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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14	HEDELITO TRINIDAD Y GARCIA,)	No. CV 07-6387-MMM
)	
15	Petitioner,)	<u>OPPOSITION TO MOTION TO STAY;</u>
)	<u>DECLARATION OF CLIFTON M.</u>
16	v.)	<u>JOHNSON</u>
)	
17	MICHAEL BENOVA, Warden,)	Hearing Date: March 3, 2008
)	Hearing Time: 10:00 a.m.
18	Metropolitan Detention)	
)	
19	Center - Los Angeles,)	
)	
20	Respondent.)	
)	

21 Respondent, Michael Benov, Warden, Metropolitan Detention
22 Center-Los Angeles ("the government"), hereby opposes the motion
23 for stay filed by petitioner Hedelito Trinidad Y Garcia
24 ("Trinidad") pending a decision by the State Department on his
25 claim under the Convention Against Torture.

1 This opposition is based on the attached Memorandum of
2 Points and Authorities and the files and record in this case.

3 DATED: January 23, 2008.

4 Respectfully submitted,

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

	<u>TABLE OF AUTHORITIES</u>	iii
	<u>MEMORANDUM OF POINTS AND AUTHORITIES</u>	1
	I <u>INTRODUCTION</u>	1
	II <u>PROCEDURAL BACKGROUND</u>	3
	III <u>DISCUSSION</u>	5
	A. THERE IS NO LEGAL BASIS FOR THIS COURT TO ORDER THE STATE DEPARTMENT TO DECIDE TRINIDAD'S CAT CLAIM AT A GIVEN TIME OR WITHIN A FIXED TIME PERIOD, ABSENT A STATUTE, TREATY, OR REGULATION AUTHORIZING THAT ORDER.	5
	B. EVEN IF THE SEPARATION OF POWERS DID NOT PROHIBIT THIS COURT FROM GRANTING THE STAY, SUCH A STAY IS BEYOND THIS COURT'S "INHERENT AUTHORITY."	7
	C. EVEN IF THIS COURT HAD AUTHORITY TO ISSUE THE STAY TRINIDAD SEEKS, THAT STAY WOULD BE UNNECESSARY, ILLOGICAL, AND DETRIMENTAL TO U.S. FOREIGN POLICY.	10
	D. COURTS LACK AUTHORITY TO REVIEW THE SECRETARY OF STATE'S DECISION TO EXTRADITE, EVEN WHERE THE FUGITIVE HAS MADE A CAT CLAIM.	13
	1. <u>Background: The Rule of Non-Inquiry, the CAT, and the Implementation of the CAT</u>	15
	a. <u>The Rule of Non-Inquiry</u>	15
	b. <u>The CAT</u>	16
	c. <u>The FARR Act and Its Implementing Regulations</u>	17

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

2.	<u>The Rule of Non-Inquiry Will Preclude Judicial Review if the Secretary Decides to Extradite Trinidad.</u>	20
a.	<u>Cornejo Is Non-Binding Dicta Insofar as the Panel Opined That the Secretary's Extradition Decisions Are Subject to Judicial Review under the CAT.</u>	21
b.	<u>The Rule of Non-Inquiry Precludes Judicial Review of the Secretary's Decision to Extradite, Even in the Face of a CAT Claim.</u>	22
3.	<u>Neither the CAT Nor the FARR Act Overturns the Rule of Non-Inquiry so as to Provide for Judicial Review; Rather, They Preclude Such Review.</u>	26
a.	<u>As a Non-Self-Executing Treaty, the CAT Itself Confers No Right to Judicial Review.</u>	26
b.	<u>The FARR Act Explicitly Does Not Create A New Avenue for Judicial Review of Extradition Decisions.</u>	28
c.	<u>The APA Provides No Basis for Reviewing the Secretary's Extradition Decision.</u>	30
(i)	<u>Executive Decisions Regarding Foreign Affairs Matters Such As Extradition Are Immune From Judicial Review Under 5 U.S.C. § 702(1).</u>	31
(ii)	<u>The Statutory Scheme Forecloses Judicial Review Pursuant to 5 U.S.C. §§ 701(a)(1) and 701(a)(2).</u>	33
IV	<u>CONCLUSION</u>	36
	DECLARATION OF CLIFTON M. JOHNSON	37

TABLE OF AUTHORITIES

Page(s)

Cases

1		
2		
3	<u>Ahmad v. Wigen,</u>	
4	910 F.2d 1063 (2d Cir. 1990)	15
5	<u>Auguste v. Ridge,</u>	
6	395 F.3d 123 (3d Cir. 2005)	17
7	<u>Barapind v. Reno,</u>	
8	225 F.3d 1100 (9th Cir. 2000)	15
9	<u>Blaxland v. Commonwealth Dir. of Public Prosecutions,</u>	
10	323 F.3d 1198 (9th Cir. 2003)	7, 22
11	<u>Block v. Community Nutrition Inst.,</u>	
12	467 U.S. 340, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984)	33
13	<u>Cantor Fitzgerald, L.P. v. Peaslee,</u>	
14	88 F.3d 152 (2d Cir. 1996)	3
15	<u>Cheung v. United States,</u>	
16	213 F.3d 82 (2d Cir. 2000)	10
17	<u>Chevron U.S.A. v. Natural Resources Defense Council,</u>	
18	467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)	30
19	<u>Cornejo-Barreto v. Seifert,</u>	
20	218 F.3d 1004 (9th Cir. 2000)	passim
21	<u>Escobedo v. United States,</u>	
22	623 F.2d 1098 (5th Cir. 1980)	15
23	<u>Export Group v. Reef Indus., Inc.,</u>	
24	54 F.3d 1466 (9th Cir. 1995)	21
25	<u>Fernandez v. Phillips,</u>	
26	268 U.S. 311, 45 S. Ct. 541, 69 L. Ed. 970 (1925)	1
27	<u>Franklin v. Massachusetts,</u>	
28	505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)	36
29	<u>Gustafson v. Alloyd Co.,</u>	
30	513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995)	29

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Cases (Cont'd)

Heckler v. Chaney,

470 U.S. 821, 105 S. Ct. 1649,
84 L. Ed. 2d 714 (1985)

35

Hoxha v. Levi,

465 F.3d 554 (3d Cir. 2006)

27

Hoxha v. Levi,

371 F. Supp. 2d 651 (E.D. Pa. 2005),
aff'd, 465 F.3d 554 (3d Cir. 2006)

2

In re Kaine,

55 U.S. (14 How.) 103,
14 L. Ed. 345 (1852)

22

Islamic Republic of Iran v. Boeing Co.,

771 F.2d 1279 (9th Cir. 1985)

28

Jimenez v. United States District Court,

84 S. Ct. 14, 11 L. Ed. 2d 30 (1963)

24-25

Karsten v. Kaiser Found. Health Plan,

36 F.3d 8 (4th Cir. 1994)

21

Kay v. Ashcroft,

387 F.3d 664 (7th Cir. 2004)

27

Lincoln v. Vigil,

508 U.S. 182, 113 S. Ct. 2024,
124 L. Ed. 2d 101 (1993)

34

Lopez-Smith v. Hood,

121 F.3d 1322 (9th Cir. 1997)

7, 22, 26

Matter of Requested Extradition of Smyth,

61 F.3d 711 (9th Cir.),
amended, 73 F.3d 887 (9th Cir. 1995)

15-16

Miranda B. v. Kitzhaber,

328 F.3d 1181 (9th Cir. 2003)

21

Mironescu v. Costner,

480 F.3d 664 (4th Cir. 2007),
cert. dismissed, 2008 WL 94735
(2008)

passim

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Cases (Cont'd)

