra -- "clear abuse of discretion and the presence of an issue of first impression" -- are also applicable here. As set out above, it is well-settled that the scope of habeas review in an extradition proceeding is very limited. The district court's determination to consider Israel's current political situation and its impact on the civilian judicial process and to consider those matters in the habeas proceeding exceeds by far the narrow scope of the hearing and thus constitutes a clear abuse of the court's discretion. And, this issue is a novel legal question for which "there is only sparse discussion * * * in the reported cases"(Von Bulow, 828 F.2d at 97, quoting Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591-592 (3d Cir. 1984). Resolution of the issue, moreover, will promote the efficient administration of justice (Von Bulow, 828 F.2d at 99-100), by focusing the habeas proceeding and barring its forays into proscribed areas.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be granted.

Respectfully submitted.

ANDREW J. MALONEY
United States Attorney
Eastern District of New York

JACQUES SEMMELMAN
Assistant U. S. Attorney
Eastern District of New York
(718) 330-2683

MURRAY R. STEIN
SARA CRISCITELLI
Attorneys
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition for a Writ of Mandamus have been served on the parties to this action and on the United States District Court at the following addresses:

Ramsey Clark
Lawrence W. Schilling
Peter B. Meadow
36 East 12th Street
New York, N.Y. 10003

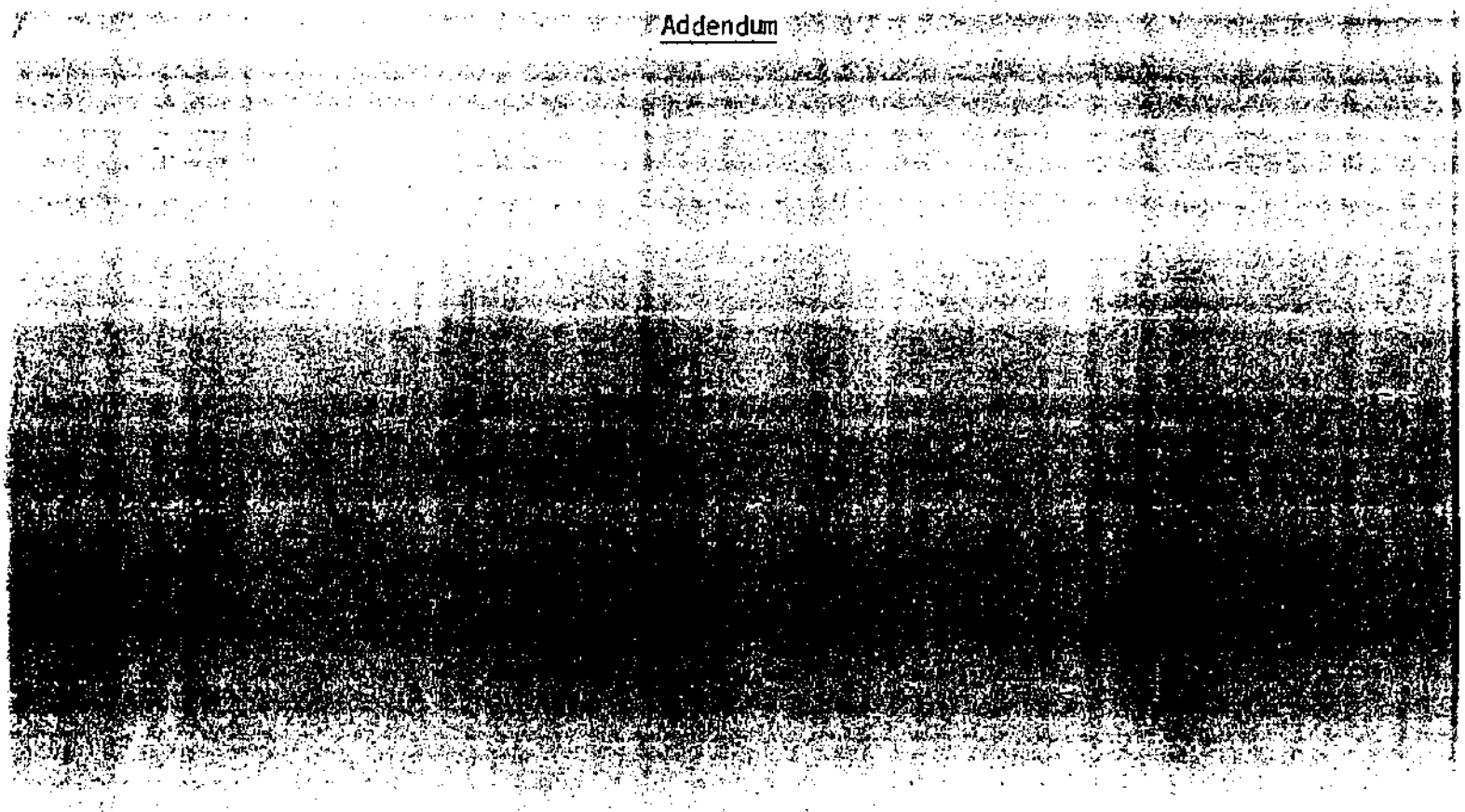
The Honorable Jack B. Weinstein
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11211

Dated: June 9, 1989

Sara Criscitelli

SARA CRISCITELLI
Attorney
Appellate Section
Criminal Division
Department of Justice
Washington, D.C. 20530
(202) (FTS) 633-3961

Addendum



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAHMOUD EL ABED AHMAD,	Case No. CV-89-715
v.	Brooklyn, New York
	May 16, 1989
GEORGE WIGEN, ET AL,	
Defendant.	

