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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HEDELITO TRINIDAD y GARCIA,	)	No. CV 08-07719-MMM(CW)
	)	
Petitioner,	)	[PROPOSED]
	)	ORDER GRANTING PETITION
v.	)	FOR WRIT OF HABEAS CORPUS
	)	
MICHAEL BENOVA (Warden),	)	
	)	
Respondent.	)	
_____	)	

The petition for writ of habeas corpus is **GRANTED** for the reasons and on the conditions stated below.

**BACKGROUND AND PROCEEDINGS**

Petitioner Hedelito Trinidad y Garcia challenges the legality of his federal custody pending extradition to the Philippines. The present action is the third of three related cases in this court, namely, an extradition proceeding and two habeas petitions.<sup>1</sup>

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<sup>1</sup> This background information is taken from the Report and Recommendation (docket no. 39) filed February 13, 2009, which contains a detailed discussion of the extradition process and the proceedings and issues in Petitioner’s three cases, along with citations to the records and to legal authorities.

1 The extradition proceeding was initiated on December 18, 2003,  
2 when the United States Attorney filed a complaint seeking Petitioner's  
3 extradition to the Philippines on a charge of kidnaping for ransom and  
4 the court issued a bench warrant. [See United States v. Trinidad,  
5 Case No. M 03-2710.] Petitioner was arraigned in this court on  
6 October 8, 2004, and the federal public defender was appointed to  
7 represent him. On December 10, 2004, the case was re-docketed as  
8 Extradition of Trinidad, No. CV 04-10097-MMM(CW), and a formal request  
9 for extradition was filed. The matter was briefed extensively, and  
10 the magistrate judge held an evidentiary hearing (on May 19 and 24,  
11 2005, with closing arguments on August 25, 2005).<sup>2</sup>

12 In the extradition proceeding it was undisputed that this court  
13 had jurisdiction, that a valid treaty was in force, and that the  
14 charged offense was covered by the treaty. The parties disputed  
15 whether there was probable cause to believe Petitioner committed the  
16 charged offense. Petitioner also argued for denial of certification  
17 on humanitarian grounds under the United Nations Convention Against  
18 Torture (the "Torture Convention"). The magistrate judge found that,  
19 in an extradition proceeding, the court had no authority to deny  
20 certification on such grounds, and that such a claim was not ripe for  
21 judicial review unless and until the Secretary of State made a final  
22 decision to extradite Petitioner.

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25 <sup>2</sup> Extradition proceedings are usually brought before magistrate  
26 judges. The magistrate judge's role is to determine whether the  
27 charged offense is extraditable under the relevant treaty, and whether  
28 there is probable cause to sustain the charge against the person in  
question. On making such determinations, the magistrate judge is  
required to certify the person as extraditable to the Secretary of  
State. See Vo v. Benov, 447 F.3d 1235, 1237 (9th Cir. 2006);  
Prasoprat v. Benov, 421 F.3d 1009, 1012 (9th Cir. 2005).

1 After considering evidentiary issues, the magistrate judge  
2 concluded that the minimum standard of probable cause had been met.  
3 The magistrate judge's Certification of Extraditability was filed  
4 September 7, 2007. In an order filed September 18, 2007, the  
5 magistrate judge stayed extradition until completion of habeas corpus  
6 proceedings in the district court.<sup>3</sup>

7 On October 5, 2007, Petitioner filed a petition for writ of  
8 habeas corpus under 28 U.S.C. § 2241, which was docketed as No. CV 07-  
9 6387-MMM. Petitioner challenged the certification, contending that  
10 the magistrate judge erred in admitting supplemental evidence; that,  
11 even with the supplemental evidence, the probable cause finding was  
12 not supported; and that, even if a probable cause finding was  
13 supported, Petitioner's extradition would violate federal law and the  
14 Torture Convention.

