ANDRÉ BIROTTE JR.
United States Attorney
ROBBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division
JONATHAN E. LOPEZ (SBN 210513)
Deputy Chief, Asset Forfeiture
and Money Laundering Section
Criminal Division
United States Dept. of Justice
1400 New York Ave, N.W.
Bond Building, Room 2200
Washington, D.C. 20005
Telephone: (202) 307-0846
Facsimile: (202) 616-2547
Email: jonathan.lopez@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JUTHAMAS SIRIWAN, aka "the Governor," and JITTISOPA SIRIWAN, aka "Jib," Defendants.	CR No. 09-81-GW GOVERNMENT'S THIRD SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Hearing Date: February 21, 2013 Hearing Time: 8:30 a.m.

Plaintiff United States of America, through its counsel of record, hereby submits its third supplemental brief to the Court. The government's third supplemental brief is based upon the attached memorandum of points and authorities, the files and records in this matter, including, the government's Response in Opposition to Defendants' Motion to Dismiss the Indictment (DE

67), the government's subsequent filings, as well as any evidence or argument presented at any hearing in this matter.

DATED: January 11, 2013

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture
and Money Laundering Section
Criminal Division
United States Dept. of Justice

/s/
JONATHAN E. LOPEZ
Deputy Chief, Asset Forfeiture
and Money Laundering Section
Criminal Division
United States Dept. of Justice

Attorneys for Plaintiff
UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

The government files this supplemental briefing to further address Thailand's response to the government's extradition request in this case.

At the November 29, 2012, hearing the Court asked two questions: (1) if it takes the Thai government five years or longer to investigate and extradite the defendants, will the Court be expected to keep this case open on its docket for that length of time[1] and (2) what significance should the Court afford Thailand's November 9, 2012 letter (the "November 9 Letter") advising of its decision to postpone review of the government's extradition request until it has completed its own domestic investigation, particularly as regards to defendants' pending motion to dismiss.[2] In addition, the Court inquired whether, setting aside international law, the United States should step aside and allow this matter to proceed solely in Thailand, given that Thailand anticipates investigating and possibly prosecuting the defendants for conduct that, to some degree, overlaps with the conduct charged in the instant indictment and one of the defendants is a Thai official.[3]

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[1] Trans. Nov. 9, 2012 hearing at 4.

[2] Trans. Nov. 9, 2012 hearing at 10-11. As further discussed in this brief, on December 20th, 2012, Thailand provided the State Department a Diplomatic Note, dated December 14th, 2012 (the "December 14th Dip Note"), informing the United States that the Thai National Anti-Corruption Commission intends to file a criminal case against defendant Juthamas Siriwan and repeating its earlier communication that it intends to postpone review of the extradition request.

[3] Trans. Nov. 9, 2012 hearing at 8.

As further discussed below, the government respectfully submits that the instant indictment should remain on the Court's docket, without further action by the Court, until defendants appear before this Court. The amount of time that lapses before defendants make such an appearance, through extradition or otherwise, is simply irrelevant to the sufficiency of the indictment or whether it must remain on the Court's docket, barring prejudicial delay attributable to the government. With respect to the November 9 Letter, Thailand's expressed desire to postpone its review of the government's extradition request is not an expression of sole Thai jurisdiction, contrary to defendants' claims. Even if it were, the desired postponement is not a basis for dismissal of the instant indictment.[4] Lastly, the Court should not consider either Juthamas Siriwan's status as a former Thai official or Thailand's independent investigation into defendants' conduct in deciding defendants' motion to dismiss the instant indictment. Both of these factors relate to foreign policy, which the Supreme Court, the Ninth Circuit and other circuits have long-held is a matter almost entirely within the purview of the political branches, not the judiciary.

A. Indictments Remain on a Court's Docket Pending Extradition

It is not at all unusual for the execution of an extradition request to take a very substantial amount of time. Treaty procedures alone frequently consume a very substantial amount of

[4] The December 14 Dip Note (attached as Exhibit A) does not change the government's analysis. Thailand's desire to investigate and possibly charge the defendants in Thailand before reviewing the extradition request does not bear on the sufficiency of the indictment.

time and the contribution of numerous case-specific factors often result in years passing before a defendant finally appears before a United States court. For example, a defendant may face being criminally charged or prosecuted in the foreign nation or be serving a term of incarceration in the foreign nation. Similarly, an appeal of the extradition request, whether pursued by the defendant or the United States, in the courts of the foreign nation, may prove to be quite lengthy.[5] In such circumstances, the United States indictment should remain active on the Court's docket and the delay, unless attributable solely to the United States government[6], should not provide cause to dismiss the United States indictment.