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Larry Schilling Ramsey Clark 36 East 12th Street New York, NY 10003
For the Defendant:	Jacques Semmelman U.S. Attorney 225 Cadman Plaza East Brooklyn, New York 11201
	Murray R. Stein Department of Justice Washington, D.C.
Transcriber:	Salvatore DiCostanzo, Court Recorder Operator
	Transcripts Assoc., Inc. 250 West 57th Street New York, New York 10107

Proceedings recorded by electronic sound recording, transcript produced by transcript service.

THE COURT: Yes, what can I do for you?

MR. STEIN: Well, Your Honor, first my name is Murray R. Stein from the Department of Justice in Washington. Your Honor, Jacques Semmelman who has been involved in this case since the onset scheduled before Judge Radgy(phonetic) at nine o'clock and at 9:25, still the prisoner hadn't come over from MCC. It's supposed to be just a one minute proceeding before Judge Radgy and he should be up any second now to --

THE COURT: Well, what is it we have to do this morning?

MR. STEIN: Well, first, Your Honor, it's my understanding and I'd like to get it clear from you since I am here that counsel for Mr. Attar(phonetic) has requested the Court to permit it to bring additional witnesses and evidence before you in this habeas proceeding. And it is the position of the government based on the law which is has come out of the initial proceedings which as I'm sure as Your Honor is aware, about 99% case long statutory law that in an extradition proceedings where we have habeas corpus it's the responsibility of the habeas court merely to review the proceedings before the extradition magistrate, in this case the extradition magistrate being Judge Korman(phonetic). I am not reopening the proceedings to permit additional evidence and witnesses.

THE COURT: Well, I understand your position. I've

read your papers and they are highly persuasive except that I believe in viewing the importance of the case and the implication of the petitioner that I will reopen to allow them to present further evidence on the matter so that if it goes up to the Supreme Court, they'll have a full record. In the meantime, you can present whatever evidence you'd like as well. I'm particularly interested from the government in determining the nature of the due process that will be afforded the petitioner, whether he'll be tried-- I notice there is an allegation to that point by the government that he'll be tried by a civilian court in the state of Israel proper. But I would like information on the nature of their procedures and whether due process will be granted.

MR. STEIN: I have two comments about that, Your Honor. First of all, although not required, there was some comment about that before in the proceedings and we supplied, it's in the record, exactly how this case would be tried. This case will be tried in Israeli courts just like any other criminal case would.

THE COURT: I understand you contention as I --

MR. STEIN: That's clearly in the record, too, Your Honor.

THE COURT: If you want to supply any additional information, you please do so.

MR. STEIN: Well, too, Your Honor,--

THE COURT: If you want to rest on the record, you please do so.

MR. STEIN: I understand that, Your Honor. The second point we have on that is that the Court pursuant to the law on the subject is not allowed to become involved in the judicial processes that would go on in the requesting state, in this case Israel. That --

THE COURT: Well, I understand --

MR. STEIN: I'm concerned about the judicial process.

THE COURT: I understand your position. But I'm not fully convinced, for example, that in this case or one involving a government which was operated without due process, where the courts merely did the bidding of the executive, where people were tortured and no attorneys were available and the like as in some -- the case of some governments, in recent years, a court couldn't consider that. So I think I can consider the issue of the whether the nature of the judicial system that he'll be exposed to.

MR. STEIN: Well, of course, we take a different view of that, Your Honor. If there was any question of, for any government that makes a request on the United States as to the viability of the judicial system it's the responsibility of the Secretary of the State either to abrogate the treaty and/or not receive any requests from that government.

THE COURT: I understand --

MR. STEIN: That's not true in this case, Your Honor.

THE COURT: I understand the position. However, the federal courts which aren't in the branch of the government will not be used in order to extradite people where there is the probability that they will be subjected to conditions which do not meet minimum standards of due process as required now, I believe, probably under international law. In any event, I'd like to consider the matter. If you say the record is complete, that's the end of it. I'm not going to preclude the petition for putting in evidence. If you wish to take an appeal for mandamus, you're free to do so. Otherwise, I don't believe my decision is appealable at this stage. That is a final order. If you want to take the mandamus petition, there's an order and I'll file so there will be something physical in the record. When is this scheduled for hearing?

MR. CLARK: I think that's the real question as far as I know, Your Honor.

THE COURT: Well, how long is this going to take?

MR. CLARK: I think two days at the most, perhaps.

