IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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| PETRU MIRONESCU,<br><br>Petitioner,<br><br>v.<br><br>THE HONORABLE CONDOLEEZZA RICE, United States Secretary of State, HARLON E. COSTNER, United States Marshal for the Middle District of North Carolina, and WILLIAM SCHATZMAN, Sheriff of Forsyth County,<br><br>Respondents. | 1:05CV00683<br><br>Related Case No. 1 03M205-1<br>1 04CV00022 |

**BRIEF IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**

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## INTRODUCTION

Petru Mironescu, a citizen of Romania, challenges the Secretary of State's discretionary decision to extradite him to Romania, to serve a four-year sentence for entering a partnership to commit auto theft, instigating aggravated theft, and bringing a motor vehicle into traffic with false license plates.[1] Petitioner does not seek relief under any of the established bases for habeas relief in extradition cases: he does not contend that the extradition judge lacked jurisdiction, he does not deny that the applicable extradition treaty applies to him and covers the crimes for which he was convicted in Romania, and he does not argue that there was a lack of evidence to support the judge's finding of probable cause to believe that he had committed those crimes. Rather, petitioner seeks relief from the Secretary's extradition decision because he would, he alleges, be subjected to torture if returned to Romania. In support of such relief, he relies on the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the statute that implemented the Convention in the United States, and the Administrative Procedure Act.

Petitioner's request ignores the constitutionally-based "Rule of Non-Inquiry," under which the courts do not inquire into the conditions or treatment that a fugitive may face after extradition. Those humanitarian factors are for the Secretary of State to consider, as part of conducting the foreign relations of the United States, in the course of deciding whether to extradite a fugitive. The United Nations Convention Against Torture is not self-executing and

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[1] The warrant for petitioner's extradition was signed by the Deputy Secretary of State, pursuant to a formal delegation of authority by the Secretary. See 70 Fed. Reg. 30,180 (May 25, 2005). Given that delegation of authority, this brief refers to the extradition decision as the Secretary's decision.

thus provides no basis on which a fugitive can seek judicial relief; the implementing statute expressly provides that it is not a basis for judicial relief; and several of the statutory exceptions to judicial review under the Administrative Procedure Act apply here.

Moreover, permitting judicial review of the Secretary of State's extradition decisions, after the courts have exercised their proper statutory role in extradition matters, would be highly damaging to the foreign relations of the United States. This is not to say that the United States would extradite a fugitive who would likely be subjected to torture in the requesting country. But the determination as to whether it is more likely than not that a fugitive would be subjected to torture is for the Executive Branch to make, not the courts.

Regardless of the outcome of petitioner's claims on their merits — and even if the petition is denied and dismissed on its merits — the Secretary of State should be dismissed as a respondent herein, and the caption of the case should be changed to reflect her dismissal. Given that the Secretary has neither physical nor legal custody of the petitioner, she is not a proper respondent to a habeas petition. Modification of the caption is necessary to avoid any inference, for future cases, that the Secretary is a proper respondent in such a matter.

## LEGAL BACKGROUND

### A. The Statutory Scheme Governing Extradition

Extradition is a means by which a fugitive is returned to a foreign country to face criminal charges there. In the United States, the judicial role in the process is governed by 18 U.S.C. § 3184, which confers jurisdiction on a federal judge to conduct an extradition hearing and determine whether the extradition request meets the statutory and treaty requirements.

An extradition is initiated by a request from a foreign country to the United States Department of State, which determines whether the request is within the applicable extradition treaty. The Department of State refers the matter to the Department of Justice for screening as well, and, if deemed valid, the request is sent to the United States Attorney in the district where the fugitive is located.

The U.S. Attorney then files a complaint in district court, seeking an arrest warrant for the charged fugitive. See Plaster v. United States, 720 F.2d 340, 345-46 (4th Cir. 1983). Following the fugitive's arrest, a district judge or magistrate judge (depending on local practice) holds a hearing to consider whether there is an existing treaty in force, whether the crime charged is covered by the treaty, whether the fugitive is the same person sought by the foreign country, and whether probable cause exists to believe that the fugitive committed the crime charged. See id.; Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977). If these requirements are met, and if there are no other grounds in the extradition treaty authorizing denial of extradition, the judge "shall certify" to the Secretary of State that the fugitive is extraditable. 18 U.S.C. § 3184.