1		
2		
3	<u>North Carolina v. Rice,</u>	
4	404 U.S. 244, 92 S. Ct. 402,	
5	30 L. Ed. 413 (1971)	22
6	<u>Peroff v. Hylton,</u>	
7	563 F.2d 1099 (4th Cir. 1977)	15
8	<u>Prasoprat v. Benov,</u>	
9	421 F.3d 1009 (9th Cir. 2005)	13, 15, 22
10	<u>Raffington v. Cangemi,</u>	
11	399 F.3d 900 (8th Cir. 2005)	27
12	<u>Renkel v. United States,</u>	
13	456 F.3d 640 (6th Cir. 2006)	27
14	<u>Reyes-Sanchez v. Attorney General,</u>	
15	369 F.3d 1239 (11th Cir. 2004)	27
16	<u>Rhines v. Weber,</u>	
17	544 U.S. 269, 125 S. Ct. 1528,	
18	161 L. Ed. 2d 440 (2005)	8-10
19	<u>Roadway Express v. Piper,</u>	
20	447 U.S. 752, 100 S. Ct. 2455,	
21	65 L. Ed. 2d 488 (1980)	8
22	<u>Saavedra Bruno v. Albright,</u>	
23	197 F.3d 1153 (D.C. Cir. 1999)	31
24	<u>Saint Fort v. Ashcroft,</u>	
25	329 F.3d 191 (1st Cir. 2003)	27
26	<u>Sanchez-Espinoza v. Reagan,</u>	
27	770 F.2d 202 (D.C. Cir. 1985)	31-32
28	<u>Sidali v. INS,</u>	
29	107 F.3d 191 (3d Cir. 1997)	15
30	<u>Sosa v. Alvarez-Machain,</u>	
31	542 U.S. 692, 124 S. Ct. 2739,	
32	159 L. Ed. 2d 718 (2004)	28
33	<u>South Dakota v. Yankton Sioux Tribe,</u>	
34	522 U.S. 329, 118 S. Ct. 789,	
35	139 L. Ed. 2d 773 (1998)	29

TABLE OF AUTHORITIES (CONT'D)

		<u>Page(s)</u>
1		
2		
3	<u>Cases (Cont'd)</u>	
4	<u>United States v. Hudson,</u>	
5	11 U.S. (7 Cranch) 32,	
6	3 L. Ed. 259 (1812)	8
7	<u>United States v. Johnson,</u>	
8	256 F.3d 895 (9th Cir. 2001) (en banc)	21
9	<u>United States v. Kin-Hong,</u>	
10	110 F.3d 103 (1st Cir. 1997)	15, 24-25
11	<u>Vo v. Benov,</u>	
12	447 F.3d 1235 (9th Cir. 2006)	7
13	<u>Wang v. Ashcroft,</u>	
14	320 F.3d 130 (2d Cir. 2003)	27
15	<u>Webster v. Doe,</u>	
16	486 U.S. 592, 108 S. Ct. 2047,	
17	100 L. Ed. 2d 632 (1988)	35
18	<u>Whitney v. Robertson,</u>	
19	124 U.S. 190, 8 S. Ct. 456,	
20	31 L. Ed. 386 (1888)	27-28
21		
22	<u>Statutes</u>	
23	5 U.S.C. §§ 701-06	
24	(Administrative Procedure Act) ("the APA")	passim
25	Foreign Affairs Reform and Restructuring	
26	Act of 1998, Pub. L. No. 105-277, 112 Stat.	
27	2681-822 (set forth in Historical and	
28	Statutory Notes to 8 U.S.C. § 1231)	
29	(the "FARR Act")	passim
30	8 U.S.C. § 1252	
31	(part of the Immigration and Nationality Act)	
32	("INA")	29
33	18 U.S.C. § 3184	13
34	18 U.S.C. § 3185	13
35	18 U.S.C. § 3186	13, 22, 33, 36
36		
37		
38		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (CONT'D)

	<u>Page(s)</u>
<u>Regulations</u>	
22 C.F.R §§ 95.1-95.4	passim
<u>Legislative History Materials</u>	
136 Cong. Rec. S17486-01 (Oct. 27, 1990)	16, 27
H.R. Conf. Rep. No. 105-432 (1998)	28
S. Treaty Doc. No. 100-20 (1988)	16
S. Exec. Rep. No. 101-30, 2d Sess. (1990)	16-18, 27
Sovereign Immunity: Hearing Before the Subcomm. on the Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 135 (1970)	32
<u>Other</u>	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 ("the CAT")	passim
U.S. Dep't of State, <u>Treaties in Force</u> (2002)	16

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In this extradition matter, Trinidad has been found
4 extraditable to the Philippines by United States Magistrate Judge
5 Carla M. Woehrle on a charge of kidnapping for ransom. Trinidad
6 has challenged that finding through a petition for a writ of
7 habeas corpus and now seeks an order staying this Court's
8 consideration of his habeas corpus petition for 60 days, to
9 "allow," as he puts it, the Secretary of State to decide on his
10 claim under the Convention against Torture ("CAT")¹. He argues
11 that this stay is efficient and promotes judicial economy because
12 it will allow both his current habeas corpus petition, and any
13 future habeas corpus petition challenging the Secretary of
14 State's issuance of a surrender warrant, to be adjudicated in a
15 single action.²

16 There are two flaws in Trinidad's argument. The first is
17 that the Secretary of State's issuance of a surrender warrant is
18 not reviewable in court. The second is that even if that
19 decision were reviewable, there is no basis for this Court to
20 dictate that the Secretary must make that decision now, as
21 opposed to the usual time, when the Secretary wants to make it.

22
23

¹ The full name and citation of this agreement is the
24 Convention Against Torture and Other Cruel, Inhuman or Degrading
25 Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23
I.L.M. 1027.

26 ² A judicial certification of extraditability is not
27 appealable and is subject only to limited collateral review
28 through the habeas corpus process. See, e.g., Fernandez v.
Phillips, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925).

1 As to the first point, that the Secretary's issuance of a
2 surrender warrant is not judicially reviewable, this Court will
3 need to examine Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th
4 Cir. 2000) ("Cornejo"), in which a panel majority said that the
5 Secretary's extradition decision was subject to judicial review
6 if the fugitive made a claim under the CAT. That conclusion was,
7 however, dicta and wrongly decided. That it was dicta is
8 supported by the concurring opinion of (now-Chief) Judge Kozinski
9 in that case, who wrote that "the question of whether petitioner
10 would be entitled to judicial review of an extradition decision
11 by the Secretary of State is not before us." Id. at 1017
12 (Kozinski, J., concurring). That it is wrongly decided is
13 supported by the result in the only two cases that have not been
14 overturned to issue a holding on this question -- Mironescu v.
15 Costner, 480 F.3d 664, 673, 676-77 (4th Cir. 2007), cert.
16 dismissed, 2008 WL 94735 (2008), and Hoxha v. Levi, 371 F. Supp.
17 2d 651, 659-60 (E.D. Pa. 2005), aff'd, 465 F.3d 554 (3d Cir.
18 2006).

19 The government suggests that it is more efficient for this
20 Court to decide the second issue first -- namely, whether, even
21 if a court may review a decision of the Secretary of State to
22 issue a surrender warrant, a court may dictate to the Secretary
23 that the decision be made at a time before all the litigation in
24 the case is completed. The first issue -- the reviewability of
25 the Secretary's decision to issue a surrender warrant -- although
26 it relates to this Court's jurisdiction at a later time, is not a
27 question that affects the jurisdiction of this Court to rule on
28

1 the stay motion now before it or on the habeas corpus motion now
2 before it. In any event, considerations of judicial economy
3 argue that this Court should avoid a difficult question of
4 jurisdiction when the case may be disposed of on a much simpler
5 ground. See Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155
6 (2d Cir. 1996). Therefore, this Opposition first raises the
7 argument that this Court has no authority to command the
8 Secretary of State to decide Trinidad's CAT claim now, then
9 raises the argument that the courts may not review the
10 Secretary's decision to issue a surrender warrant.

11 **II. PROCEDURAL BACKGROUND**

12 Trinidad was arrested in October 2004 based on an arrest
13 warrant issued by United States Magistrate Judge Patrick J. Walsh
14 in December 2003, in connection with a request from the
15 Philippine government and a Philippine arrest warrant charging
16 Trinidad with kidnapping for ransom. (Criminal Docket for Case #
17 03-mj-02710 at 1.) Trinidad had his initial appearance the next
18 day, at which time United States Magistrate Judge Paul Game, Jr.,
19 ordered him detained. (Id. at 5.)

20 On December 10, 2004, as part of its *Request for*
21 *Extradition*, the government filed the formal extradition papers
22 that had been transmitted from the Philippines to the United
23 States. (Civil Docket for Case # 04-cv-10097-MMM-CW ["Civil
24 Docket"] at 9.) Under the practices of this Court, the
25 government's filing initiated a new matter bearing a civil case
26 number, which matter was randomly assigned to United States
27 District Judge Margaret M. Morrow and referred pursuant to
28

1 statute and General Order of this Court to Judge Woehrle for
2 conduct of the extradition hearing. (Id. at 9, 11.)

3 Pre- and post-hearing briefing -- and the extradition
4 hearing itself -- occupied much of 2005. (Id. at 14, 18-27, 29,
5 33, 35, 37.) The extradition hearing, at which witnesses
6 testified and exhibits were admitted, took place over two days:
7 May 19 and 24, 2005, with closing arguments on August 25, 2005.
8 (Id. at 33, 35, 37.)