THE COURT: But you're going to give the other, the respondent the full statement, name witnesses, their background, and approximately what you're going to have them say so they can prepare for cross examination. If the government wants to submit anything you follow the same rules. Are you going to have any experts?

MR. CLARK: Yes, Your Honor.

THE COURT: Experts will give their full background and basis for their opinion, hearsay, full written report. Government will do the same.

MR. STEIN: Your Honor, are we going to supplied today with the names of these witnesses and a prop of their testimony?

THE COURT: I don't know about today. Can we fix the date for the hearing? Let's fix it and then you can get it efficiently in advance. When can I have some days? Better call Chief Judge Platt and tell him I cannot take his case. I'm just completely tied up with other cases. How are we going to fit in a three week trial, a trial that's going to be three weeks?

(Off Record Discussion)

THE COURT: Put this on for the fifth and sixth. And half of the seventh of June. All right, jury selection in that --

MR. STEIN: What time would that be? I'll be coming in from Washington a day later that morning.

THE CLERK: 10:30.

MR. STEIN: Okay, thank you.

THE COURT: Is that convenient? We'll make it whatever time.

MR. STEIN: As far as I know at the present time,

Your Honor, I have to be back in Las Vegas next week. I don't have any -- I can't think on the top of my head any conflicts at this time. If I have any, I will speak to Mr. Semmelman.

THE COURT: Well, all right. We'll work it out. We'll accommodate counsel for both sides, obviously, whatever it convenient. Is there anything else?

MR. CLARK: Just time within which we should exchange data on witnesses.

THE COURT: That -- within one week. For the petitionary and the respondent will have three days, three business days thereafter. Anything further? Can we have a full record now of this?

THE CLERK: Yes.

MR. STEIN: Your Honor, I'd just like to make one thing clear. As I understand it, is there anything that Mr. Attar is going to do pursuant to your order? Some comment about the prospective trial?

THE COURT: No. I'm going to give him carte blanche. They can say anything they want. That is a matter that was a concern to me as I was reading the papers. There's an issue as to that point. We did have a case some years ago involving an Israeli who fire bombed a bus that now Judge Radgy, I think, prosecuted, habeas petition. I believe that ended in an agreement by the petitioner to go over voluntarily under was some plea agreement.

MR. STEIN: I think that was the Lightner(phonetic) case, Your Honor.

THE COURT: Lightner case, yes. But that's certainly a precedent. I suppose the Court considered -- who was the magistrate in that case?

MR. STEIN: Lightener is involved in -- I think he reported to Susan Wright(phonetic).off the top of my head, Your Honor. It doesn't have to do with that, but I think it's a question of release on --

THE COURT: Well, I don't.want to hear --

MR. STEIN: Off the top of my head.

THE COURT: Was there a hearing in that case?

MR. STEIN: I don't remember the full process. I --

THE COURT: Well, I'll get the citation from Judge Radgy and, June, would you order from the document center the full files in that case. Are there any other cases we have that are -- that bear on the issue of the kind of justice?

MR. STEIN: Well, I think, Your Honor, the most recent person who's done any publicity about returning to Israel is Ivan Demenyoke(phonetic) also known as Ivan the Terrible. There wouldn't be any difference in the trial of Ivan Demenyoke than there would be.in this particular case and, of course, Demenyoke even had the opportunity to use his U.S. attorneys in the case.

THE COURT: Well, if you have any material, I'll take

judicial notice and we'll just supply it. I believe I can take judicial notice extensively in these cases. That applies to either party. All right. Thank you very much.

MR. STEIN: Your Honor, I just -- there's one other case I think that before Demenyoke, there was a six circuit. There was also a little older case that may have made some comment on this and that's the case involving Abu Ian(phonetic) who was extradited to Israel a few year before. The case went through the seventh circuit.

THE COURT: Well, any information you can give me I'll take. Judicial notice in related cases is of broad, particularly on an issue such as this. I have taken judicial notice of the nature of the French system in connection with a case involving race horses. And I think of the British system a couple years involving, I think, Mr. George or what's his name?

THE CLERK: Boy George.

THE COURT: Boy George. There's was death and I said that the English system was operating with due process. The French system was operating with due process. The Indian system, too. I don't remember having done it for the Israeli system. I should say, however, that some years ago, probably fifteen years or more ago, I did visit Israel and I lectured on Mount Scopis(phonetic) and did some research on the Israeli legal system which resulted in the publication of three or

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

AHMAD,

Plaintiff, CV 89 715

-against- United States Courthouse
Brooklyn, New York

UNITED STATES OF AMERICA,

Defendant. March 23, 1989
- -x 2:10 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONRABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: RAMSEY CLARK, ESQ.
PETER MEADOW, ESQ.

For the Defendant: ANDREW J. MALONEY, ESQ.
United States Attorney
BY: JACQUES SEMMELMAN, ESQ.
Assistant United States Attorney
Brooklyn, N.Y.

Court Reporter: Allan R. Sherman
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced from computer.

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four articles in a New York law journal. Look them up if you think that I ought to be excused, feel free to make a motion after you look at the articles.