15 On December 20, 2007, Petitioner moved to stay the first habeas  
16 proceeding until the Secretary of State had reviewed his Torture  
17 Convention claim. In an order filed March 3, 2008, the court denied  
18 the motion to stay, finding that a Torture Convention claim would only  
19 be ripe for judicial review if the Secretary decided to extradite  
20 Petitioner, and that Petitioner could seek a stay of extradition, if  
21 necessary, once the district court decided the habeas petition. On  
22 April 15, 2008, Petitioner moved for reconsideration of the order  
23 denying a stay. In an order filed May 13, 2008, the court denied the  
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25 <sup>3</sup> A magistrate judge's certification of a person as extraditable  
26 is not directly appealable but may be challenged in a habeas petition  
27 filed as a new action in the district court. Vo, 447 F.3d at 1240.  
28 The district court's habeas review of a magistrate judge's extradition  
order is limited to whether the magistrate had jurisdiction, whether a  
treaty in force covered the charged offense, and whether competent  
evidence supported a finding of probable cause. Vo, 447 F.3d at 1240.

1 motion, again finding the Torture Convention claim not ripe for review  
2 unless and until the Secretary decided to extradite Petitioner.

3 In an order filed July 16, 2008, the court denied Petitioner's  
4 first habeas petition, rejecting the evidentiary arguments and  
5 affirming the probable cause finding. The court also found, again,  
6 that the Torture Convention claim, if reviewable, would not be ripe  
7 until the Secretary had made a final decision to surrender Petitioner  
8 for extradition, and denied the first habeas petition without  
9 prejudice to asserting a Torture Convention claim in a second  
10 petition. On July 24, 2008, Petitioner waived his right to appeal the  
11 district court decision in the first habeas proceeding. On September  
12 12, 2008, the Secretary of State issued a warrant to surrender  
13 Petitioner for extradition.<sup>4</sup> Petitioner then filed a request to stay  
14 extradition pending resolution of a second habeas petition. In orders  
15 filed September 29, 2008, the court granted the stay.

16 The present, second habeas proceeding was opened on November 24,  
17 2008, as a petition for writ of habeas corpus under 28 U.S.C. § 2241,  
18 docketed as No. CV 08-7719-MMM(CW). (Petitioner's second habeas  
19 petition and other documents were originally filed in Case No. CV 07-  
20 6387, and were re-docketed under the new case number.) The second  
21 habeas petition challenges Petitioner's custody pending extradition to  
22 the Philippines under the Secretary of State's surrender warrant  
23 issued September 12, 2008. Petitioner contends that his extradition  
24 would violate the Torture Convention and federal law because there are

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26 <sup>4</sup> If a person has been judicially certified as extraditable, the  
27 Secretary of State then decides whether to surrender that person to  
28 the foreign state. Vo, 447 F.3d at 1237. The Secretary may decide to  
extradite, not to extradite, or to extradite with conditions. See,  
e.g., United States v. Kin Hong, 110 F.3d 103, 109-10 (1st Cir. 1997).

1 substantial grounds to believe that he would be tortured if returned  
2 to the Philippines. Petitioner claims that the Secretary's decision  
3 to extradite him, in spite of his Torture Convention claim, was  
4 arbitrary in violation of the Administrative Procedure Act ("APA"), 5  
5 U.S.C. § 551 et seq.<sup>5</sup>

6 Respondent filed an application to dismiss the second petition  
7 for lack of jurisdiction, which the parties fully briefed. In the  
8 February 13, 2009 Report and Recommendation, the magistrate judge  
9 recommended that the application to dismiss the petition be denied and  
10 that respondent be ordered to answer Petitioner's APA claim on its  
11 merits. Respondent filed objections (docket no. 40), and a notice of  
12 supplemental authority (docket no. 47) to which Petitioner filed a  
13 response (docket no. 48). In an order filed May 15, 2009 (docket no.  
14 46), the court adopted the Report and Recommendation, denied the  
15 motion to dismiss, ordered Respondent to file an answer addressing  
16 Petitioner's APA claim on its merits, directed Respondent to submit  
17 evidence from the administrative record (sufficient to enable the  
18 court to determine whether the Secretary acted arbitrarily,  
19 capriciously, in abuse of discretion, or in violation of law in  
20 deciding to extradite Petitioner), and stated that Respondent might  
21 raise any issues about the protection of confidential materials.