9 On September 7, 2007, Judge Woehrle determined that the
10 government had established probable cause to sustain the
11 kidnapping charge. (Id. at 72.) She therefore issued an
12 extradition certification, ordering that Trinidad was
13 extraditable and certifying the matter to the United States
14 Secretary of State to decide whether to issue a warrant to
15 extradite him. The government did not oppose Trinidad's
16 application for a stay of extradition pending the completion of
17 habeas corpus proceedings in the district court, and Judge
18 Woehrle issued that stay. (Id. at 71-72.)

19 In October 2007, Trinidad filed a petition for a writ of
20 habeas corpus challenging Judge Woehrle's certificate of
21 extraditability. (Civil Docket for Case # 07-cv-06387 ["Habeas
22 Docket"] at 6-16, 18-19.) Among the challenges in his petition
23 was a claim that much of the evidence presented to Judge Woehrle
24 was unreliable because it had been procured by torture in the
25 Philippines. The government opposed this petition on November
26 30, 2007 (Habeas Docket at 20), and Trinidad filed a Traverse
27 three weeks later (Habeas Docket at 22).

28

1 The same day that he filed his Traverse, Trinidad filed the
2 present motion asking this Court to stay consideration of his
3 habeas corpus petition pending the Secretary of State's ruling on
4 his CAT claim.

5 **III. DISCUSSION**

6 **A. THERE IS NO LEGAL BASIS FOR THIS COURT TO ORDER THE STATE**
7 **DEPARTMENT TO DECIDE TRINIDAD'S CAT CLAIM AT A GIVEN TIME OR**
8 **WITHIN A FIXED TIME PERIOD, ABSENT A STATUTE, TREATY, OR**
9 **REGULATION AUTHORIZING THAT ORDER.**

10 Although Trinidad says the 60-day stay will "allow"³ the
11 State Department to decide whether the CAT precludes extradition
12 this case, the State Department does not want to make that
13 decision now. (See Declaration of Clifton M. Johnson ["Johnson
14 Decl.,"] at ¶ 11.) Hence, in order for the stay to have any
15 meaning, this Court will have to not simply allow but order the
16 State Department to make its decision within that time frame or
17 some other time frame. Such an order would be an impermissible
18
19
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21 ³ See Stay Motion at 3, 7. At other times Trinidad says
22 that the stay will be "pending" the Secretary of State's review,
23 without addressing whether the Secretary of State has any
24 intention to perform this review now or whether Trinidad is
25 seeking that this Court exercise some compulsion on the
26 Secretary. (Stay Motion at 1, 4.) Perhaps Trinidad makes a
27 subtle nod to the fact that an order will be necessary compelling
28 the Secretary to make a decision, when, quoting a case dealing
with a totally different situation, he says that the Supreme
Court has "cautioned that Federal proceedings may not be stayed
indefinitely, and that reasonable time limits must be imposed on
a petitioners' return to state court to exhaust additional
claims." (Stay Motion at 7.)

1 infringement on the separation of powers between the judiciary
2 and the Executive.⁴

3 These two branches of government embody separate interests,
4 and absent constitutional or statutory basis neither is
5 subservient to the other. There is, however, no such
6 constitutional or statutory basis here. This Court may no more
7 order the Secretary to make the CAT decision now than it may
8 order who at the State Department may take part in that decision.
9 This Court may no more impose a schedule or a time frame on the
10 Secretary than the Secretary may impose one on the courts.

11 Thus, it would be an affront to the separation of powers
12 that animates our political system for a court to say that the
13 Secretary must make a decision at a particular time -- and not
14 the usual time -- for the convenience or the "economy" of the
15 court. Just as the courts have an interest in judicial
16 efficiency, so does the Secretary of State have an interest in
17 the efficiency of her department. Considering the same matter
18 twice is inefficient for the Secretary, especially where, as
19 here, a determination of whether Trinidad faces torture in the
20 Philippines is closely intertwined with the determination of
21 whether the witnesses against Trinidad were tortured in the
22 Philippines by the very police agency that is accusing Trinidad
23 of kidnapping. (See Stay Motion at 6.) It would be unjustified

24 _____
25 ⁴ One should always be skeptical when a party to litigation
26 says, as Trinidad does here, that its position is actually good
27 for the other side. (See Stay Motion at 6 ["The State Department
28 will also benefit from a stay."].) The determination of what is
good for the State Department should be left up to the State
Department, which has said that it does not want a stay.

1 for a court to say that its efficiency is more important than the
2 Secretary of State's efficiency, where there is no statute, no
3 regulation, no treaty, and not even any empirical evidence
4 supporting that conclusion.

5 Moreover, the Ninth Circuit has cautioned against excessive
6 intervention in the extradition process: "Unwarranted expansion
7 of judicial oversight may interfere with foreign policy and
8 threaten the ethos of the extradition system." Blaxland v.
9 Commonwealth Dir. of Public Prosecutions, 323 F.3d 1198, 1208
10 (9th Cir. 2003). This concern reflects the fact that
11 "extradition is a diplomatic process carried out through the
12 powers of the executive, not the judicial, branch." Blaxland,
13 323 F.3d at 1207. As such, extradition must be treated as an
14 executive function except to the extent that a statute interposes
15 a judicial role. Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th
16 Cir. 1997); accord Vo v. Benov, 447 F.3d 1235, 1237 (9th Cir.
17 2006).

18 **B. EVEN IF THE SEPARATION OF POWERS DID NOT PROHIBIT THIS COURT**
19 **FROM GRANTING THE STAY, SUCH A STAY IS BEYOND THIS COURT'S**
20 **"INHERENT AUTHORITY."**

21 Trinidad asserts that this Court's power to issue a stay
22 comes from its inherent power to control its docket and promote
23 judicial efficiency. (Stay Motion at 4.) He stretches too far.

24 As the government argued in its Answer (filed November 30,
25 2007) to Trinidad's habeas corpus petition, a stay of these
26 proceedings pending decision by the Secretary of State is not
27 within this Court's inherent authority. As the government noted,
28

1 courts may grant a fugitive's motion to stay an extradition for
2 the duration of a habeas corpus proceeding, because such a stay
3 is necessary to allow habeas corpus review to occur. That is, if
4 a person is extradited, the person cannot thereafter obtain
5 meaningful habeas corpus review.

6 But, as the government set forth in its Answer, a court
7 possesses no inherent authority to stay extraditions so that
8 certain State Department action may take place, where that State
9 Department action will not deprive the court of its power to
10 conduct the habeas corpus review. "The inherent powers of
11 federal courts are those which 'are necessary to the exercise of
12 all others.'" Roadway Express v. Piper, 447 U.S. 752, 764, 100
13 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) (plurality opinion) (quoting
14 United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L. Ed. 259
15 (1812)). The correctness of this conclusion that the stay sought
16 by Trinidad is inappropriate is even more apparent in light of
17 the rule that inherent powers "must be exercised with restraint."
18 Roadway Express, 447 U.S. at 764.

19 In support of his position that this Court has the inherent
20 power to stay its proceedings until the State Department decides
21 his CAT claim, Trinidad cites Rhines v. Weber, 544 U.S. 269, 125
22 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). (Stay Motion at 4-5.)
23 Rhines addressed habeas corpus petitions challenging state
24 convictions in federal district court, where those petitions
25 include one or more claims as to which the petitioner had
26 exhausted state remedies and one or more claims as to which the
27 petitioner had not -- so-called "mixed" petitions. Trinidad

28

1 notes that absent a stay to allow the petitioner to return to
2 state court to exhaust his unexhausted claims, the petitioners
3 would, as Trinidad writes, "'forever los[e] their opportunity for
4 any federal review of their unexhausted claims.'" (Stay Motion
5 at 4, quoting Rhines, 544 U.S. at 275 [brackets in Stay Motion].)

6 The Rhines case does not support the granting of a stay in
7 this case, but rather confirms the view that a court's inherent
8 powers are only those powers necessary to the existence of all
9 others. If a district court could not stay its consideration of
10 a "mixed" petition, then the one-year statute of limitations of
11 the Antiterrorism and Effective Death Penalty Act of 1996 would
12 "likely mean the termination of any federal review," 544 U.S. at
13 275, even as to the claims that the petitioner had properly
14 exhausted in state court. Although the Rhines court did not
15 explain the legal authority under which it authorized a stay (the
16 case never, for example, speaks of a court's "inherent powers"),
17 as a factual matter the district court's stay approved in Rhines
18 was necessary to the ability of the district court to review the
19 petitioner's claims at all. The opposite is the case here: The
20 denial of the stay sought by Trinidad does not affect the power
21 of the district court to review at a later time the extradition
22 decision of the Secretary of State, assuming that district courts
23 have such power in the first place.