MR. CLARK: Do you know what year that was?

THE COURT: Pardon me?

MR. CLARK: Do you know what year that was approximately?

THE COURT: No, but if you call my secretary, Dorothy Rosenberg, she can probably give it to you. She may even have a copy of it some place.

MR. CLARK: I find that serve that has no precedential -- and the attorney general of Ireland, Murray, in February declined to extradite to the United Kingdom, a priest named Flynn, specifically on the grounds of a seven page opinion he couldn't get a fair trial in the UK.

THE COURT: All right. Thank you very much.

MR. CLARK: Thank you, sir.

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Sherry Levit — 5/17/89

Signature of Transcriber — Date

THE CLERK: Civil cause for status conference, Ahmad versus U.S.A.

MR. SEMMELMAN: Good afternoon, your Honor.

MR. MEADOW: Good afternoon.

THE COURT: Good afternoon. What can I do to help you?

MR. SEMMELMAN: Perhaps that question is best addressed to defense counsel, it's their habeas petition.

MR. MEADOW: We called for the status conference, we filed a habeas -- there is a scheduling order already ordered.

THE COURT: For the hearing, for a hearing?

MR. MEADOW: No, for response by the government and then a reply by us.

THE COURT: Are you going to require a hearing in this case?

MR. MEADOW: We believe we may, yes.

We'll certainly want to put on new documentary evidence and we may, if we can locate and afford the witnesses, we'll want perhaps one day, maybe two days of hearing.

THE COURT: Do you have any idea when you will be ready?

MR. MEADOW: The scheduling as you ordered puts us about 40 days from -- that was a few days ago, we would certainly be ready at that time and if necessary -- it would be better if it was after that for us to see what positions

are being taken.

THE COURT: What date would you suggest, sometime in May?

MR. CLARK: Second week in May.

MR. MEADOW: One of our problems, some of our witnesses may come from overseas and based on that, it will be based on availability and we don't know that at this time but if we can set a tentative date and maybe over the next two weeks try to formulate a date.

THE COURT: May 15th.

MR. MEADOW: That would be fine.

MR. CLARK: I have the possibility of a trial in North Carolina. May 22nd would be a little better if that would be convenient to the Court.

MR. SEMMELMAN: It's fine with me, your Honor.

MR. CLARK: Why don't we just go with the 15th and if something happens, we can let you know and perhaps reschedule it.

We have a change of venue motion pending down there and I think it's going to be granted.

THE COURT: Shall we put it on for May 15th at 10:00 o'clock for trial?

MR. SEMMELMAN: Your Honor, it will be the government's position that there is no need for a hearing because there has already been a hearing before Judge Korman

usual pretrial order.

MR. MEADOW: Your Honor, I had one question for the Court.

THE COURT: Yes.

MR. MEADOW: On our petition, the first line of the order to show cause, the petition, I guess it's a formal leave to proceed -- the first line of the form for the order to show cause is petitioner is granted leave to proceed in forma pauperis.

We were previously appointed counsel.

THE COURT: And you want to proceed, I didn't understand, I thought you were paid counsel. You want to proceed in forma pauperis?

MR. MEADOW: Yes, we didn't formally apply because I had thought that the appointment by Judge Korman continued.

THE COURT: The appointment will continue and you may proceed in forma pauperis.

All right. Nice to say you.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In the Matter of the Petition of :

MAHMOUD EL-ABED AHMAD :

(a/k/a "Mahmoud Abed Atta"), :

Petitioner, :

for a writ of Habeas Corpus as :

-against- :

George Wigen, as Warden of the Metropolitan Correctional Center of the Federal Bureau of Prisons, Romolo J. Imundi, as United States Marshall for the Southern District of New York, James A. Baker, as Secretary of State of the United States and Richard Thornburgh, as Attorney General of the United States, :

Respondents. :

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CV-89-0715

88 Civ.

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, through his counsel, alleges as follows:

1. Petitioner bases his prayer for relief on 28 U.S. C. 2241 et. seq. No previous application has been made for a writ of habeas corpus or similar relief.

2. Petitioner, a United States citizen is incarcerated at the Metropolitan Correction Center in Manhattan where he has been held since May 6, 1987, a period now totaling approximately 22 months. There are not now nor have there ever been any criminal or civil charges lodged against Petitioner in this Country nor are any such charges pending or anticipated.

3. Petitioner is held in custody pursuant to an order of the Honorable Edward R. Korman, United States District Court Judge for the Eastern District of New York issued pursuant to 18

so in our view the record is complete and the defense should not be entitled to reopen.

THE COURT: You will submit the full record at this time?

MR. SEMMELMAN: Yes, actually Judge Korman has the record unless his clerk has sent it downstairs. I'm not sure.

THE CLERK: He is has not.

MR. SEMMELMAN: So Judge Korman would have the record at this time.

THE COURT: Are you going to rest on the record before you?

MR. SEMMELMAN: Yes.

THE COURT: You'll have to submit the record at some point.