22 On June 12, 2009, Respondent filed an application to certify the  
23 court's order for interlocutory appeal (docket no. 50). In a minute  
24 order filed July 20, 2009 (docket no. 57), the court denied this  
25 application and again ordered Respondent to file an answer and submit  
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27 <sup>5</sup> Petitioner also claims that the Secretary's decision denied  
28 him procedural and substantive due process under the Fifth Amendment,  
but the court has not reached, and need not reach, those claims.

1 evidence. In a notice of non-compliance filed August 3, 2009 (docket  
2 no. 58), Respondent reasserted the position that this court lacks  
3 jurisdiction to review the Secretary of State's final extradition  
4 decision, and respectfully declined to produce further evidence as  
5 ordered by the court.

6 In a motion filed August 4, 2009 (docket no. 4), Respondent made  
7 an anticipatory application for a detention hearing for Petitioner,  
8 and sought an order staying release. In a minute order filed August  
9 28, 2009 (docket no. 63), the magistrate judge denied the application,  
10 without prejudice, as premature, stating that Petitioner was in  
11 custody, that the court had not ordered him released, and that, if the  
12 court issued the writ, the parties would then have an opportunity to  
13 litigate the issue of Petitioner's release or detention pending  
14 appeal.

15 At a status conference on September 4, 2009, counsel confirmed  
16 that the Government anticipates that the writ will be granted, intends  
17 to appeal on the issue of jurisdiction, and intends to ask the court  
18 to order that Petitioner remain in custody while the appeal is  
19 pending, and that Petitioner also anticipates that the writ will be  
20 granted, and intends to seek release on conditions pending appeal.

21 [See minute order filed September 4, 2009, docket no. 64.] To  
22 expedite proceedings, counsel agreed that counsel would waive the  
23 opportunity to file objections to a second report and recommendation;  
24 that Magistrate Judge Woehrle would submit this matter to Judge Morrow  
25 for decision by presented order rather than report and recommendation;  
26 that the presented order would be lodged and served on the parties;  
27 and that, after the filing of this order, the court would hold a  
28 hearing on issues raised in Respondent's "anticipatory application"

1 (docket no. 59). Since then, Petitioner has filed opposition to  
2 Respondent's application for continued detention (docket no. 66), and  
3 Respondent has filed a reply (docket no. 67).

4 **THE TORTURE CONVENTION**

5 The Torture Convention was adopted by the United Nations General  
6 Assembly in 1984, and entered into force as to the United States in  
7 1994. See Cornejo-Barreto v. Seifert ("Cornejo-Barreto I"), 218 F.3d  
8 1004, 1007 and n.1 (9th Cir. 2000). Article 3 of the Torture  
9 Convention provides that "[n]o State Party shall . . . extradite a  
10 person to another State where there are substantial grounds for  
11 believing that he would be in danger of being subjected to torture."  
12 Quoted in Cornejo-Barreto I, 218 F.3d at 1011. Article 3 of the  
13 Torture Convention was implemented by Congress in 1998 in section 2242  
14 of the "FARR Act," which stated that it was United States policy not  
15 to extradite any person to a country where there were substantial  
16 grounds for believing that person would be in danger of being  
17 tortured, and called for the adoption of regulations to implement that  
18 policy.<sup>6</sup> The State Department adopted regulations implementing  
19 section 2242 of the FARR Act and defining the Secretary of State's  
20 duties under Article 3 of the Torture Convention in regard to  
21 extradition. These regulations provide, in part, as follows:

22 [T]he Secretary [of State] is the U.S. official  
23 responsible for determining whether to surrender a fugitive  
24 to a foreign country by means of extradition. In order to  
25 implement the obligation assumed by the United States

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27 <sup>6</sup> The FARR Act is the Foreign Affairs Reform and Restructuring  
28 Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. Section 2242 of the  
FARR Act was codified in a note to 8 U.S.C. § 1231.