This is clear from cases such as United States v. Blake, 817 F.Supp.2d 1082 (N.D. Ind. 2011) – a case specifically involving extradition from Thailand. The defendant was indicted in the United States in 2002 and a request for extradition was made by the United States to Thailand that same year. Thailand did not respond to the United States' extradition request until 2005.[7] In its response, Thailand informed the United States that the

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[5] An indictment remains on a court's docket even in instances in which the defendant is in a nation with which the United States has no extradition treaty. See United States v. Hooker, 607 F.2d 286 (9th Cir. 1979), cert. denied, 445 U.S. 905 (1980)(defendant was incarcerated in Peru with which the United States had no extradition treaty but then fled to Ecuador and was ultimately returned to the United States).

[6] See United States v. Manning, 56 F.3d 1188, 1194-1195 (9th Cir. 1995)(noting that Sixth Amendment right to speedy trial only arises when the delay is the government's fault and defendant can show actual prejudice resulting from the delay).

[7] Id. at 1084.

defendant was imprisoned in Thailand and would not be released until 2025.[8] The defendant's sentence was later cut short and the defendant was extradited to the United States in 2011, nine years after extradition was first sought.[9] The court, citing United States v. Hooker, 607 F.2d 286 (9th Cir. 1979), cert. denied, 445 U.S. 905 (1980), held that "foreign relations and treaty negotiations are exclusively the province of the executive branch"[10] and when "the government made its single request to extradite [defendant], it did what was needed to secure [defendant]; the treaty authorized no further efforts, so further efforts were unnecessary."[11] The court held that the defendant's arrest and conviction in Thailand were completely attributable to his own actions.[12] The court further held that because the defendant's own actions had made him unavailable to the United States, any and all delay was attributable to the defendant for speedy trial purposes.[13]

Similarly, in United States v. Reumayr, 530 F.Supp.2d 1200, (D.N.M. 2007), there was a six and half year delay between indictment and the defendant's ultimate appearance before the United States court. As in the instant case, this delay had been caused by the fact that the defendant was in a foreign nation

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[8] Id.

[9] Id. at 1084-85.

[10] Id. at 1085, citing Hooker at 607 F.2d 286.

[11] Id. at 1086.

[12] Id. at 1088.

[13] Id.

(Canada) and was fighting Canadian charges arising from the same criminal conduct charged in the United States.[14] The defendant argued that the United States should be held responsible for the delay because, according to the defendant, the United States should simply have allowed him be tried in Canada instead of pursuing extradition.[15] The court held, however, that "the nature of extradition proceedings argues against such a result," explaining that [e]xtradition proceedings are not ordinary criminal proceedings; extradition is ultimately a function of the executive branch, not the judicial branch."[16] The court further held that

> foreign countries extraditing defendants to this country are entitled to follow the extradition procedures established by their laws, and the United States is not responsible in a Sixth Amendment sense when those laws and procedures **create delays, however long. This is true even though the United States had the option of foregoing its extradition efforts in deference to the pending Canadian charges.**[17]

The court observed that, while in Canada, the defendant had pursued all avenues of appeal in an attempt to avoid extradition[18] and, citing United States v. Manning, 56 F.3d 1188

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[14] This case also illustrates the government's previous argument that two nations may pursue independent charges against a common defendant for actions arising out of the same set of facts. See United States v. Corey, 232 F.3d 1166, 1179 (9th Cir. 2000)(concurrent jurisdiction over a particular controversy is well-recognized in international law); DE 67 at 44-48, DE 84 at 9-14.

[15] 530 F.Supp.2d at 1203.

[16] Id. at 1205 (citation omitted).

[17] Id. at 1206 (emphasis added).

[18] Id. at 1205.