24 Trinidad makes the nonsensical assertion that "[t]he Rhines
25 rationale for authorizing stays of federal petitions pending
26 exhaustion of claims in state proceedings is even stronger when
27 applied to extraditees raising CAT claims in habeas proceedings."

28

1 (Stay Motion at 5.) Trinidad argues that persons facing
2 extradition are precluded from raising CAT claims during
3 extradition proceedings. (Id.) But that is no different from
4 the situation in Rhines -- petitioners challenging their state
5 convictions in federal habeas corpus proceedings are precluded
6 from raising unexhausted claims. Trinidad's assertion appears to
7 be merely another statement of his argument that the stay he
8 seeks will promote judicial efficiency and an expeditious
9 resolution of this case.

10 Trinidad's position is similar to that of a defendant in a
11 U.S. prosecution asking for a stay of his sentencing to "allow"
12 immigration authorities to decide whether to institute
13 deportation proceedings. Such a defendant might claim that
14 whether or not he will be deported has an effect on the sentence
15 he should receive. Yet, such a defendant has no right to a stay
16 for the sentencing court to "allow" (or compel) immigration
17 authorities to make this decision.

18 **C. EVEN IF THIS COURT HAD AUTHORITY TO ISSUE THE STAY TRINIDAD**
19 **SEEKS, THAT STAY WOULD BE UNNECESSARY, ILLOGICAL, AND**
20 **DETRIMENTAL TO U.S. FOREIGN POLICY.**

21 Traditionally, the Secretary of State is the last step in
22 the extradition process. In the normal course of events, the
23 Secretary considers whether to issue a surrender warrant only
24 after all judicial proceedings are done and the judiciary has
25 found extradition to be lawful. (See Johnson Decl. at ¶¶ 4, 11;
26 see also, e.g., Cheung v. United States, 213 F.3d 82, 88 (2d Cir.
27 2000)). That sequence is logical and beneficial to U.S. foreign
28

1 policy interests, and should be adhered to in this and other
2 cases. Indeed, the government is not aware of any case in which
3 a stay of habeas corpus proceedings pending the Secretary's
4 decision whether to extradite was granted or even requested.

5 One reason the stay of habeas corpus proceedings that
6 Trinidad proposes does not make sense from a practical standpoint
7 is that it may well turn out that the Secretary of State's
8 surrender warrant is not reviewable in court. The Ninth
9 Circuit's statement in Cornejo allowing such review is dicta,
10 because the issue was not before the court. The government, and
11 the only circuit court outside the Ninth Circuit to have ruled on
12 the issue, take the position that the Secretary of State's
13 decision to issue a surrender warrant is not reviewable in court.
14 See Mironescu, 480 F.3d at 673, 676-77. The Cornejo case and the
15 non-reviewability of the Secretary's decision under the CAT are
16 discussed at greater length in Section D of this Opposition. If
17 the decision is non-reviewable, a stay would delay extradition
18 and force the Secretary to visit the matter twice, on one
19 occasion prematurely.

20 There is a second prudential reason that the Secretary's
21 decision should follow habeas corpus review. In cases in which
22 the grant of a writ of habeas corpus releasing the fugitive is
23 appropriate, it is better for U.S. foreign policy if extradition
24 is denied based on a judicial ruling rather than the Secretary's
25 refusal to issue a surrender warrant. See Mironescu, 480 F.3d at
26 673 ("one could well argue that the damage done to our foreign
27 relations with another country is likely to be less where a
28

1 court, as opposed to the Secretary, makes the decision that
2 extradition must be denied"). If the Secretary is forced to
3 decide first whether a fugitive is likely to be tortured, any
4 decision adverse to the requesting State will harm diplomatic
5 relations.

6 A third reason that the Secretary's decision should follow
7 habeas corpus review is that the State Department's ability to
8 seek and obtain assurances from a requesting State regarding the
9 treatment of the fugitive following extradition, should such
10 assurances become necessary, would be limited if the State
11 Department were unable to explain to the requesting State whether
12 and on what charges the fugitive could be surrendered if the
13 assurances were given. (See Johnson Decl. at ¶ 11.)⁵

14
15 ⁵ In its Opposition to Trinidad's petition for a writ of
16 habeas corpus, the government also argued that the stay of
17 proceedings sought by Trinidad would force the Secretary to
18 decide on the CAT claim months or even years before the end of
19 litigation, such that the Secretary would not be acting on
20 information that was fresh at the time of the fugitive's
21 surrender. Trinidad responded in his Traverse that this was not
22 the case because there would still be the same amount of
23 litigation with or without a stay, given that without a stay the
24 fugitive would need to bring a second habeas corpus petition
25 following action by the Secretary, this petition challenging only
26 the decision on the CAT claim. (Traverse at 13.) Although his
27 response assumes that fugitives will bring a second habeas corpus
28 petition and appeal challenging the Secretary's decision on the
CAT claim, which will not invariably be the case, Trinidad makes
a very good point with which the government generally agrees.
Hence, the government withdraws its reliance on the timing
argument described above as an independent argument. Of course,
everything turns on whether judicial review of the Secretary's
decision on the CAT claim is permissible. If it is
impermissible, as the government argues, then a stay for that
decision to be made is completely illogical and would indeed
force the Secretary to make this time-critical decision at an
unjustifiably early time.

1 D. COURTS LACK AUTHORITY TO REVIEW THE SECRETARY OF STATE'S
2 DECISION TO EXTRADITE, EVEN WHERE THE FUGITIVE HAS MADE A
3 CAT CLAIM.

4 Up to this point, this filing has discussed why, even if the
5 Secretary of State's decision to surrender a fugitive despite a
6 CAT claim were judicially reviewable, this Court could not and
7 should not dictate to the Secretary that she evaluate that claim
8 now, in the midst of habeas corpus proceedings. The next part of
9 this filing is devoted to demonstrating that the Secretary's
10 decision on a CAT claim is not, in fact, reviewable. We begin
11 with a discussion of what is known as "the rule of non-inquiry."

12 Following a judicial certification, the Secretary of State
13 decides whether to extradite. (See Johnson Decl. at ¶ 4, 11.)⁶
14 For decades, in this and other circuits, the rule of non-inquiry
15 has provided that these decisions by the Secretary are
16 unreviewable because they involve sensitive foreign policy
17 matters that are the exclusive province of the Executive Branch.

18
19
20 If judicial review of the Secretary's decision turns out to
21 be permissible, there is no cause to fear that the Secretary will
22 improperly surrender a fugitive before the fugitive can file a
23 second habeas corpus petition. A fugitive who is concerned that
his surrender might moot a given challenge can always seek a stay
of the surrender, and the United States will not surrender a
fugitive if such a stay is pending or under consideration.

24 ⁶ Section 3186 provides that "[t]he Secretary of State may
25 order the person committed under sections 3184 or 3185 of this
26 title to be delivered to any authorized agent of such foreign
27 government, to be tried for the offense of which charged." See
28 also Prasoprat v. Benov, 421 F.3d 1009, 1015 (9th Cir. 2005)
("discretion belonged to the Secretary of State" as to whether to
extradite); Cornejo, 218 F.3d at 1010 ("the Secretary acts in her
discretion to determine whether the person will be surrendered").

1 This venerable doctrine derives from the separation of powers
2 that forms the fundamental structure of the Constitution.

3 In Cornejo, however, a Ninth Circuit panel majority opined
4 in dictum that the Secretary's extradition decisions could be
5 subject to judicial review. The panel's reasoning is flawed, and
6 the implications of this conclusion revolutionary. Judicial
7 review of extradition decisions would overturn decades of
8 authority and thrust the Court into the role of second-guessing
9 the Secretary's judgment regarding intricate and delicate foreign
10 relations matters such as whether particular countries have the
11 ability or will to prevent torture in particular cases, and other
12 questions related to the most effective way for the United States
13 to minimize that risk.

14 According to the panel majority in Cornejo, the reason for
15 this radical change in extradition practice is the Foreign
16 Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-
17 277, 112 Stat. 2681-822 (the "FARR Act").⁷ This Act does not,
18 however, permit judicial review. In fact, it provides exactly
19 the opposite -- that "nothing in [the FARR Act] shall be
20 construed as providing any court jurisdiction," id. at § 2242(d),
21 to review the Secretary's extradition decisions. Those decisions
22 have never been justiciable under the Administrative Procedure
23 Act ("APA"), and they are not suddenly justiciable under the APA
24 by virtue of the FARR Act. Accordingly, the rule of non-inquiry
25 should continue to operate as it has for decades.