MR. SEMMELMAN: Fine, I will do that but as a matter of law, it's our position, and I'm prepared at some point to submit a memo to the Court on this, that the plaintiff should not be entitled at this point in the proceeding to put on additional evidence not presented before Judge Korman.

THE COURT: You will certainly put that in your response and brief.

MR. SEMMELMAN: Yes.

THE COURT: And they can reply.

All right. In any event you'll give the usual trial notice of witnesses, experts and the like pursuant to the

U.S.C. Sec. 3184 and the Treaty of Extradition between the United States and the Government of Israel.

4. This matter comes before the Court on habeas corpus review after Petitioner has been subjected to two successive extradition hearings before separate extradition hearing officers who reached directly divergent findings.

5. In the original hearing held, the Honorable John L. Caden, United States Magistrate for the Eastern District of New York denied the Government's request for certification for extradition. Magistrate Caden held evidentiary hearings to determine the Israeli extradition request on December 16 and 17, 1987, and February 22, 1988. The matter was titled In Matter of the Extradition of Mahmoud Abed Atta a/k/a/"Mahmoud El-Abed Ahmad", Magistrate's Docket No. 87-0551 M. A copy of Magistrate Caden's Memorandum and Order dated June 17, 1988 is attached hereto as Exhibit 1.

6. In a second extradition proceeding filed immediately after the Magistrate's denial of extradition in the first, again titled In Matter of the Extradition of Mahmoud Abed Atta a/k/a/"Mahmoud El-Abed Ahmad", docketed as 88 CV 2008 (ERK), an application to have Petitioner certified for extradition was granted by the Honorable Edward R. Korman in a Memorandum and Order dated February 2, 1989. Judge Korman adopted the record from the hearings before Magistrate Caden and also held further evidentiary hearings on July 6, 7, and 8, August 3 and 24, and September 15 and 16, 1988. As part of his memorandum opinion Judge Korman ruled that it was inappropriate that he sit as an Article III judge in a habeas corpus proceeding that would review

his own decision and therefore directed that the anticipated habeas corpus petition be assigned to another judge by random selection. Judge Korman's memorandum and order is attached hereto as Exhibit 2. Judge Korman stayed the certification for extradition on the grounds that Petitioner file a petition for a writ of habeas corpus within 30 days. As of the filing of this petition, that stay remains indefinitely in effect.

7. There is no direct appeal of orders certifying extraditability and the correctness of such orders is properly subject to challenge by petition for writ of habeas corpus, pursuant to 28 U.S.C. 2241.

8. Petitioner, a United States citizen, was initially arrested on April 27, 1987 in Venezuela, where he maintained an apartment, and was held in detention for approximately 9 days. During that time he was held in solitary confinement, denied access to a lawyer, and subject to beatings and incessant interrogation.

9. Upon information and belief, agents of Israel and the United States directly participated with agents of the Venezuelan government in Petitioner's illegal arrest, detention, interrogation, and mistreatment or such was done at their instigation and request and with their approval.

10. Upon information and belief, during his detention in Venezuela, United States agents urged the Venezuelan government to extradite Petitioner directly to Israel. Venezuelan refused to do. There is no extradition treaty between the two countries. The United States then determined to accept custody of

Petitioner solely for the purpose of extraditing him to Israel. Although documents indicate Petitioner was expelled from Venezuela for unspecified immigration violations, Petitioner asserts this was a pretext to send him out of the country in the custody of United States agents. Petitioner was never charged with any crime by the Venezuelan authorities.

11. On or about May 1, 1987, an FBI Legal Attache went to Venezuela to consult with top level Venezuelan security officials concerning Petitioner. The FBI agent remained there for 6 days and consulted regularly with Venezuelan officials.

12. On May 3, 1987, an arrest warrant was issued for Petitioner by the Magistrates Court in Jerusalem, Israel, charging him with murder.

13. On May 5, 1987, two more FBI agents came to Venezuela taking Petitioner into their custody and bringing him to the United States.

14. On May 6, 1987, Petitioner was turned over to all three FBI agents while they waited on a Pan American Airways Plane bound for New York in the Caracas Venezuela airport. Handcuffed, Petitioner was put on the plane and turned over to the agents. One of the agents removed the handcuffs from him. He was searched, brought to a middle seat in the rear of the plane and restrained for the rest of the flight with agents on either side of him. An agent testified that at some point, either immediately or shortly after the plane was in the air, the agents stated that Petitioner was formally being put under arrest. The reality is that at all times he was under arrest and at no time

to fully demonstrate that if he is sent to Israel he will be subject to conditions of detention, torture and possible assassination in violation of the constitution as well as universally accepted principles of human rights and international law.

19. This petition is supported by the transcripts, pleadings, documentary evidence, briefs, and opinions generated in the extradition proceedings that underlie this petition, as well as further evidence that will be submitted at the evidentiary hearings requested under this petition and memoranda of law to be submitted with the court's permission or at the court's request at a later date.

WHEREFORE, Petitioner prays that:

1. The Court conduct a hearing upon the receipt of respondent's answer to the instant petition and petitioner's response thereto, if any.