(9th Cir. 1995), noted that "courts have uniformly held the defendant, rather than the government, liable for delay caused by extradition proceedings or by other attempts to remain outside the United States."[19]

In Manning, extradition was delayed yet the indictment remained on the Court's docket. As noted supra n.6, the court held that the defendant was deemed to have entirely waived his speedy trial rights because he "knew of the indictment against him," yet had "resisted all efforts to bring him to the United States."[20] The court stated that a defendant "cannot avoid a speedy trial by forcing the government to run the gauntlet of obtaining formal extradition and then complain about the delay that he caused by refusing to return voluntarily to the United States."[21]

While defendants in the instant case have not specifically claimed a Sixth Amendment speedy trial violation[22], the foregoing cases demonstrate that any such argument would fail even though the extradition and treaty process might take a very substantial amount of time to complete. A delay due to the defendants' non-appearance before the Court, which is entirely attributable to

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[19] Id. at 1206.

[20] 56 F.3d at 1195.

[21] Id.

[22] Defendants allude to such an argument in their last brief claiming "[F]ully nine months have passed since the United States' request for extradition. Needless to say, the Defendants have not been extradited..." DE 97 at 3.

their own doing, simply cannot serve as a valid basis for dismissing the indictment, no matter how long the delay may be.

B. Neither the November 9 Letter nor the December 14 Dip Note Constitute Assertions of Sole Jurisdiction by Thailand and Defendants' Claims to the Contrary Fail to Provide a Valid Basis for Dismissal of Indictment

Defendants argue in their last brief that the November 9 Letter constitutes an "expression of sovereign interest," and an exercise of "exclusive jurisdiction over the extraterritorial crimes of its officials, both as a matter of Thai law and the international precepts of organic jurisdiction."[23] Presumably, these claims extend to the December 14 Dip Note. The government maintains that these communications are not expressions of Thai sovereign interests or exclusive jurisdiction and that no language to this effect appears in, or is at all implied by, the November 9 Letter or the December 14 Dip Note. Further, neither communication provides any basis under statute, law, or treaty for this Court to dismiss the pending indictment.

The November 9 Letter does three things. First, it outlines the charges upon which the United States is seeking extradition, namely money laundering offenses. Second, it outlines the violations of Thai law that Thailand is currently pursuing against defendants in Thailand, namely violations of abuse of public trust.[24] Third, it states Thailand's intention to postpone review of the extradition request until it has finished

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[23] DE 97 at 5.

[24] It is evident by the plain language of the letter that these charges are separate and distinct. That they arise out of a common set of facts is irrelevant.

its own investigation.[25] Similarly, the December 14 Dip Note: (1) states that the National Anti Corruption Commission (the "NACC") intends to file criminal charges against defendant Juthamas Siriwan; (2) states that the NACC intends to continue to investigate defendant Jittisopa Siriwan (all on charges separate from those in the government's indictment); and (3) reiterates Thailand's position that it will postpone review of the extradition request pending prosecution in Thailand.

The direct, and implied, language of both the November 9 Letter and the December 14 Dip Note, clearly do not include any assertion of sole jurisdiction by Thailand. In addition, the Department of State has unequivocally stated that it does not view Thailand's communicated position as either a rejection of the government's extradition request or an assertion of sole jurisdiction.[26] "The President conducts our foreign relations through the State Department"[27] and as the government's representative in these matters, the State Department is in the best position to determine the meaning of the Thai government's

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[25] To that end, the November 9 Letter cites, in part, to Article 5(2) of the Extradition Treaty between Thailand and the United States, which states that a requesting nation "may" refuse a request based on double jeopardy grounds. Extradition Treaty with Thailand, U.S.-Thail, Dec. 14, 1983, S. TREATY DOC. NO. 98-16 (1984), Art. 5(2) (the "Treaty"). Thailand merely cited to this provision – seemingly as one possible outcome of its investigation – it did not assert this provision or indicate that it was actually refusing the government's extradition request at this stage.

[26] DE 96, Exhibit B.

[27] Hooker, 607 F.2d at 289 (9th Cir. 1979); see also Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)(noting that the opinion of a department of government particularly charged with the negotiation and enforcement of a treaty is given great weight).

response. The government's extradition request in this case presented Thailand with an opportunity to make the types of original/organic jurisdictional claims that defendants insist Thailand is advancing. Yet, the only references to sole jurisdiction, organic jurisdiction, or any other claim of superior Thai interests purporting to preclude the United States from prosecuting defendants for their alleged crimes against the United States in this case have originated with defendants not the Thai government.