27 ⁷ The FARR Act is set forth in the Historical and Statutory
28 Notes to 8 U.S.C.A. § 1231.

1 1. Background: The Rule of Non-Inquiry, the CAT, and the
2 Implementation of the CAT

3 a. The Rule of Non-Inquiry

4 The Ninth Circuit generally adheres to the rule of non-
5 inquiry: that "it is the role of the Secretary of State, not the
6 courts, to determine whether extradition should be denied on
7 humanitarian grounds or on account of the treatment that the
8 fugitive is likely to receive upon his return to the requesting
9 state." Prasoprat, 421 F.3d at 1016; see also Barapind v. Reno,
10 225 F.3d 1100, 1105-06 (9th Cir. 2000). Other courts of appeals
11 have also followed this rule.⁸

12 Underlying the rule of non-inquiry is the notion that
13 "courts are ill-equipped as institutions and ill-advised as a
14 matter of separation of powers and foreign relations policy to
15 make inquiries into and pronouncements about the workings of
16 foreign countries' justice systems." Matter of Requested

17
18 ⁸ See, e.g., United States v. Kin-Hong, 110 F.3d 103, 110
19 (1st Cir. 1997) ("Under the rule of non-inquiry, courts refrain
20 from investigating the fairness of a requesting nation's justice
21 system and from inquiring into the procedures or treatment which
22 await a surrendered fugitive in the requesting country."
23 [quotation marks and citations omitted]); Sidali v. INS, 107 F.3d
24 191, 195 n.7 (3d Cir. 1997) ("it is the function of the Secretary
25 of State -- not the courts -- to determine whether extradition
26 should be denied on humanitarian grounds"); Ahmad v. Wigen, 910
27 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international
28 comity are ill-served by requiring a foreign nation . . . to
satisfy a United States district judge concerning the fairness of
its laws and the manner in which they are enforced."); Escobedo
v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980) ("[T]he
degree of risk is an issue that properly falls within the
exclusive purview of the executive branch.") (citations and
quotations omitted); Peroff v. Hylton, 563 F.2d 1099, 1101-03
(4th Cir. 1977) (declining review of due process challenge to
Secretary of State's issuance of surrender warrant).

1 Extradition of Smyth, 61 F.3d 711, 714 (9th Cir.), amended, 73
2 F.3d 887 (9th Cir. 1995). In addition, the State Department "has
3 diplomatic tools, not available to the judiciary, which it can
4 use to insure that the requesting state provides a fair trial"
5 id. (quoting commentator), or otherwise to protect the accused.

6 **b. The CAT**

7 The CAT was adopted by the United Nations General Assembly
8 in 1984. See S. Exec. Rep. No. 101-30, at 2 (1990). Article 3
9 of the CAT provides:

10 1. No State Party shall expel, return ("refouler") or
11 extradite a person to another State where there are
12 substantial grounds for believing that he would be in danger
13 of being subjected to torture.

14 2. For the purpose of determining whether there are such
15 grounds, the competent authorities shall take into account
16 all relevant considerations including, where applicable, the
17 existence in the State concerned of a consistent pattern of
18 gross, flagrant or mass violations of human rights.

19 S. Treaty Doc. No. 100-20, at 20 (1988). The CAT entered into
20 force for the United States in November 1994. Cornejo, 218 F.3d
21 at 1007; U.S. Dep't of State, Treaties in Force, 182 (2007); 22
22 C.F.R. § 95.1(a).

23 The Senate conditioned its approval of the CAT on a
24 Resolution of Ratification declaring that "Articles 1 through 16
25 of the Convention are not self-executing." 136 Cong. Rec.
26 S17486-01, at S17491-92 (Oct. 27, 1990); S. Exec. Rep. 101-30, at
27 31. The Senate committee report regarding the CAT included the
28

1 Executive's analysis that extradition determinations would not be
2 subject to judicial review, stating:

3 The reference in Article 3 to "competent authorities"
4 appropriately refers in the United States to the competent
5 administrative authorities who make the determination
6 whether to extradite, expel, or return. . . . Because the
7 Convention is not self-executing, the determinations of
8 these authorities will not be subject to judicial review in
9 domestic courts.

10 S. Exec. Rep. No. 101-30, at 17-18. Finally, the President's
11 ratification of the CAT was also "subject to" a declaration that
12 it was not self-executing. Auguste v. Ridge, 395 F.3d 123, 132
13 (3d Cir. 2005).

14 **c. The FARR Act and Its Implementing Regulations**

15 Congress passed the FARR Act in part to supply more detailed
16 guidance for the implementation of Article 3 of the CAT. See
17 Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-761, 2681-822. The
18 FARR Act tracked Article 3 of the CAT, noting that it is "the
19 policy of the United States not to expel, extradite, or otherwise
20 effect the involuntary return of any person to a country in which
21 there are substantial grounds for believing the person would be
22 in danger of being subjected to torture." FARR Act, § 2242(a).
23 The FARR Act also directed the heads of appropriate agencies to
24 "prescribe regulations to implement the obligations of the United
25 States under Article 3 of the [CAT]." Id. at § 2242(b).

1 The FARR Act expressly states that it does not create
2 jurisdiction for a court to review the Secretary's application of
3 Article 3 of the CAT. It provides in pertinent part:

4 Notwithstanding any other provision of law . . . nothing
5 in this section shall be construed as providing any court
6 jurisdiction to consider or review claims raised under the
7 Convention or this section, or any other determination made
8 with respect to the application of the policy set forth in
9 subsection (a), except as part of the review of a final
10 order of removal [under the Immigration and Nationality
11 Act].

12 FARR Act, § 2242(d) (emphasis added).

13 As required by the FARR Act, § 2242(b), the Department of
14 State adopted regulations to implement Article 3 of the CAT in
15 the extradition context. See 22 C.F.R. §§ 95.1-95.4. These
16 regulations reinforce that "the Secretary is the U.S. official
17 responsible for determining whether to surrender a fugitive to a
18 foreign country by means of extradition." Id. at § 95.2(b).
19 Consistent with the U.S. understanding of the CAT, the
20 regulations define the standard as whether the "person facing
21 extradition from the U.S. 'is more likely than not' to be
22 tortured in the State requesting extradition." Id.⁹ In
23 extradition cases where allegations regarding torture have been
24 made, "appropriate policy and legal offices review and analyze
25 information relevant to the case in preparing a recommendation to

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27 ⁹ The U.S. Senate gave its advice and consent to
28 ratification subject to its "understanding" that "more likely
than not" was the standard. S. Exec. Rep. No. 101-30, at 30.

1 the Secretary as to whether or not to sign the surrender
2 warrant." Id. at § 95.3(a). Thereafter, "[b]ased on the
3 resulting analysis of relevant information, the Secretary may
4 decide to surrender the fugitive to the requesting State, to deny
5 surrender of the fugitive, or to surrender the fugitive subject
6 to conditions." Id. at § 95.3(b). The regulations also provide
7 that "[d]ecisions of the Secretary concerning surrender of
8 fugitives for extradition are matters of executive discretion not
9 subject to judicial review." Id. at § 95.4.

10 The State Department must address sensitive issues when a
11 fugitive makes a torture claim. In assessing such claims, the
12 Secretary may need to weigh conflicting evidence from various
13 sources regarding the situation in the requesting country. (See
14 Johnson Decl. at ¶ 6.) She may need to decide whether to broach
15 with foreign officials the often delicate question of possible
16 mistreatment, and, if she does so, to assess which officials to
17 approach and in what way to address them. The Secretary must
18 then determine whether to seek assurances from the requesting
19 country, and, concomitantly, evaluate whether such assurances are
20 likely to be reliable. Those determinations require expertise in
21 a host of matters, including an understanding of the nature and
22 structure of the requesting country's government and its degree
23 of control over the various actors within the foreign judicial
24 system, an assessment of the credibility of the requesting
25 country's leadership, an ability to predict how the country is
26 likely to act in light of its past assurances and behavior, and
27 the experience to evaluate whether confidential diplomacy or

28

1 public pronouncements would best protect the safety of the
2 fugitive. These determinations are inherently sensitive and
3 discretionary and are within the power of the Executive to engage
4 in foreign relations.