A judicial extradition certification is not appealable, but "limited" collateral review is available through the habeas corpus process. See Peroff, 563 F.2d at 1102. In that review, the district court determines whether the extradition judge had jurisdiction, whether there was jurisdiction over the fugitive individual, whether the extradition treaty was in force and covered the crime at issue, and whether any evidence supported the extradition judge's finding of probable cause. See Prushinowski v. Samples, 734 F.2d 1016, 1018 (4th Cir. 1984) (citing Fernandez v. Phillips, 268 U.S. 311, 312 (1925)); accord Plaster, 720 F.2d at 347-48, 349 &

n.10. This review is "exceedingly narrow"; "[t]hat [the fugitive] may be able to assert a strong defense and avoid being convicted in no way implies that extradition is improper." Prushinowski, 734 F.2d at 1018. Resolution of the habeas petition is a final appealable order.

Once a judge has certified extraditability, the question whether the fugitive shall actually be surrendered is committed to the discretion of the Secretary of State. 18 U.S.C. § 3186 ("The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.") (emphasis added). The surrender of a fugitive to a foreign government is "purely a national act . . . performed through the Secretary of State," within the Executive's "powers to conduct foreign affairs." See In re Kaine, 55 U.S. 103, 110 (1852); Plaster, 720 F.2d at 354 ("Within the parameters established by the Constitution, the ultimate decision to extradite is, as has frequently been noted, reserved to the Executive as among its powers to conduct foreign affairs."). For this reason, the courts adhere to a "Rule of Non-Inquiry," explained further below, regarding any humanitarian arguments against extradition; any such arguments are only "for consideration of the Department of State." In re Extradition of Atuar, 300 F. Supp. 2d 418, 426, 432 (S.D. W. Va. 2003); accord Prasoprat v. Benov, 421 F.3d 1009, 1016 (9th Cir. 2005); Ntakirutimana v. Reno, 184 F.3d 419, 430 (5th Cir. 1999).

B. The Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "Convention") was adopted by the

United Nations General Assembly in 1984. See S. Exec. Rep. No. 101-30, at 2 (1990). Article 3 of the Convention provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

S. Treaty Doc. No. 100-20, at 20 (1988). The United States signed the Convention on April 18, 1988. See S. Exec. Rep. No. 101-30, at 2.

The United States Senate provided its "advice and consent" to the Convention Against Torture on October 27, 1990. 136 Cong. Rec. S17486-01, at S17491 (Oct. 27, 1990). The Senate conditioned its concurrence upon a Resolution of Ratification which includes a declaration that "the provisions of Articles 1 through 16 of the Convention are not self-executing." Id. at S17492; see S. Exec. Rep. 101-30, at 31. The instrument of ratification with which the President ratified the Convention for the United States also contained this declaration, and stated that the ratification was "subject to" the declaration (Attachment A hereto). Additionally, the Senate committee report regarding the Convention, to which the text of the proposed Resolution of Ratification was appended, included this language:

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

Id. at 17-18. After the President ratified the Convention, it entered into force for the United States on November 20, 1994.

In part to implement the Convention Against Torture, Congress passed and the President approved section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 ("the FARR Act"). See Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). Section 2242 begins by paraphrasing Article 3 of the Convention, noting that it is "the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Id. § 2242(a), 112 Stat. at 2681-822. Section 2242 of the FARR Act also directed "the heads of the appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3 . . . ." Id. § 2242(b), 112 Stat. at 2681-822. Section 2242(d) provides in pertinent part:

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal [in immigration cases].

