

DECLARATION OF CLIFTON M. JOHNSON

I, Clifton M. Johnson, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Assistant Legal Adviser for Law Enforcement and Intelligence (“L/LEI”) in the Office of the Legal Adviser of the U.S. Department of State (“Department”), Washington, D.C. L/LEI, which I supervise, is responsible for providing legal advice to the Department on international law enforcement matters of significance to the Department and managing the Department’s responsibilities in cases of international extradition. I am a career member of the U.S. Government’s Senior Executive Service and have supervised the management of the Department’s international extradition responsibilities since September 2006. The following statements provide a general overview of the process of extraditing a fugitive from the United States to a foreign country. They are not intended to be an exhaustive description of all of the steps that might be undertaken in particular cases. I make these statements based upon my personal knowledge and upon information made available to me in the performance of my official duties.

2. Extradition requests made to the United States begin when a formal extradition request is presented to the State Department by a diplomatic note from the requesting State’s embassy in Washington, or through a similar diplomatic communication. Upon receiving the request with properly certified supporting documents, an attorney within L/LEI reviews the materials to determine: (a) whether an extradition treaty is in effect between the requesting State and the United States; (b) whether the request appears to come within the scope of the treaty; and (c) whether, on the face of the supporting documents, there is no clearly-evident defense to extradition under the treaty (for example, that the offense is a political offense). If the attorney is satisfied that the extradition request facially satisfies these requirements, L/LEI transmits the

request and documents to the Department of Justice for further review and, if appropriate, the commencement of extradition proceedings before a United States magistrate judge or a United States district judge.

3. The extradition judge conducts a hearing to examine whether extradition would be lawful under the terms of the treaty and the relevant provisions of United States law, 18 U.S.C. §§ 3181 – 3196, including determining whether there is sufficient evidence to sustain the charge(s) against the fugitive. If he or she finds that a fugitive is extraditable on any or all of the charges for which extradition is sought, the extradition judge certifies the fugitive's extraditability to the Secretary of State, who is the U.S. official responsible for determining ultimately whether to surrender the fugitive to the requesting State. See 18 U.S.C. §§ 3184, 3186. In U.S. practice, the extradition judge's decision whether to certify extraditability is not dependent on consideration of any humanitarian claims, such as the age or health of the fugitive. Similarly, under the long-established "rule of non-inquiry," consideration of the likely treatment of the fugitive if he or she were to be returned to the country requesting extradition should not be a part of the decision to certify extraditability. Instead, such issues are considered by the Secretary of State in making the final extradition decision.¹

4. The extradition judge's certification is not directly appealable, but can be challenged on certain grounds through a petition for a writ of habeas corpus. Once the judicial process is complete - either because the fugitive is not pursuing a habeas corpus petition or because such a petition has been denied – the second phase of the extradition process begins, wherein the Secretary must decide whether a fugitive who has been found extraditable by a court

¹ The Secretary's authority has been delegated and may be exercised by the Deputy Secretary of State and, in cases not involving allegations of torture, by the Under Secretary of State for Political Affairs. The Secretary retains the authority to act personally in any case as well. References in this declaration to the "Secretary" should be read to include her delegates where appropriate.

should actually be extradited to a requesting State. In determining whether a fugitive should be extradited, the Secretary may consider de novo any and all issues properly raised before the extradition court (or a habeas court), as well as any other considerations for or against surrender. Among these other considerations are humanitarian issues and matters historically arising under the rule of non-inquiry, including whether the extradition request was politically motivated, whether the fugitive is likely to be persecuted or denied a fair trial or humane treatment upon his or her return, and, since the entry into force for the United States of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) in 1994, specifically whether it is more likely than not that the fugitive would face torture in the requesting State.

5. The United States has undertaken the obligation under Article 3 of the Torture Convention not to extradite a person to a country where “there are substantial grounds for believing that he would be in danger of being subjected to torture.” A formal, written Understanding included in the United States’ instrument of ratification of the treaty establishes that the United States interprets this phrase to mean “if it is more likely than not that he would be tortured.” As the U.S. official with ultimate responsibility for determining whether a fugitive will be extradited, the Secretary carries out the obligation of the United States under the Torture Convention.

6. The Department's regulations at 22 C.F.R. Part 95, which the Department promulgated pursuant to section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, outline the procedures for considering the question of torture in the context of the Secretary’s determination as to whether a fugitive will be extradited. Whenever allegations relating to torture are brought to the Department’s attention by the fugitive or other

interested parties, appropriate policy and legal offices within the Department with regional or substantive expertise review and analyze information relevant to the particular case in preparing a recommendation to the Secretary. The Department's Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports (discussed below in paragraph 7), is a key participant in this process. The views of the relevant regional bureau, country desk, and U.S. Embassy also play an important role in the Department's evaluation of torture claims, because our regional bureaus, country desks, and Embassies are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel, in general and as they may apply to a particular case in a requesting State.