5 **2. The Rule of Non-Inquiry Will Preclude Judicial Review**
6 **if the Secretary Decides to Extradite Trinidad.**

7 There are two steps leading to the conclusion that this
8 Court should hold that the Secretary's decision to issue a
9 surrender warrant is unreviewable, even in the face of a CAT
10 claim: One, the language from Cornejo supporting judicial review
11 of the Secretary's decision is dicta. Two, the language from
12 Cornejo supporting judicial review of the Secretary's decision is
13 incorrect and should not be followed.

14 As to the second step -- that judicial review of the
15 Secretary's decision to extradite is unreviewable even when there
16 is a CAT claim -- this conclusion is supported by two independent
17 bases. First, the long-standing "rule of non-inquiry" prohibits
18 judicial review of the Secretary's decision. Second, the FARR
19 Act, passed to implement the CAT, bars judicial consideration of
20 any challenge to the Secretary's decision.

21 The Fourth Circuit recently addressed these arguments in
22 Mironescu. It disagreed with the government as to the first
23 point, the rule of non-inquiry. It sided with the government as
24 to the second point, the statutory bar. The net result was that
25 the court prohibited the challenge to the Secretary's decision.
26 The government submits that the Fourth Circuit was incorrect as
27 to the rule of non-inquiry but correct as to the statutory bar.

28

1 The government sets forth support for these conclusions later in
2 this filing.

3 a. Cornejo Is Non-Binding Dicta Insofar as the Panel
4 Opined That the Secretary's Extradition Decisions
5 Are Subject to Judicial Review under the CAT.

6 Although the law in this Circuit regarding how "dicta"
7 should be defined is unsettled,¹⁰ the conclusion in Cornejo that
8 the Secretary's extradition decisions are subject to judicial
9 review is not binding, regardless which definition controls.

10 In Cornejo, the Secretary had not yet decided in that case
11 whether to extradite the fugitive, so any discussion regarding
12 possible future review, or the future application of the APA, was
13 premature. As pointed out in the concurring opinion by a member
14 of the Cornejo panel, the availability or unavailability of
15 judicial review after a final extradition decision was not
16 properly before the panel. See 218 F.3d at 1017 (Kozinski, J.,
17 concurring); see also Karsten v. Kaiser Found. Health Plan, 36
18 F.3d 8, 11 (4th Cir. 1994) (noting that courts should refrain
19 from "solving questions that do not actually require answering in
20 order to resolve the matters before them"). A decision on this

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22 ¹⁰ According to one view, a court's pronouncement is dicta
23 when it "is unnecessary to our disposition of the case." See
24 United States v. Johnson, 256 F.3d 895, 920 (9th Cir. 2001) (en
25 banc) (Tashima, J., concurring); Export Group v. Reef Indus.,
26 Inc., 54 F.3d 1466, 1472 (9th Cir. 1995). According to another,
27 "where a panel confronts an issue germane to the eventual
28 resolution of the case, and resolves it after reasoned
consideration in a published opinion, that ruling becomes the law
of the circuit." See Johnson, 256 F.3d at 914 (Kozinski, J.,
concurring); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th
Cir. 2003).

1 question therefore was not germane to the eventual resolution of
2 the case, because at the time, it was not even known whether the
3 Secretary would decide to extradite. Hence, the discussion in
4 Cornejo about judicial review of the Secretary's possible, future
5 decision to extradite was "an opinion advising what the law would
6 be upon a hypothetical set of facts." North Carolina v. Rice,
7 404 U.S. 244, 246, 92 S. Ct. 402, 30 L. Ed. 413 (1971). Thus,
8 the discussion was advisory and is not binding on this Court.¹¹

9 **b. The Rule of Non-Inquiry Precludes Judicial Review**
10 **of the Secretary's Decision to Extradite, Even in**
11 **the Face of a CAT Claim.**

12 The surrender of a fugitive to a foreign government is
13 "purely a national act . . . performed through the Secretary of
14 State," within the Executive's "powers to conduct foreign
15 affairs." See In re Kaine, 55 U.S. (14 How.) 103, 110, 14 L. Ed.
16 345 (1852). Accordingly, the Secretary of State's decision
17 whether to extradite a fugitive certified as extraditable has
18 traditionally been treated as final and "not subject to judicial
19 review." Lopez-Smith, 121 F.3d at 1326. The nonjusticiability
20 of the Secretary's decision in this context falls under the "rule
21 of non-inquiry."

22
23 ¹¹ Several panels in the Ninth Circuit have mentioned
24 Cornejo in passing, but none of the cases actually involved the
25 present issue of whether the Secretary's decision to extradite
26 under 18 U.S.C. § 3186 is reviewable. Their reference to Cornejo
27 was in the form of an acknowledgment or background discussion
28 rather than in reliance on the decision for purposes of deciding
the case in question. See, e.g., Prasoprat, 421 F.3d at 1016
n.5; Blaxland, 323 F.3d at 1208; Barapind, 225 F.3d at 1106.

1 Judicial review of the Secretary's decision would place the
2 Court in an unfamiliar and inappropriate position. For example,
3 if the Secretary accepted the assurance of a foreign government
4 that, despite some human rights abuses in that country, the
5 person would not be tortured -- thereby complying with the policy
6 of the FARR Act and the CAT -- a court could evaluate that
7 decision only by second-guessing the informed judgment of the
8 Department of State that such an assurance could be trusted. It
9 is difficult to contemplate how judges would reliably conduct
10 such a review, lacking any expertise in foreign relations in
11 general, and relations with the relevant country in particular,
12 that the State Department had built up over many years. (See
13 Johnson Decl. at ¶ 6.)

14 Moreover, judicial review of the Secretary's extradition
15 decision could require the disclosure of State Department
16 officials' judgments concerning the likelihood of torture --
17 which judgments could include an assessment of the reliability of
18 information and representations provided, and communications with
19 the requesting government. Such a disclosure could harm our
20 foreign policy by chilling important sources of information and
21 interfering with the ability of our foreign relations personnel
22 to interact effectively with foreign States. (See Johnson Decl.
23 at ¶¶ 12-13.)

24 Consistent with the diplomatic sensitivities that surround
25 the Department's communications with requesting States concerning
26 torture allegations, the Department does not make public its
27 decisions to seek assurances in particular extradition cases.

28

1 (See Johnson Decl. at ¶ 12.) A demand for assurances may be seen
2 as raising doubts about the foreign State's institutions or
3 commitment to the rule of law, even where the assurances are
4 sought merely to highlight our concerns. (Id.) If the State
5 Department were required to publicize its communications with a
6 requesting State concerning allegations of torture, it is likely
7 that the foreign State, as well as other governments, would be
8 deterred from frank communications with the United States in the
9 future on relevant topics. (See Johnson Decl. at ¶ 13.)
10 Furthermore, public disclosure of our demand for written
11 assurances from high-level foreign officials, or for the right to
12 monitor the treatment of defendants or prisoners by the foreign
13 criminal justice systems, could impose pressure on foreign States
14 to seek comparable assurances, however inappropriate, from the
15 United States in future cases in which our country seeks
16 extradition of a fugitive.

17 Finally, only the Secretary has the diplomatic tools for
18 protecting a fugitive or assuring humane treatment upon his
19 return. See Kin-Hong, 110 F.3d at 110. With respect to torture
20 claims such as those raised here, the Secretary has three
21 options: "to surrender the fugitive to the requesting State, to
22 deny surrender of the fugitive, or to surrender the fugitive
23 subject to conditions." 22 C.F.R. § 95.3(b). The Secretary may
24 attach conditions to the surrender of the fugitive, such as
25 demanding that the requesting country provide assurances
26 regarding the individual's treatment. See, e.g., Jimenez v.
27 United States District Court, 84 S. Ct. 14, 19, 11 L. Ed. 2d 30

1 (1963) (Goldberg, J., in chambers) (describing commitments made
2 by foreign government to Department of State as a condition of
3 surrender); Kin-Hong, 110 F.3d at 110 (stating that the Secretary
4 may also elect to use diplomatic methods to obtain fair treatment
5 for the relator"); Johnson Decl. at ¶¶ 8-10.

6 Under this approach, it is not the situation that Trinidad's
7 CAT claim will receive no audience, simply that its audience will
8 be the Secretary of State or her designee. "It is not that
9 questions about what awaits the relator in the requesting country
10 are irrelevant to extradition; it is that there is another branch
11 of government, which has both final say and greater discretion in
12 these proceedings, to whom these questions are more properly
13 addressed." Kin-Hong, 110 F.3d at 111.