As required by section 2242 of the FARR Act, the Department of State promulgated regulations to implement Article 3 of the Convention Against Torture in the extradition context. See 22 C.F.R. §§ 95.1-95.4. These regulations provide that "the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition." Id. § 95.2(b). In extradition cases where allegations regarding torture have been made, "appropriate policy and legal offices review and analyze information relevant to the case in

preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." Id. § 95.3(a). Thereafter, "[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." Id. § 95.3(b). The State Department regulations further provide that "[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review." Id. § 95.4.

STATEMENT OF FACTS

The petitioner here, Petru Mironescu, was prosecuted and convicted in Romania, in absentia, on charges of entering into a partnership to commit auto theft, instigation of aggravated theft, and bringing a motor vehicle into traffic with false license plates. He received a sentence of three years on each charge, which were merged for an aggregate sentence of four years. See In re Extradition of Mironescu, 296 F. Supp. 2d 632, 633 (M.D.N.C. 2003). Romania submitted a request to the United States for petitioner's extradition, under the countries' Extradition Treaty. Id.; Treaty Between the United States and Rumania for the Extradition of Fugitives from Justice, Jul. 23, 1924, U.S.-Rom., 44 Stat. 2020 [hereinafter Extradition Treaty].[2] Petitioner was arrested on October 31, 2003, and this Court (The Honorable Wallace W. Dixon presiding) held an extradition hearing. The Court found that the evidence presented had "establishe[d] probable

[2] Romania and the United States entered into a "Supplementary Extradition Treaty" in 1936, merely to add another crime to the list of offenses for which extradition may be sought. See Supplementary Extradition Treaty Between the United States of America and Rumania, Nov. 10, 1936, U.S.-Rom., 50 Stat. 1349.

cause to believe that Defendant committed the charged offenses," and the Court certified petitioner's extraditability to the Secretary of State. 296 F. Supp. 2d at 638.

Petitioner filed a petition for writ of habeas corpus before this Court, challenging the order certifying extradition on the grounds that the Extradition Treaty "does not apply to petitioner," and that the order "violates both Article 3 of the Torture Convention and 8 U.S.C. § 1158(c)" (governing asylum cases). See Mironescu v. Costner, 345 F. Supp. 2d 538, 542 (M.D.N.C. 2004) (recommendation of Dixon, M.J.). Magistrate Judge Dixon recommended denial of the petition without prejudice, finding that habeas review of an order certifying extraditability is available only after the Secretary of State actually issues a warrant for petitioner's surrender to the requesting country. Id. at 550. Judge Dixon also found, however, that "the presiding magistrate judge [in the extradition hearing] clearly had jurisdiction, [that] the plain language of the treaty includes the offense charged, [that] there was certainly evidence to support a probable cause finding as Petitioner had actually been convicted of the crime charged as detailed in extensive documents passed through the American Consulate in Romania," that the Extradition Treaty "does apply" to the petitioner, and that 8 U.S.C. § 1158(c) does not bar petitioner's extradition. Id. at 544-46 (footnotes omitted). Regarding petitioner's claim based on the Convention Against Torture, Magistrate Judge Dixon found that habeas review of such a claim may be available. Id. at 546-50 (citing Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), and Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289 (2001)).

On review of Judge Dixon's recommendation, this Court "adopt[ed] the Magistrate Judge's finding that Petitioner's certification for extradition is valid and the extradition treaty

between the United States and Romania does apply." Id. at 540. The Court also concurred that "within the narrow habeas review allowed by the Fourth Circuit of extradition certification, no review is presently allowed to consider Petitioner's evidence of a violation of Article 3 of the United Nations Convention Against Torture." Id. The Court, however, "disagree[d] with" and "reject[ed]" Judge Dixon's recommendation that petitioner "would be able to re-file his habeas petition, after the Secretary of State makes a determination as to whether to extradite Petitioner, on the question of whether the Secretary's determination violates Article 3 of the Convention Against Torture." Id. at 540-41. The Court found "uncertainty" regarding the continuing vitality of the Cornejo-Barretto opinion relied on by Judge Dixon, and a lack of "court authority applying St. Cyr to extradition." Id. at 540-41. The Court noted, however, that petitioner would "be able to bring his humanitarian concerns to the attention of the Secretary of State, who is charged with appropriately applying the Convention Against Torture." Id. at 541.