1 pursuant to Article 3 of the [Torture] Convention, the  
2 Department considers the question of whether a person facing  
3 extradition from the U.S. "is more likely than not" to be  
4 tortured in the State requesting extradition when  
5 appropriate in making this determination.

6 Decisions on extradition are presented to the Secretary  
7 only after a fugitive has been found extraditable by a  
8 United States judicial officer. In each case where  
9 allegations relating to torture are made or the issue is  
10 otherwise brought to the Department's attention, appropriate  
11 policy and legal offices review and analyze information  
12 relevant to the case in preparing a recommendation to the  
13 Secretary as to whether or not to sign the surrender  
14 warrant.

15 Based on the resulting analysis of relevant  
16 information, the Secretary may decide to surrender the  
17 fugitive to the requesting State, to deny surrender of the  
18 fugitive, or to surrender the fugitive subject to  
19 conditions.

20 22 C.F.R. §§ 95.2-95.3 (2000) (quoted in *Cornejo-Barreto I*, 218 F.3d at  
21 1011-12).

#### 22 **THE JURISDICTIONAL ISSUE**

23 As discussed at length in the Report and Recommendation cited  
24 above, this court's determination that it has jurisdiction to review  
25 Petitioner's Torture Convention claim is controlled by the Ninth  
26 Circuit's decision in *Cornejo-Barreto I*. In *Cornejo-Barreto I*, as  
27 understood by this court, the Ninth Circuit held that a fugitive  
28 fearing torture if extradited may bring a claim in a habeas petition



1 under 28 U.S.C. § 2241, that such a claim would only be ripe if and  
2 when the Secretary of State makes a final decision to surrender the  
3 fugitive for extradition, and that a district court would then have  
4 jurisdiction to review such a claim. Cornejo-Barreto I, 218 F.3d at  
5 1012-13. The Ninth Circuit summarized its conclusions as follows:

6 The individual's right to be free from torture is an  
7 international standard of the highest order. Indeed, it is  
8 a jus cogens norm [footnote omitted]: the prohibition  
9 against torture may never be abrogated or derogated.

10 [footnote omitted] We must therefore construe Congressional  
11 enactments consistent with this prohibition. In the  
12 extradition context, the approach we describe here allows us  
13 to give full effect to Congressional legislation without  
14 creating a conflict between domestic and international law.  
15 We recognize that Congress intended the Secretary of State  
16 to act as the "competent authority" charged with enforcing  
17 Article 3 of the Convention. We also recognize that  
18 Congress did not limit judicial review of the Secretary's  
19 decisions under long-standing APA procedures. An extraditee  
20 ordered extradited by the Secretary of State who fears  
21 torture upon surrender, therefore, may state a claim  
22 cognizable under the APA that the Secretary of State has  
23 breached her duty, imposed by the FARR Act, to implement  
24 Article 3 of the Torture Convention. Such a claim, brought  
25 in a petition for habeas corpus, becomes ripe as soon as the  
26 Secretary of State determines that the fugitive is to be  
27 surrendered to the requesting government.

28 Id. at 1016-17.

1 In applying to dismiss the present petition for lack of  
2 jurisdiction, Respondent raised five arguments applicable to the APA  
3 claim: that district court review of Torture Convention claims is  
4 barred by the "REAL ID Act"<sup>7</sup>; that judicial review of the Secretary's  
5 final extradition decisions is precluded by the "Rule of Non-Inquiry"  
6 as reaffirmed in Munaf v. Geren, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2207, 171 L.  
7 Ed. 2d 1 (2008); that neither the Torture Convention nor the FARR Act  
8 overturned the Rule of Non-Inquiry; that the APA does not support  
9 judicial review of the Secretary's decisions; and that the suggestion  
10 in Cornejo-Barreto I that the Secretary's decisions are reviewable  
11 amounts to non-binding dicta. These arguments were rejected after  
12 lengthy discussion in the February 13, 2009 Report and Recommendation.  
13 That determination was adopted by the court's May 15, 2009 Order,  
14 which also rejected further arguments raised in Respondent's  
15 objections. That order and the discussion in the Report and  
16 Recommendation are incorporated in this order. In rejecting  
17 Respondent's jurisdictional challenge, this court has relied on and  
18 continues to rely on its reading of the holding in Cornejo-Barreto I  
19 and its understanding that this holding remains the law of this  
20 circuit and is binding on this court.