Moreover, the Ninth Circuit has made clear that to the extent that discretionary determinations must be made in the extradition context, such discretion is vested in the executive rather than the judiciary. In Vo v. Benov, 447 F.3d 1235 (9th Cir. 2006), the Ninth Circuit examined the precise provision of the Treaty, Article 5(2) (double jeopardy), on which defendants now rely. The defendant in Vo resided in the United States and faced extradition to Thailand. He claimed, among other things, that because the United States had instituted its own proceeding against him (which was had been by that time dismissed), the double jeopardy provisions of Article 5(2) applied and he could not be extradited.[28]

The Magistrate Judge serving as the extradition court concluded that he did not possess the authority to address this argument as only the executive, not the courts, may deny extradition on this ground.[29] The Ninth Circuit agreed,

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[28] Id. at 1237.

[29] Id. at 1239.

explaining that Article 5(2) is a discretionary provision within the province of the Secretary of State rather than the extradition magistrate.[30] As such, the court held that it did not have the authority to determine whether the defendant was "proceeded against." Rather, only the Secretary of State has the authority to make such a determination[31] and only the Secretary of State can determine what evidence might bear on such a decision.[32] Indeed, the Ninth Circuit held that an extradition court exercises "very limited authority in the overall process of extradition."[33]

Consequently, a defendant has no judicially cognizable right not to be extradited on a basis that falls within a discretionary exception to an extradition treaty - and thus has no grounds for challenging extradition on this basis. The Vo court explained the difference between a court's role in adjudicating a mandatory exception to an extradition treaty and a discretionary exception to such a treaty as follows:

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[30] Id. at 1246.

[31] Since a court cannot step in the shoes of the Secretary of State to determine whether a defendant was "proceeded against" under Article 5(2) of the Treaty when a defendant is being extradited *from* the United States, it stands to reason that a court cannot stand in the shoes of Thailand to make such a determination when a defendant is being extradited *to* the United States.

[32] Id. at 1245-47.

[33] Id. at 1245. See also Blaxland v. Commonwealth Dir. Of Pub. Prosecutions, 323 F.3d 1198, 1208 (9th Cir. 2003)("If the evidence is sufficient to sustain the charge, the inquiring magistrate judge is required to certify the individual as extraditable to the Secretary of State..."); Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005)(same).

> In determining whether an individual is extraditable, the extradition magistrate examines the treaty to ascertain whether it allows extradition in the circumstances presented by the relator. Extradition treaties often provide for the general extraditability of individuals who commit offenses that are recognized as crimes in both the requesting and the requested states, subject to enumerated exceptions. These exceptions are of two general types: mandatory exceptions (including political offenses) and discretionary exceptions. If an individual falls within a mandatory exception, the United States cannot extradite him to the requesting country and the magistrate may not certify him as extraditable. If an individual falls within a discretionary exception, however, the United States can choose not to extradite him to the requesting country, but it is under no obligation to the relator to do so. When requested by the United States, the magistrate must certify an individual even though he may be subject to a discretionary exception.[34]

In this case, where Thailand is the requested country, the decision of whether to extradite the defendants – *even if* they are proceeded against on the same charges in Thailand – rests *only* with the Government of Thailand. Thus, even if Thailand eventually decides not to extradite the defendants on the basis of Article 5(2) of the Treaty, the defendants have no right to raise that issue with this Court and this Court has no role in "enforcing" any Thai determination.[35]

In any event, Thailand has made no such decision under the Treaty; at this stage, it has only declared its intention to postpone review of the government's extradition request pending its own likely prosecution of Juthamas Siriwan and its ongoing

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[34] Id. at 1245-46 (footnote omitted).

[35] Terlinden v. Ames, 184 U.S. 270, 286 (1902)(noting that a foreign citizen shall not be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the foreign nation).

investigation of Jittisopa Siriwan. Even if Thailand made a decision not to extradite under Article 5(2) or some other provision, the government submits that such a non-extradition decision would not bear on the sufficiency of the indictment or provide a basis for dismissal of the indictment. Congress has clearly provided extraterritorial jurisdiction for the statutes charged in the indictment. As such, whether or not Thailand has expressed a superior interest, or any other issues of comity, are not to be considered by the Court.[36] Should Thailand refuse to extradite, the indictment still stands.[37] Despite defendants' attempts to assert sovereign interests on Thailand's behalf, the November 9 Letter and the December 14 Dip Note are simply informative of Thailand's current position regarding extradition and of its own investigation. It does not, however, have any relevance to defendants' motion to dismiss.