After learning that a warrant to surrender him to Romanian authorities had been signed, petitioner filed the present habeas petition on August 3, 2005. See Petition for Writ of Habeas Corpus by Person in Federal Custody (docket #1) at 1 & Ex. 1 [hereinafter Petition]. He alleges that he "is currently in the custody of respondent Harlon E. Costner, the United States Marshal for the Middle District of North Carolina," and that he "is being detained in the Forsyth County Detention Center," under the control of respondent William Schatzman, Sheriff of Forsyth County. Id. at 3. Petitioner asserts that the Secretary's decision to extradite him to Romania is "arbitrary and capricious" in violation of the Administrative Procedure Act, and that the Court's

order certifying his extraditability violates the Convention Against Torture and section 2242 of the FARR Act. Id. at 5, 18.[3]

Petitioner's second habeas petition was accompanied by a motion for temporary restraining order ("TRO") and preliminary injunction (docket #2), requesting an order against surrendering the petitioner to Romanian authorities. The Court issued the requested TRO, with an order to show cause why a preliminary injunction should not be granted (docket #4). The parties then filed a "Joint Motion (1) to Set Aside Order to Show Cause and (2) to Set Briefing Schedule," noting that the Department of State and the Department of Justice had determined not to surrender petitioner for extradition for six months or until the Court rules on the current petition, whichever first occurs (docket #6). In response to the joint motion, the Court set aside the TRO and order to show cause, and entered the briefing schedule proposed by the parties (docket #7).

QUESTIONS PRESENTED

1. Whether the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment abrogates the long-established Rule of Non-Inquiry, under which courts refrain from considering, on a habeas petition by a fugitive being held for extradition, what treatment the fugitive is likely to receive upon his return to the requesting country.

[3] Petitioner has filed an "Amendment to Petition for Writ of Habeas Corpus by Person in Federal Custody," merely to correct his spelling of the name of the Secretary of State (docket #5).

2. Whether the Foreign Affairs Reform and Restructuring Act of 1998 abrogates the Rule of Non-Inquiry.

3. Whether the Administrative Procedure Act provides a basis for a court to consider what treatment a fugitive is likely to receive after extradition, notwithstanding the Rule of Non-Inquiry.

4. Whether petitioner must be released under 18 U.S.C. § 3188, in that more than two months have passed since The Honorable Wallace W. Dixon of this Court certified his extraditability to the Secretary of State.

5. Whether the Secretary of State, who has neither physical nor legal custody of a fugitive being held for extradition, is a proper respondent to a petition for writ of habeas corpus filed by the fugitive.

ARGUMENT

"[M]atters involving extradition have traditionally been entrusted to the broad discretion of the executive." See Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977). This is especially important in the context of international extradition, which "necessarily implicate[s] the foreign policy interests of the United States." Id.; see Prushinowski v. Samples, 734 F.2d 1016, 1019 n.2 (4th Cir. 1984) ("The State Department . . . not the courts, is the agency primarily charged with responsibility in the area . . . ."). Thus, the courts adhere to a "Rule of Non-Inquiry" regarding any humanitarian arguments against extradition to a foreign country, holding that "it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his

return to the requesting state." Prasoprat v. Benov, 421 F.3d 1009, 1016 (9th Cir. 2005); accord Ntakirutimana v. Reno, 184 F.3d 419, 430 (5th Cir. 1999). As another district court in the Fourth Circuit has held, under "the well established rule of non-inquiry . . . [i]nquiry is prohibited into the conditions and treatment which a relator might face upon extradition." In re Extradition of Atuar, 300 F. Supp. 2d 418, 432 (S.D. W. Va. 2003). Thus, "[h]umanitarian considerations are not within the province of the Court. Rather, they are for consideration of the Department of State." Id. at 426 (citations omitted).