21 **PETITIONER'S APA CLAIM**

22 The Cornejo-Barreto I Panel did not decide a claim under the  
23 Torture Convention and the APA, nor did it determine the evidence  
24 needed or the standard to be applied in reaching such a decision;  
25 instead, it simply held that a petitioner could obtain judicial review  
26 of such a claim once it became ripe.

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27 <sup>7</sup> See the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat.  
28 231.

1 In Petitioner's case, it is undisputed that he presented a  
2 Torture Convention claim to the Secretary of State, that he was  
3 entitled to the Secretary's review of that claim (pursuant to the  
4 Torture Convention, the FARR Act, and the implementing regulations),  
5 and that, in issuing a surrender warrant, the Secretary rejected his  
6 Torture Convention claim. In the present action, Petitioner has  
7 presented to this court a non-frivolous claim for habeas corpus  
8 relief, contending that his custody pursuant to the surrender warrant  
9 is illegal because the Secretary's denial of his Torture Convention  
10 claim was arbitrary under the APA.<sup>8</sup>

11 As noted above, this court has held that Petitioner's Torture  
12 Convention claim is now ripe, and that this court has jurisdiction to  
13 review it under the APA. In its May 15, 2009 Order, the court ordered  
14 Respondent to answer Petitioner's APA claim on its merits and to  
15 submit evidence from the administrative record sufficient to enable  
16 the court to determine whether the Secretary acted arbitrarily in  
17 deciding to extradite Petitioner, while stating that Respondent might  
18 raise any issues about protection of confidential materials. Having  
19 unsuccessfully sought reconsideration or immediate appeal on the  
20 jurisdictional issue, Respondent then declined to comply with this  
21 court's orders on further proceedings. Accordingly, the court must  
22 now decide this claim under the APA, without Respondent's assistance.

23 Under the APA, a reviewing court must hold unlawful and set aside  
24 an agency action that is "arbitrary, capricious, an abuse of  
25 discretion, or otherwise not in accordance with law." Crickon v.

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27 <sup>8</sup> Petitioner's claim that he fears being subjected to torture if  
28 extradited is supported by evidence that several of his co-defendants  
were subjected to torture while in custody in the Philippines.

1 Thomas, 579 F.3d 978, 982 (9th Cir. 2009)(quoting 5 U.S.C. § 706(2)  
2 (A). However, review is "highly deferential, presuming the agency  
3 action to be valid and affirming the agency action if a reasonable  
4 basis exists for its decision." Crickon, 579 F.3d at 982 (quoting  
5 Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 475  
6 F.3d 1136, 1140 (9th Cir. 2007)(citation and internal quotation marks  
7 omitted)). "A reasonable basis exists where the agency considered the  
8 relevant factors and articulated a rational connection between the  
9 facts found and the choices made." Crickon, 579 F.3d at 982 (quoting  
10 Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir. 2008)(citation and  
11 internal quotation marks omitted)).