2. The Court issue a writ of habeas corpus directing that Petitioner be unconditionally discharged.

3. The Court grant such other and further relief as may seem just and proper.

DATED: March 3, 1989

BY: Pet B. Meadow
Peter B. Meadow

Ramsey Clark
Lawrence W. Schilling
Peter B. Meadow

36 East 12th Street
New York, N.Y. 10003
(212) 475-3232

Attorneys for Petitioner

c. Petitioner cannot be extradited to the State of Israel as under the facts surrounding his arrest, detention and arrival in New York the court cannot properly assert jurisdiction. Petitioner cannot be extradited to the State of Israel because subjecting him to a second extradition procedure after the determinations in the first hearing was a violation of constitutional double jeopardy and res judicata protections and generally accepted principles of due process and fundamental fairness.

e. Under the facts and circumstances of this case, returning Petitioner to Israel will constitute a violation of United States international treaty obligations and other accepted principles of international law.

f. Petitioner should not be returned to Israel as he will be faced with procedures and/or treatment that is "antipathetic to a federal court's sense of decency."

1. This issue, although noted by Petitioner during the hearings below, was outside the jurisdiction of the extradition hearing officers and was therefore not fully presented. Also many of the events that serve to support these allegations have either first arisen or initially come to light since the onset of the extradition hearings in this matter.

2. Petitioner asserts and requests a hearing to fully demonstrate that if he is sent back to Israel at this time his chances of receiving even a modicum of due process within the Israeli judicial system are nonexistent.

3. Petitioner asserts and requests a hearing

PAN:JS
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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In the Matter of the Petition of
MAHMOUD EL-ABED AHMAD, also known
as "Mahmoud Abed Atta,"

Petitioner,

for a writ of Habeas Corpus as

- against - 89 CV 715 (JBW)

George Wigen, as Warden of the
Metropolitan Correctional Center
of the Federal Bureau of Prisons,
Romolo J. Imundi, as United States
Marshal for the Southern District
of New York, James A. Baker, as
Secretary of State of the United
States and Richard Thornburgh, as
Attorney General of the United States,

Respondents.

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THE GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION FOR A WRIT OF HABEAS CORPUS

ANDREW J. MALONEY
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

JACQUES SEMMELMAN
Assistant U.S. Attorney
MURRAY R. STEIN
U.S. Department of Justice
(Of Counsel)

> narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.
>
> * * *
>
> The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, Extradition, §40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure.

290 U.S. at 293, 296 (emphasis added). Thus, extraditing Atta to Israel cannot possibly constitute a violation of the international treaty obligations of the United States.

F. Israel's Judicial System is Not a Proper Subject for the Scrutiny of this Court

Petitioner contends that he will not receive "even a modicum of due process" within the Israeli judicial system, and that he should not be returned to Israel for that reason.

This argument was not raised below, apparently because defense counsel correctly recognized that this argument may only properly be addressed to the Department of State, not the courts. As the Second Circuit stated in Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976), cert. denied, 429 U.S. 833 (1976), "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based." Id. at 484-485 (citing Factor v. Laubenheimer, 290 U.S. 276 (1933)). Accord, Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), cert. denied, 106 S. Ct. 1198 (1986); see also Glucksman v. Henkel, 221 U.S. 508, 512 (1911) ("we are bound by the existence of an extradition treaty to assume that the trial will be fair.")

If there is reason to believe that a nation with which we have a valid extradition treaty does not intend to comply with "due process" in its most general sense, the responsibility for investigating and addressing that concern rests entirely with the State Department; the courts may not become involved. Gallina v. Fraser, 278 F.2d 77, 78-79 (2d Cir.), cert. denied, 364 U.S. 851 (1960); accord, In re Ryan, 360 F. Supp. 270, 274 (E.D.N.Y. 1973); aff'd without op., 478 F.2d 1397 (2d Cir. 1973). To require

Israel to establish the fairness of its judicial system negates the purpose of an extradition treaty, undermines the responsibility of the Secretary of State, and effectively eliminates the treaty making power of the Senate.

Furthermore, it is well established that

> Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.

Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), aff'd, 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960). Accord, Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972). Thus, whatever the phrase "due process" has come to require in a United States court, there is simply no obligation upon a foreign country to adhere to the same standard -- or any standard -- in order to secure the extradition of a defendant pursuant to a valid treaty. See also Neely v. Henkel, 180 U.S. 109, 122 (1901).

In spite of that, Israel -- while under no obligation to do so under the treaty, United States law or in-

ternational law -- has produced evidence that Atta will receive a fair trial. (Government's Ex. 30(A).)