14 Mironescu's rejection of the rule of non-inquiry in the
15 context of the CAT is illogical. The syllogism in that case runs
16 as follows: The Supreme Court cases limiting habeas corpus
17 review of extradition orders and saying that individuals being
18 extradited are not constitutionally entitled to any particular
19 treatment abroad do not involve claims that extradition would
20 violate a federal statute. 480 F.3d at 670-71. The claim in
21 Mironescu involved a federal statute -- the FARR Act. Id. Thus,
22 the petitioner now has a "foothold" for his habeas corpus action
23 that was previously lacking. Id. at 671.

24 The fatal flaw in that analysis is that the statute that
25 supposedly allows for judicial review is one in which Congress
26 said that "nothing in this section shall be construed as
27 providing any court jurisdiction to consider or review claims
28

1 raised under the [CAT],” a fact that the Mironescu court later
2 described as “Congress’s unambiguously expressed intention that
3 courts reviewing extradition challenges may not consider CAT or
4 FARR Act claims.” 480 F.3d at 676. Hence, Mironescu’s decision
5 on the rule of non-inquiry was in error.

6 **3. Neither the CAT Nor the FARR Act Overturns the Rule of**
7 **Non-Inquiry so as to Provide for Judicial Review;**
8 **Rather, They Preclude Such Review.**

9 The Cornejo panel majority recognized the ruling of Lopez-
10 Smith that, before the FARR Act, no judicial review of the
11 Secretary’s extradition decision was available. See Cornejo, 218
12 F.3d at 1010; accord id. at 1009 n.5. Thus, the panel majority
13 believed that new authorization for judicial review came from the
14 FARR Act. 218 F.3d at 1014.

15 The panel majority thus apparently found in this legislative
16 action an intent by Congress to overrule the precedent
17 establishing the judicial rule of non-inquiry. The language and
18 history of the FARR Act, as well as its implementing regulations
19 indicate, however, that Congress’s intent was the opposite.

20 **a. As a Non-Self-Executing Treaty, the CAT Itself**
21 **Confers No Right to Judicial Review.**

22 The government does not contest that Article 3 of the CAT
23 prohibits the extradition of a person who is more likely than not
24 to be tortured, and that the FARR Act creates a mandatory duty on
25 the part of the Secretary of State to implement that prohibition.
26 Neither of those enactments, however, allows the courts to review

1 the Secretary of State's decision regarding whether a fugitive is
2 likely to be subject to torture after extradition.

3 The CAT is not self-executing and therefore, in the absence
4 of implementing legislation, it creates no judicially enforceable
5 rights in extradition cases. Although Cornejo expressly did not
6 reach this issue, 218 F.3d at 1011 n.6, numerous courts ruling on
7 the issue have uniformly held that the CAT is not self-executing.
8 See, e.g., Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir.
9 2003); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003); Hoxha
10 v. Levi, 465 F.3d 554, 564 n.15 (3d Cir. 2006); Mironescu, 480
11 F.3d at 677 n.15 (4th Cir.); Renkel v. United States, 456 F.3d
12 640, 645 (6th Cir. 2006); Kay v. Ashcroft, 387 F.3d 664, 671 n.7
13 (7th Cir. 2004); Raffington v. Cangemi, 399 F.3d 900, 903 (8th
14 Cir. 2005); Reyes-Sanchez v. Attorney General, 369 F.3d 1239,
15 1240 n.1 (11th Cir. 2004); see also Cornejo, 213 F.3d at 1017
16 (Kozinski, J., concurring). This conclusion is supported by the
17 fact that the United States Senate conditioned its ratification
18 of the CAT on a declaration that Article 3 was "not self-
19 executing," 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990);
20 S. Exec. Rep. No. 101-30 at 18, 31, and reported that because the
21 CAT was not self-executing, extradition determinations by the
22 Executive Branch "will not be subject to judicial review in
23 domestic courts." S. Exec. Rep. No. 101-30, at 18.

24 A non-self-executing treaty such as the CAT does not confer
25 judicially enforceable rights on private parties. Whitney v.
26 Robertson, 124 U.S. 190, 194, 8 S. Ct. 456, 31 L. Ed. 386 (1888)
27 (if treaty's "stipulations are not self-executing, they can only
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1 be enforced pursuant to legislation to carry them into effect");
2 Sosa v. Alvarez-Machain, 542 U.S. 692, 735, 124 S. Ct. 2739, 159
3 L. Ed. 2d 718 (2004) (a treaty that is not self-executing does
4 not create obligations enforceable in federal courts); Islamic
5 Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir.
6 1985) (non-self-executing agreement is merely an agreement
7 between nations with no effect on domestic law absent additional
8 governmental action). The CAT therefore does not itself enable
9 review of the Secretary of State's extradition determinations.

10 **b. The FARR Act Explicitly Does Not Create A New**
11 **Avenue for Judicial Review of Extradition**
12 **Decisions.**

13 Nor does the FARR Act provide jurisdiction for judicial
14 review of the Secretary's application of Article 3 of the CAT.
15 To the contrary, as described earlier, the FARR Act states:
16 "[N]otwithstanding any other provision of law . . . nothing in
17 this section shall be construed as providing any court
18 jurisdiction to consider or review claims raised under the [CAT]
19 or this section . . . except as part of the review of a final
20 order of removal [in immigration cases]." Sec. 2242(d); see also
21 H.R. Conf. Rep. No. 105-432, at 150 (1998) ("The provision agreed
22 to by the conferees does not permit for judicial review of the
23 regulations or of most claims under the Convention."
24 [typographical error deleted]).

25 The statement in Cornejo that this language merely
26 "prohibits courts from reading an implied cause of action into
27 the statute," 218 F.3d at 1015, is mistaken. Section 2242(d)
28

1 sweeps much more broadly than that. It addresses a previously
2 unreviewable action of the Secretary and announces that it does
3 not authorize review. Moreover, the statute says that
4 "[n]otwithstanding any other provision of law" the FARR Act
5 should not be interpreted to provide jurisdiction to review
6 extradition decisions -- indicating that the FARR Act was not
7 intended to allow review when combined with another statute, the
8 APA, as suggested in Cornejo. See 218 F.3d at 1015.

9 The Cornejo panel majority's interpretation of
10 Section 2242(d) of the FARR Act would render the entire last
11 phrase of this section -- "except as part of the review of a
12 final order of removal pursuant to section 242 of the Immigration
13 and Nationality Act" ("INA")-- superfluous. Section 242 of the
14 INA already provides courts with subject matter jurisdiction and
15 a cause of action to review a final order of removal. See 8
16 U.S.C. § 1252(d). The "except" clause has meaning only if the
17 first part of the provision is understood to reflect Congress'
18 view that there will be no judicial review whatsoever under the
19 FARR Act, "except" for review of final orders of removal under
20 the INA. Thus, interpreting Section 2242(d) consistently with
21 the axiom that courts should "avoid[] interpreting statutes in a
22 way that 'renders some words altogether redundant,'" see South
23 Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 347, 118 S. Ct. 789,
24 139 L. Ed. 2d 773 (1998) (quoting Gustafson v. Alloyd Co., 513
25 U.S. 561, 574, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995)), compels
26 the conclusion that Congress did not intend to authorize judicial
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1 review of extradition decisions, including CAT claims, under the
2 FARR Act.

3 In addition, the regulations promulgated by the State
4 Department under the authority of the FARR Act (and declared by
5 Congress to be judicially unreviewable, Sec. 2242(d)) support the
6 proposition that nothing in the FARR Act established a new right
7 to judicial review of extradition decisions. On their face, the
8 regulations state that there is no judicial review of the
9 Secretary's extradition decisions. See 22 C.F.R. § 95.4.
10 Especially in light of Congress's explicit delegation to the
11 Secretary of authority to "implement" the obligations of the
12 United States under the CAT, see FARR Act § 2242(b), these
13 regulations deserve substantial deference as published agency
14 interpretations of the FARR Act. See Chevron U.S.A. v. Natural
15 Resources Defense Council, 467 U.S. 837, 843, 104 S. Ct. 2778, 81
16 L. Ed. 2d 694 (1984) (where there has been a Congressional
17 delegation of administrative authority, courts must defer to
18 reasonable agency interpretation).¹²

19 c. The APA Provides No Basis for Reviewing the
20 Secretary's Extradition Decision.

21 The APA, 5 U.S.C. §§ 701-06, waives the government's
22 immunity from certain suits challenging administrative agency
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24 ¹² At virtually every stage of relevant Congressional
25 action, from the approval of the CAT, to the enactment of the
26 FARR Act, to the delegation of rulemaking authority to the
27 Secretary of State, Congress took pains to reinforce the concept
28 that the United States' obligations under the CAT in extradition
cases -- though undeniably important -- are not enforceable in
court.