7. The Department will consider information concerning judicial and penal conditions and practices of the requesting State, including the Department's annual Human Rights Reports, and the relevance of that information to the individual whose surrender is at issue. The Department will examine materials submitted by the fugitive, persons acting on his or her behalf, or other interested parties, and will examine other relevant materials that may come to its attention.

8. The Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition. Based on the analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State or to deny surrender of the fugitive. Or, in some cases, the Secretary might condition the extradition on the requesting State's provision of assurances related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment. In addition to assurances related to torture, such assurances may include, for example, that the fugitive will have regular access to counsel and the full protections afforded

under that State's constitution or laws. Whether assurances are sought is decided on a case-by-case basis. In a number of cases since the entry into force of the Torture Convention, the Secretary signed an extradition warrant only after the Department engaged in a diplomatic dialogue and received adequate assurances of humane treatment from the requesting State.

9. When evaluating assurances or other information provided by the requesting State, Department officials, including the Secretary, consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the requesting State that would provide context for the assurances provided. Department officials, including the Secretary, may also consider U.S. diplomatic relations with the requesting State when evaluating assurances. For instance, Department officials may make a judgment regarding the requesting State's incentives and capacities to fulfill its assurances to the United States, including the importance to the requesting State of maintaining an effective extradition relationship with the United States.

10. In some cases, the Department has monitored or arranged for a third party such as a governmental or non-governmental human rights groups in the requesting State to monitor the condition of a fugitive extradited from the United States. As with the issue of assurances, the decision whether to seek a monitoring arrangement is made on a case-by-case basis, based on the circumstances of a particular case, which could include the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive's condition, the ability of such groups or persons to provide effective monitoring, and similar considerations.

11. Consistent with federal statutes and the Department's regulations, the Secretary makes her extradition determination, and in particular evaluates any claims regarding the

likelihood of torture, only after the fugitive has been committed for extradition and any habeas petitions have been resolved. See 7 FAM 1634.3(f), which provides as follows:

Under U.S. law (18 U.S.C. § 3188), a fugitive who has been certified extraditable and committed to custody must be transferred to the requesting country within two calendar months of such certification and commitment. A fugitive who is not transferred by the expiration date of the statutory two-month period may petition the District Court for release. For this reason, the Department of State may initiate the final review of the case as soon as feasible after the receipt of the record of the case. However, if a fugitive seeks judicial review of the extradition judge's finding of extraditability, the Department suspends its final review of the case. After the district court denies the petition for habeas corpus, the Department typically begins or resumes its review process unless a court has stayed the surrender pending appeal.

A contrary approach would be wasteful of government resources and potentially detrimental to the foreign policy of the United States, as it would be ill-advised for the Department to embark on the extensive and sensitive process described above if there were still a question as to whether the fugitive will be found to be extraditable. Moreover, the Department's ability to seek and obtain assurances, should that become necessary, would be limited if the Department is unable to explain to the requesting State whether and on what charges the fugitive could be surrendered if the assurances were given.

12. The Department's ability to seek and obtain assurances from a requesting State also depends in part on the Department's ability to treat dealings with the relevant foreign government with discretion. Consistent with the diplomatic sensitivities that surround the Department's communications with requesting States concerning allegations relating to torture, the Department does not make public its decisions to seek assurances in extradition cases in order to avoid the chilling effects on requesting States' willingness to make such assurances should they become public and the possible damage to our ability to conduct foreign relations with those countries. Seeking assurances may be seen as raising questions or criticism about the

requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the requesting State and satisfy ourselves that the requesting State is aware of the concerns that have been raised and is in a position to undertake a commitment of humane treatment of a particular fugitive. There also may be circumstances in which it may be important to protect sources of information (such as sources within a foreign government) about torture allegations, who want to keep their identity or the specific information they provide confidential.

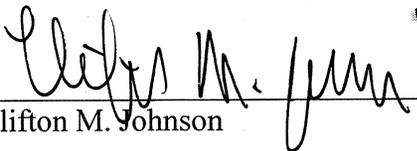
13. If the Department is required to make public its communications with a requesting State concerning allegations of torture, that State, as well as other States, would likely be reluctant to communicate frankly with the United States concerning such issues. I know from experience that the delicate diplomatic exchange that is often required in these contexts cannot occur effectively except in a confidential setting. Later review in a public forum of the Department's dealings with a requesting State regarding extradition matters would thus seriously undermine our ability to investigate torture allegations and to reach acceptable understandings with requesting States.

14. A judicial decision overturning a determination made by the Secretary after extensive discussions and negotiations with a requesting State could seriously undermine our foreign relations. Moreover, judicial review of the Secretary's determination – which as noted above is based on a wide range of information derived from people who are professionally expert in country conditions in the requesting State – to surrender a fugitive to a requesting State inevitably would add delays to extradition in what is already frequently a lengthy process. A new round of judicial review and appeal could undermine the requesting State's ability to

prosecute and also harm our efforts to press other countries to act more expeditiously in surrendering fugitives for trial in the United States.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2009.


Clifton M. Johnson