C. Foreign Policy Considerations Are Within the Purview of the Political Branches of Government; Not the Judiciary

At the previous hearing, the Court inquired as to whether the United States should step aside and allow this matter to

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[36] See United States v. Yousef, 327 F.3d 56, 92 (2nd. Cir. 2003)(when Congress' intent is specified, courts do not look to international law); DE 67 at 35-36; DE 84 at 9-13. Additionally, there is no precedent in the Ninth Circuit in which extraterritorial jurisdiction was declined in a criminal matter on the basis of comity.

[37] If Thailand were to deny extradition, the defendants would be in the same position they would be in if they resided in a country that did not have an extradition treaty with the United States. As discussed in Part A supra n.5, lack of an extradition treaty is not a valid basis for dismissal. Moreover, as discussed in Part C, the responsibility for weighing the implications of ignoring any expressed intent on the part of Thailand lies solely with the executive branch.

proceed solely in Thailand given one of the defendants is a former official and Thailand anticipates investigating and perhaps prosecuting the defendants. Long-standing case law, however, holds that these kinds of questions fall entirely within the purview of the executive branch instead of the judiciary. In Corey, 232 F.3d at 1179 n.9, (9th Cir. 2000), a case evaluating concurrent jurisdiction, the Ninth Circuit stated that "[w]hen construing a statute with potential foreign policy implications, we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States".[38]

The executive branch's exclusive authority in areas concerning foreign policy, especially in matters of extradition, was recognized by the Supreme Court over a hundred years ago when it held that "[t]he decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision...." Terlinden, 184 U.S. at 289 (1902). As demonstrated by the cases previously cited in this brief, the Ninth Circuit, as well as other circuits,[39] has long recognized the executive branch's

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[38] See also United States v. Armstrong, 517 U.S. 456, 464 (1996)("The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws....so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.")(internal citations omitted).

[39] See Escabedo v. United States, 623 F.3d 1098, 1105 (11th Cir. 1980)("The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs" (citing cases)).

primacy regarding matters of foreign policy. Indeed, in Hooker, the Ninth Circuit specifically characterized its holding in the case as "a recognition of 'the exclusive competence of the executive branch in the field of foreign affairs.'"[40] Similarly, in United States v. Lopez-Hood, the Ninth Circuit held that "[e]xtradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function."[41] The "judicial function" referred to in Lopez-Hood has since been interpreted as meaning the court's limited role in determining (1) whether a particular crime is extraditable and (2) whether probable cause exists to sustain the charge.[42]

Accordingly, the foreign policy implications of defendant Juthamas Siriwan's status as a former official in Thailand and Thailand's exploration of domestic charges arising out of the same criminal conduct at issue in this case are matters within the exclusive province of the executive branch. So too are matters such as the feasibility of such an extradition, including the length of time it may take and any impact of the delay on the government's ability to prove its case. Such matters, however, have no bearing on the sufficiency of the indictment nor do they provide a valid basis for a motion to dismiss.

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[40] 607 F.2d at 289 quoting First National City Bank v. Banco National de Cuba, 406 U.S. 759, 761 (1972).

[41] 121 F.3d 1322, 1326 (9th Cir. 1997).

[42] Prasoprat, 421 F.3d at 1012.

Conclusion

The issue here is whether the defendants, through their briefings and many arguments therein, have provided this Court with any legal basis to dismiss the indictment. They have not. The charges set forth in the indictment are legally valid and sufficiently pled. Defendants have failed to substantiate a valid basis for this Court to grant their motion to dismiss. The government accordingly requests that the Court DENY defendants' motion to dismiss on all grounds presented.

The government further requests that this Court reconvene when defendants are either extradited to the United States or otherwise appear before this Court in keeping with standard practice when indicted defendants reside or are otherwise found overseas.

DATED: January 11, 2013

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture
and Money Laundering Section
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/s/
JONATHAN E. LOPEZ
Deputy Chief
Money Laundering &
Bank Integrity Unit
AFMLS, Criminal Division
United States Dept. of Justice