Specifically, Atta will be tried before the District Court of Jerusalem, an ordinary Civil Court before which ordinary criminal offenders are tried. (Id. at ¶ 3.) Atta will not be tried before any military court or tribunal. (Id. at ¶ 4.) Atta's trial will be a civil trial, conforming to established judicial procedures. (Id. at ¶ 5.) The Court will be composed of three legally trained professional judges. (Id.) Atta will be afforded all rights and protections accorded any Israeli citizen, including those set out in Israel's Penal Law, Israel's Criminal Procedure Law, and all other laws pertaining to criminal trials. (Id.) In particular, Atta will be presumed innocent and the state will have the burden of proving Atta's guilt beyond a reasonable doubt; Atta will be permitted to be represented by counsel of his choice from among members of the Israeli bar, including an Arab member of the bar; all trial proceedings will be translated into a language in which Atta is fluent; Atta's attorney will be permitted to cross-examine prosecution witnesses; Atta will be entitled to have witnesses testify on his behalf; Atta may testify on his own behalf if he so chooses; and the trial will be open to the public and the press. (Id.)

In short, Atta will receive a fair trial in Israel. Extraditing him to that country will not violate his due process rights.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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In the Matter of the Petition of
MAHMOUD EL-ABED AHMAD, also known
as "Mahmoud Abed Atta,"

Petitioner,

for a writ of Habeas Corpus as

- against -

89 CV 715 (JBW)

George Wigen, as Warden of the
Metropolitan Correctional Center
of the Federal Bureau of Prisons,
Romolo J. Imundi, as United States
Marshal for the Southern District
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Secretary of State of the United
States and Richard Thornburgh, as
Attorney General of the United States,

Respondents.

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF THE PETITION FOR A WRIT OF HABEAS CORPUS

Ramsey Clark
Lawrence W. Schilling
Peter B. Meadow

36 East 12th Street
New York, N.Y. 10003
(212) 475-3232

ATTORNEYS FOR PETITIONER

POINT FIVE

IF EXTRADITION IS GRANTED IN THIS CASE THERE IS A SUBSTANTIAL LIKELIHOOD PETITIONER WILL FACE TORTURE, CRUEL AND INHUMAN PUNISHMENT AND DETENTION, AND A TRIAL SO VIOLATIVE OF DUE PROCESS THAT UNDER THE CIRCUMSTANCES EXTRADITION CANNOT BE ALLOWED

Petitioner asserts that this Court should hold a hearing to examine whether or not there is a likelihood that if extradited to Israel he will face torture, cruel and unusual punishment and detention and possible assassination. Petitioner further asserts that this hearing should examine in detail the judicial procedures that Petitioner will likely face upon his extradition and planned trial in Israel. For reasons noted below, these hearings will be held to establish de novo factual findings and to determine whether or not certification for extradition can constitutionally be allowed at this time.

As a general rule, when reviewing extradition decisions our courts have refused to inquire into the conditions the individual will face upon his arrival in the requesting country as well as the kind of judicial procedures he may face. However, in 1960, the United States Court of Appeals for the Second Circuit recognized the existence of an exception to what has come to be known as the rule of noninquiry. The Court determined that the rule was not absolute; it was subject to being transcended in "situations where the relator, upon extradition, would be subject to procedures or punishment ... antipathetic to a federal court's sense

of decency. " Gallina v. Fraser, 278 F. 2d 77, 79 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960); see also, Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980), cert. denied, 449 U.S. 856 (1980); United States ex.rel. Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974).

Thus, in the face of a proper showing, the rule of non-inquiry must yield. Courts are alert to the possibility of such showing being made, and the language from Gallina carving out the exception to the rule remains a vital part of a decisional law. Not only has it remained a part of decisional law in the 2nd Circuit, but it has been recognized in other circuits as well. For example, in 1985, the United States Court of Appeals for the Sixth Circuit announced that it would make no inquiry into the procedures which would apply after surrender "[i]n the absence of any showing that the [the extraditee] will be subjected to 'procedures antipathetic to a federal court's sense of decency.'" Demjanjuk v. Petrovsky, 776 F. 2d 571, 583 (6th Cir. 1985).Cf.,Prushinowski v. Samples 734 F. 2d 1016, 1019 (4th Cir. 1984). Furthermore, this circuit continues to be sensitive to the possible existence of Gallina conditions. Cf. Linnas v. INS, 790 F. 2d 1024, 1032 (2d Cir. 1986), cert. denied ___U.S.___, 107 S.Ct. 600 (1986).

Petitioner asserts that his is a case wherein the rule of non-inquiry should give way and this court must review the circumstances he is facing upon possible extradition to Israel. Petitioner was precluded from raising this matter in either of the courts that held the extradition proceedings below although it was alluded to at different times during the hearings and

within Petitioner's final briefs before Judge Korman. The issue of whether the rule of non-inquiry should be waived is arguably beyond the limited jurisdiction of the extradition hearing officer and could not be addressed by him even if desired. It seems clear that the issue arises as one of constitutional dimension that may be only cognizable under habeas corpus review of this matter.

Further, many of the facts that support this issue are both new and newly discovered. As all must know, the political situation in the requesting country, Israel, and in the territories occupied by Israel has been extremely volatile. In mid-December 1987, just a few days prior to the commencement of the initial hearing before Magistrate Caden, the newest phase of the ongoing uprising, which has become known as the "Intifada" began.