1 action and seeking relief other than money damages. 5 U.S.C.
2 § 702. It provides that a reviewing court may "hold unlawful and
3 set aside agency action, findings, and conclusions found to
4 be . . . arbitrary, capricious, an abuse of discretion, or
5 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In
6 Cornejo, the panel majority relied on the APA as the vehicle for
7 judicial review of the Secretary's decision on a fugitive's CAT
8 claim. 218 F.3d at 1012-17. Contrary to that reliance, however,
9 the APA does not provide any authority for judicial review of the
10 Secretary's decision on a CAT claim.

11 (i) Executive Decisions Regarding Foreign Affairs
12 Matters Such As Extradition Are Immune From
13 Judicial Review Under 5 U.S.C. § 702(1).

14 Judicial review of Trinidad's CAT claim in this case is
15 precluded under 5 U.S.C. § 702(1), which states that the APA's
16 judicial review provision does not affect "other limitations on
17 judicial review or the power or duty of the court to dismiss any
18 action or deny relief on any other appropriate legal or equitable
19 ground." This provision incorporates not only express statutory
20 preclusions of judicial review (such as that in the FARR Act),
21 but also traditional preclusions regarding foreign affairs
22 matters such as extradition decisions, which are exclusively
23 entrusted to the political branches of government. See Saavedra
24 Bruno v. Albright, 197 F.3d 1153, 1158-59 (D.C. Cir. 1999) (non-
25 reviewability of consular visa decisions unaffected by APA's
26 grant of right of review to persons suffering legal wrong from
27 agency action); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208

1 (D.C. Cir. 1985) (it would be abuse of discretion to provide
2 relief under APA where court would be required to interject
3 itself into sensitive foreign affairs matter).

4 The legislative history of § 702 reinforces the conclusion
5 that § 702 precludes judicial review here. The provision was
6 enacted as part of the 1976 amendments implementing the
7 recommendations of the Administrative Conference of the United
8 States, which amendments were designed, among other things, to
9 ensure that the waiver of sovereign immunity in the APA did not
10 allow courts "to decide issues about foreign affairs, military
11 policy, and other subjects inappropriate for judicial action."
12 Sovereign Immunity: Hearing Before the Subcomm. on the
13 Administrative Practice and Procedure of the Senate Comm. on the
14 Judiciary, 91st Cong., 2d Sess. 135 (1970) (report of the
15 Administrative Conference Committee on Judicial Review); see also
16 Saavedra, 197 F.3d at 1158. The Administrative Conference also
17 noted that "'much of the law of unreviewability consists of
18 marking out areas in which legislative action or traditional
19 practice indicate that courts are unqualified or that issues are
20 inappropriate for judicial determination.'" Id. (quoting 1
21 Recommendations and Reports of the Administrative Conference 191,
22 225). By adopting the rule of non-inquiry, courts have "marked
23 out" extradition determinations as such an area.

1 (ii) The Statutory Scheme Forecloses Judicial
2 Review Pursuant to 5 U.S.C. §§ 701(a)(1) and
3 701(a)(2).

4 The APA does not waive sovereign immunity from suit where
5 "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or
6 "agency action is committed to agency discretion by law," *id.* at
7 § 701(a)(2). To qualify under the first provision, the statute
8 in question need not expressly bar judicial review; rather, APA
9 review can be foreclosed by virtue of "the collective import of
10 legislative and judicial history behind a particular statute [or]
11 . . . by inferences of intent drawn from the statutory scheme as
12 a whole." Block v. Community Nutrition Inst., 467 U.S. 340, 349,
13 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984). The courts' repeated
14 application of the rule of non-inquiry constitutes a "judicial
15 history" of not reviewing determinations by the Secretary under
16 18 U.S.C. § 3186 regarding the treatment of fugitives after
17 extradition.

18 Moreover, taking the applicable statutory scheme as a whole,
19 the FARR Act expressly provides that "[n]otwithstanding any other
20 provision of law," it is not to be construed as providing
21 jurisdiction to "consider or review . . . any . . . determination
22 made with respect to the application of the policy [against
23 extraditing a fugitive who will likely be subjected to torture]."
24 FARR Act, § 2242(d). This language evidences a congressional
25 intent to preclude judicial review and leave the rule of non-
26 inquiry intact. Thus, the APA does not apply and does not afford

1 Trinidad the right to judicial review of the Secretary's
2 extradition decision.

3 APA review of the Secretary's decisions on CAT claims is
4 also barred because those decisions are "committed to agency
5 discretion." 5 U.S.C. § 701(a)(2); see Lincoln v. Vigil, 508
6 U.S. 182, 191, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993) (section
7 701(a)(2) covers matters that have been traditionally left to
8 agency discretion). The FARR Act does not impose a duty of the
9 sort that is judicially reviewable. Notably, the substantive
10 standard of the CAT is merely paraphrased in the statute, and is
11 couched in terms of "policy," rather than "duty." Thus, Section
12 2242(a) of the FARR Act states that "[i]t shall be the policy of
13 the United States not to expel, extradite, or otherwise effect
14 the involuntary return of any person . . . [where] there are
15 substantial grounds for believing the person would be in danger
16 of . . . torture."¹³

17 Similarly, the FARR Act requires the Secretary of State to
18 "prescribe regulations to implement the obligations" of the
19 United States under Article 3, leaving it to the Secretary to
20 define what those "obligations" are. See FARR Act, § 2242(b).

21 _____
22 ¹³ The analysis in Cornejo of this statutory text was
23 flawed. The panel majority noted that the directive in Article 3
24 of the CAT that "[n]o State Party shall . . . extradite" a person
25 likely to face torture was "mandatory, not precatory." Cornejo,
26 218 F.3d at 1014. Imputing this mandate to the FARR Act, the
27 panel majority found the latter "similarly forceful" on grounds
28 that it directed the United States to "implement the obligations
of the United States under Article 3" of the CAT. Id. The panel
majority ignored, however, the fact that the FARR Act simply
articulates a "policy," and leaves to the Secretary's discretion
the decision as to what the "obligations" of the United States
actually are.

1 As set forth in the regulations, the "obligation" of the United
2 States under Article 3 of the CAT is to refuse extradition if the
3 "competent authorities," taking into account "all relevant
4 considerations," determine that there are substantial grounds for
5 believing that there is a danger of torture. See 22 C.F.R.
6 § 95.2. Under the FARR Act, the competent authority for the
7 United States is the Secretary of State. It is for that
8 Executive Branch officer to determine whether a fugitive is
9 "likely to face torture." Such a standard "fairly exudes
10 deference," Webster v. Doe, 486 U.S. 592, 600, 108 S. Ct. 2047,
11 100 L. Ed. 2d 632 (1988), to the State Department, and indicates
12 that the statute's implementation was committed to agency
13 discretion by law.

14 Also, in determining which categories of agency action are
15 unreviewable under § 701(a)(2), the Supreme Court has considered
16 whether the actions in question have traditionally been left to
17 agency discretion. See Lincoln, 508 U.S. at 192 (allocation of
18 funds from lump sum appropriation is "traditionally regarded as
19 committed to agency discretion" and is therefore unreviewable).
20 Thus, in Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649, 84 L.
21 Ed. 2d 714 (1985), the Supreme Court held that an agency's
22 decision not to bring an enforcement action has traditionally
23 been committed to agency discretion, and, accordingly, would be
24 presumptively unreviewable under § 701(a)(2). And in Webster v.
25 Doe, the Court refused to review a decision by the Director of
26 Central Intelligence to terminate an employee in the interests of
27 national security, "an area of executive action 'in which courts

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1 have long been hesitant to intrude.'" Lincoln, 508 U.S. at 192
2 (quoting Franklin v. Massachusetts, 505 U.S. 788, 819, 112 S. Ct.
3 2767, 120 L. Ed. 2d 636 (1992) (Stevens, J., concurring in part
4 and concurring in judgment). As discussed above, the Secretary's
5 extradition decisions have traditionally been "committed to
6 agency discretion," not only pursuant to the judicial rule of
7 non-inquiry, but also pursuant to statute. See 18 U.S.C. § 3186.
8 Therefore, Trinidad has no right to judicial review under
9 5 U.S.C. § 701(a)(2) or any other provision of the APA.

10 **IV. CONCLUSION**

11 Accordingly, Trinidad's motion for a stay should be denied.
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