Under the Rule of Non-Inquiry, the courts also "refrain from investigating the fairness of a requesting nation's justice system." United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997). For example, courts are not to accept evidence regarding the requesting country's "law enforcement procedures and its treatment of prisoners"; such evidence is irrelevant and improper on a habeas petition challenging extradition. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).

> The interests of international 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. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.

Id. (citation omitted).

The Rule of Non-Inquiry "is shaped by concerns about institutional competence and by notions of separation of powers," Kin-Hong, 110 F.3d at 110: "Extradition is an executive, not a judicial, function. The power to extradite derives from the President's power to conduct foreign affairs." Martin v. Warden, Atlanta Penitentiary, 993 F.2d 824, 828 (11th Cir. 1993). The courts also recognize that they are "ill-equipped . . . to make inquiries into and pronouncements about

the workings of foreign countries' justice systems." In re Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995). "It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." Kin-Hong, 110 F.3d at 111.

The Department of State also has a greater range of choices than the courts in responding to an extradition request and in protecting the fugitive after extradition. See Peroff, 563 F.2d at 1102 ("The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings . . . ."). For example, with respect to torture claims like those raised here, the Department's regulations provide:

> Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

22 C.F.R. § 95.3(b). One kind of "condition" upon which the Department of State may surrender a fugitive is a demand that the requesting country provide assurances regarding the individual's treatment. See Jimenez v. United States District Court, 84 S. Ct. 14, 19 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers). The Department of State, but not the courts, is in a position to know whether an extradition should be conditioned on the provision of any assurances by the requesting country, and to determine whether any such assurances are adhered to after extradition. As the First Circuit has noted:

> The Secretary may also decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign

> policy considerations. Additionally, the Secretary may attach conditions to the surrender of the relator. The State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator.

Kin-Hong 110 F.2d at 109-10 (citations omitted); see United States v. Baez, 349 F.3d 90, 92-93 (2d Cir. 2003) (referring to assurances provided by United States upon extradition of fugitive by another country). Thus, the courts recognize that "the executive branch's ultimate decision on extradition may [properly] be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies." Blaxland v. Commonwealth Director of Public Prosecutions, 323 F.3d 1198, 1208 (9th Cir. 2003). Contra Petition at 21 (arguing that, in absence of further judicial review, extradition may be improperly influenced by "political, economic and foreign policy considerations").[4]

As described above, the federal judiciary has an important statutorily-defined role in the U.S. extradition process. Federal judges decide whether extradition requests meet the requirements of the applicable extradition treaties, and whether the requesting country's evidence establishes probable cause to believe that the fugitive committed the crimes charged — a solidly traditional judicial function. If the extradition judge certifies extraditability, the fugitive can file a habeas petition to seek review of the judge's determination on those issues.

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[4] Petitioner contends that the legislative history of the ratification of the Convention Against Torture indicates that the "competent authorities" whom the Convention contemplates as determining whether an extraditee is likely to face torture "should [not] be limited to the Secretary of State." See Petition at 27-28. This contention is directly contrary to the Senate committee report on the Convention, which clearly states that the phrase "competent authorities" "appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return." See S. Exec. Rep. 101-30, at 17.

Once the courts have determined extraditability, however, the process moves into foreign affairs, and authority over its pursuit shifts entirely to the Executive Branch. At that stage, the Secretary of State exercises her discretion to decide whether, and under what circumstances, a fugitive should be returned to the requesting country. The statutory commission of this decision to the Secretary's discretion reflects a recognition of the fact that the decision necessarily involves sensitive foreign relations considerations that are not amenable to review.

Moreover, judicial review of a decision by the Secretary of State to extradite a particular individual to a particular requesting foreign country would place the federal courts in an unfamiliar and inappropriate position. For example, if the Secretary accepted the assurance of a foreign government that, despite a history of human rights abuses in that country, the person will not be tortured, a court could evaluate that decision only by second-guessing the expert opinion of the Department of State that such an assurance can be trusted. It is difficult to contemplate how judges would make such a prediction, lacking any ability to communicate with the foreign country or to weigh the current situation within that country. Further, requiring the Department of State to disclose the fact that it has sought assurances from a foreign government, and the nature of those assurances, could be extremely sensitive.