This newly intensified period of violence and conflict, that in Petitioner's is merely a new phase of a conflict that has been taking place at least since the start of the Israeli occupation, involves an extreme acceleration and growth of violent resistance by the Palestinian community and a corresponding acceleration and growth in the repressive and violent nature of the Israeli response. Almost simultaneously, the actions of the Israeli Government both current and past have come under greater scrutiny, and revelations of past and present Human Rights and Judicial abuses have come to public prominence. Examples include the systematic and long covered-up use of torture by Israeli security forces, the imposition of summary detention and trial procedures, various blatant abuses of human rights, continued and

unapologetic violations of international law on numerous level.

Just a few of the articles and reports on the subject are submitted herewith. Petitioner asserts that these reports clearly indicate that if extradited to Israel at the present time he will be undoubtedly tortured until he confesses the acts alleged, housed in horrendously indecent detention facilities, and indeed face the possibility of assassination within the confines of his detention. If brought to trial, any symbolic procedural fairness is impossible and not even a semblance of due process of any kind can be anticipated.

Just a few of the articles and reports on the subject are submitted herewith and are attached as exhibits to the Certification of Petitioner's Attorney Peter Meadow)[40]
Petitioner asserts that these reports clearly indicate that if extradited to Israel at the present time he will be undoubtedly tortured until he confesses the acts alleged, housed in horrendously indecent detention facilities, and indeed face the possibility of assassination within the confines of his detention. If

1. The documents submitted at this time include, The U.S. Department of State's Country Reports on Human Rights Practices For 1988 for State of Israel (Exhibit 2); 1988 Report of the National Lawyers Guild,"International Human Rights Law and Israels Efforts to Suppress the Palestinian Uprising" (Exhibit 3); "An Examination of the Detention of Human Rights Workers From the West Bank and Gaza and Conditions of Detention at Ketziot", Lawyers Committees For Human Rights, December 1988 (Exhibit 4);Amnesty International,"Israel and The Occupied Territories: Excessive Force: Beatings to Maintain LAw and Order", August 1988 (Exhibit 5) ; Ansar 2: Detention, Humiliation and Intimidation, Report of the Database Project on Palestinian Human Rights - February 1988 (Exhibit 6); Human Rights Packet: A Sample of 1988 Database Project Material on Human Rights Violations in the Occupied Territories, The Database Project on Palestinian Human Rights (Exhibit 7).

brought to trial, any symbolic procedural fairness is impossible and not even a semblance of due process of any kind can be anticipated.

The Court is urged to review this documents closely. Only a portion of them will be directly discussed herein.

In what would appear to be the United States Government's first true recognition of the abuses perpetuated by the Israeli occupation of the West Bank territory and the fact that the occupation itself and numerous aspects of it amount to violations of the Geneva Protocols and other aspects of international law, the Department of State's Country Reports on Human Rights Practices For 1988 candidly reviews the situation in the section devoted to the State of Israel.

> Civilian unrest, reflecting Palestinian opposition to the occupation, has resulted in a number of outbreaks of violence during the last 21 years, which in turn have led periodically to sharp crackdowns by Israeli military forces. Beginning in December 1987, the occupation entered a new phase, referred to as the intifada, when civilian unrest became far more widespread and intensive than at any time heretofore. The active participants in these civil disturbances were primarily young men and women motivated by Palestinian nationalism and a desire to bring the occupation to an end. They gathered in groups, called and enforced strikes, threw stones and firebombs at Israeli security forces and civilian vehicles, or erected barricades and burned tires so as to interfere with traffic. The Israeli Government has regarded the uprising as a new phase of the 40-year war against Israel and as a threat to the security of the State. The Israeli Defense Forces, caught by surprise and untrained and inexperienced in riot control, responded in a manner which led to a substantial increase in human rights violations.

Meadow Certification Exhibit 2, page 1376.

The State Department estimates the extent of casualties for 1988 as follows;

> 366 Palestinians were killed in 1988 as a result of the uprising, most of them by the IDF, some by Israeli settlers. Thirteen Palestinians were killed by other Palestinians for suspected collaboration with Israeli authorities. Over 20,000 Palestinians were wounded or injured by the IDF. Eleven Israelis had been killed in the Intifada. According to IDF statistics, approximately 1,100 Israelis have been injured.

Id. at 1377.

The State Department report goes on to discuss the revelations made by the "Landau Commission" , in a report concerning the use of torture in questioning those charged with security offenses. The Commission report not only made contained revelations about past conduct by Israeli security police (the "Shin Bet") but also had recommendations condoning the use of torture in interrogation in the future writing that "limited and clearly delineated 'physical and psychological pressure' (which it defined in a secret annex) should be allowed in appropriate circumstances." Id. at 1378.

The State Department report recognizes that the inhuman treatment of suspects and detainees , which includes "beatings . . . hooding, sleep deprivation and use of cold showers" continued after the Landau Commission report. The other documents submitted herewith as exhibits to the Meadow certification provide a detailed description of the torture Petitioner can expect upon his reture to Israel, should extradition be allowed. See e.g. Exhibit 3, National Lawyers Guild Report, pp. 47- 54;