12 A court reviewing an agency decision considers the administrative  
13 record as a whole, "weighing both the evidence that supports and the  
14 evidence that detracts from the [agency's] conclusion." Lingenfelter  
15 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). The reviewing court  
16 may set aside an agency decision that is "unsupported by substantial  
17 evidence." Robert F. Kennedy Medical Center v. Leavitt, 526 F.3d 557,  
18 561 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(E)).<sup>9</sup> However, a court  
19 must review an agency decision based solely on the administrative  
20 record "and determine whether the agency has articulated a rational  
21 basis for its decision." Crickon, 579 F.3d at 982 (quoting Tablada v.  
22 Thomas, 533 F.3d 800, 805 (9th Cir. 2008)). The court may not attempt  
23 itself to make up for deficiencies in the record. Crickon, id.  
24 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.

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26 <sup>9</sup> "Substantial evidence is more than a mere scintilla. It means  
27 such relevant evidence as a reasonable mind might accept as adequate  
28 to support a conclusion." Metropolitan Stevedore Co. v. Rambo, 521  
U.S. 121, 149, 117 S. Ct. 1953, 138 L. Ed. 2d 327 (1997) (quoting  
Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206,  
217, 83 L. Ed. 126 (1938)).

1 Auto. Ins., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443  
2 (1983)). Thus, the reviewing court may "not supply a reasoned basis  
3 for the agency's action that the agency itself has not given."  
4 Crickon, id. (citing Motor Vehicle Mfrs. Ass'n, id.). Nor should the  
5 reviewing court "infer an agency's reasoning from mere silence."  
6 Crickon, id. (quoting Arrington, 516 F.3d at 1112).

7 In Petitioner's case, Respondent has refused to provide the  
8 administrative record on which the Secretary relied in making her  
9 final decision.<sup>10</sup> Because of Respondent's refusal to comply with  
10 court orders, the court has no administrative record to review, no  
11 evidence to weigh, and no grounds for finding that the Secretary's  
12 decision was supported by substantial evidence. Respondent has  
13 refused to provide any relevant evidence from which this court could  
14 find that "the agency has articulated a rational basis for its  
15 decision." Crickon, 579 F.3d at 982. As noted above, this court may  
16 not attempt itself to make up for this deficiency by supplying "a  
17 reasoned basis for the agency's action that the agency itself has not  
18 given," and may not "infer an agency's reasoning from mere silence."  
19 Id. Accordingly, the court has no alternative by to conclude that a  
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21 <sup>10</sup> Petitioner contended in the Traverse (docket no. 62) that  
22 this court may presume that Petitioner's record in this court was  
23 incorporated in the administrative record. However, this court has no  
24 evidence as how the court record figured into the administrative  
25 process after Petitioner was certified as extraditable. The only  
26 evidence on this question yet supplied by Respondent consists of  
27 declarations attesting to procedures the State Department generally  
28 follows in deciding whether to surrender a fugitive, certified as  
extraditable, who states a claim under the Torture Convention. See,  
e.g., Declaration of Clifton M. Johnson, exhibit to Respondent's  
opposition to Petitioner's bail motion (docket no. 33, filed January  
5, 2009). However, this evidence does not establish what the  
Secretary's decision in this specific case was based on, or whether  
that decision was arbitrary, which are the points at issue in the  
present action.

1 decision for which no rationale has been offered is, per se,  
2 arbitrary, and is not entitled to any deference. See Crickon, 579  
3 F.3d at 983 ("`[t]he agency's lack of explanation for its choice  
4 renders its decision arbitrary and capricious"')(quoting Arrington,  
5 516 F.3d at 1112).

6 **ORDERS**

7 It is therefore **ORDERED** as follows:


8 1. The petition for writ of habeas corpus is granted.

9 2. Petitioner is ordered released from custody imposed pursuant  
10 to the Secretary's surrender warrant.

11 3. Judgment shall be entered accordingly.

12 4. The order releasing Petitioner from custody is stayed, for a  
13 period of sixty days, or such shorter time as is needed, for  
14 resolution of Respondent's application for Petitioner's continued  
15 detention pending appeal of this decision.

16  
17 DATED: November 17, 2009

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MARGARET M. MORROW  
United States District Judge

20 Presented by

21 Dated: October 16, 2009

22 /S/  
23 CARLA M. WOHRLE  
United States Magistrate Judge