Petitioner in this case makes certain arguments regarding the Rule of Non-Inquiry that are based on misapprehensions of the case law on which his arguments are based. For example, he quotes Parretti v. United States, 112 F.3d 1363 (9th Cir. 1997), for the proposition that the rule "has been applied exclusively to the non-justiciable issues raised by challenges to the general fairness of the requesting nation's legal or penal system." See Petition at 30 (quoting Parretti,

112 F.3d at 1369). This case, petitioner contends, does not present such issues. Id. But this case does, in fact, present precisely the kind of "non-justiciable issues" to which the Ninth Circuit was referring in Parretti.[5] The government in Parretti sought to uphold extradition based only on the allegations of the foreign country's warrant, without any determination of probable cause by a U.S. court. 112 F.3d at 1367, 1368-69. The panel rejected that effort, stating that the government's request would be "an unprecedented extension of the rule of judicial non-inquiry." Id. at 1369. The court explained:

> Heretofore, the rule of judicial non-inquiry has been applied exclusively to the non-justiciable issues raised by challenges to the general fairness of a requesting nation's legal or penal system, issues that are beyond the purview of Article III judicial power. For instance . . . in *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir.1983), we affirmed a district court's refusal to decide in an extradition proceeding whether the fugitive would be subjected to brutal and unfair treatment upon her return to the requesting nation, recognizing that "[a]n extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country."

Id. (footnote omitted). Petitioner's contention, in this case, that he would be subjected to torture in Romania obviously relates to "the procedures or treatment which [allegedly] await [him] in the requesting country."[6]

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[5] Furthermore, the Parretti decision that petitioner cites is no longer good law. The panel that issued that decision later issued an amended opinion which included the language quoted by the petitioner here. 122 F.3d 758, 765 (9th Cir. 1997). But the amended panel opinion was then withdrawn on rehearing, and the en banc opinion contains no similar language. See Parretti v. United States, 143 F.3d 508 (9th Cir. 1998).

[6] Petitioner also quotes other case law from the Ninth Circuit for the proposition that "the 'rule of non-inquiry' does not apply when 'the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency . . . .'" See Petition at 29 (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)). The words that petitioner omits, however, are highly relevant; the entire sentence reads: "We can (continued...)

Notwithstanding all of the foregoing, petitioner asserts that his extradition would violate the Convention Against Torture, section 2242 of the Foreign Affairs Reform and Restructuring Act (which implemented the Convention), and the Administrative Procedure Act. He also asserts that his release is compelled by 18 U.S.C. § 3188, which imposes a time limit on the detention of a person being held for extradition. Petitioner does not challenge his extradition based on any aspect of the traditional, "exceedingly narrow" habeas corpus review of extradition certifications: that is, he does not contend that the extradition judge lacked jurisdiction; he does not deny, in the present petition, that the Extradition Treaty applies to him and covers the crimes for which he was convicted in Romania; and he does not argue that there was no evidence to support the extradition judge's finding of probable cause. See Prushinowski, 734 F.2d at 1018. Indeed, any such arguments would appear to be foreclosed by this Court's ruling on petitioner's first habeas petition, to the effect that "Petitioner's certification for extradition is valid." 345 F. Supp. 2d at 540.

Neither the Convention, nor section 2242 of the FARR Act, nor the Administrative Procedure Act abrogates the Rule of Non-Inquiry and requires or permits the courts to consider humanitarian arguments against extradition, which are well-established as the exclusive province

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[6](...continued)
imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of [the general principle upholding extradition]." Arnbjornsdottir-Mendler, 721 F.2d at 683 (words in brackets are by the Ninth Circuit). The courts have not, to this day, undertaken any such "reexamination," however. As the Ninth Circuit itself has noted in another case, the statement in Arnbjornsdottir-Mendler is a "frequently quoted (but not followed) dictum." Lopez-Smith v. Hood, 121 F.3d 1322, 1326-27 (9th Cir. 1997).

of the Executive Branch. Petitioner cannot rely on the Convention because it is not self-executing, and he cannot rely on section 2242 because the statute itself expressly forecloses judicial review. See Pub. L. 105-277, § 2242(d), 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). He also cannot rely on the Administrative Procedure Act, whose very language forecloses such reliance. Moreover, the statutory time limit on the detention of a fugitive held for extradition does not compel petitioner's release; in arguing to the contrary, petitioner misunderstands the law regarding when the time period begins, and, in any event, "sufficient cause" would exist to deny release under that statute even if the statutory period were held to have passed. See 18 U.S.C. § 3188.[7]

Finally, regardless of the Court's ruling on the merits of petitioner's second habeas petition, the Secretary of State should be dismissed as a respondent herein — and the caption of this matter changed to reflect her dismissal — given that she is not "the person who has custody over [petitioner]." 28 U.S.C. § 2242; see United States v. Moussaoui, 382 F.3d 453, 464-65 (4th Cir. 2004) ("Ordinarily, a habeas writ must be served on a prisoner's immediate custodian — the individual with day-to-day control over the prisoner.") (internal quotation marks omitted).

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[7] In addition to these arguments, petitioner repeats, in his new habeas petition, an argument that the Court rejected on his first petition — that is, that the immigration judge's decision granting him asylum precludes, by statute, his return to Romania. See Petition at 34 (citing 8 U.S.C. § 1158(c)(1)). This argument "fails to acknowledge the distinction between the asylum process and the extradition process." In re Extradition of Mironescu, 296 F. Supp. 2d 632, 638 n.6 (M.D.N.C. 2003). "Individuals who have been granted an asylum are still eligible for extradition for non-political crimes . . . ." Mironescu v. Costner, 345 F. Supp. 2d 538, 546 (M.D.N.C. 2004) (recommendation of Dixon, M.J.).

I. Neither the Convention Against Torture Nor Section 2242 of the FARR Act Abrogates the Rule of Non-Inquiry

Petitioner contends that the order certifying his extradition to the Secretary of State "violates Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." See Petition at 18. He also contends that the order violates section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998. Id. Neither of those enactments, however, abrogates the Rule of Non-Inquiry and requires or permits the courts to make determinations, exclusively within the province of the Department of State, regarding whether a fugitive is likely to be subject to torture after extradition.

A treaty is an agreement between or among two or more nations. "International treaties are not presumed to create rights that are privately enforceable." Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992).[8] Only a treaty that is deemed "self-executing . . . become[s] effective as judicially enforceable law without the enactment of implementing legislation." In re Extradition of Atuar, 300 F. Supp. 2d 418, 432 (S.D. W.Va. 2003). Moreover, "[c]ourts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." Goldstar (Panama) S.A., 967 F.2d at 968. The

[8] Petitioner cites a 1924 Supreme Court decision for the proposition that "[t]reaties are presumed to be self-executing and, therefore, judicially-enforceable without the aid of any implementing legislation." See Petition at 19 (citing Asakura v. City of Seattle, 265 U.S. 332, 341 (1924)). The decision does not, however, stand for that proposition. Rather, the Court only noted that a provision of the particular treaty involved in that case "establishes the rule of equality between Japanese subjects while in this country and native citizens," and that "[t]reaties for the protection of citizens of one country residing in the territory of another are numerous." 265 U.S. at 341. The Court then proceeded to apply the treaty, thus impliedly ruling that that particular treaty was self-executing.

Senate's resolution consenting to a treaty may provide explicitly that the treaty is not self-executing; in such cases, the courts uniformly give effect to such language. See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 2767 (2004). The effect of such a condition is that the treaty does "not itself create obligations enforceable in the federal courts." Id.

Several courts, including the Fourth Circuit, have squarely held that the Convention Against Torture is not self-executing. See Malm v. INS, 16 Fed. Appx. 197, No. 00-2371 (4th Cir. Aug. 10, 2001) (copy attached hereto pursuant to 4th Cir. Rule 36(c)); accord Raffington v. Cangemi, 399 F.3d 900, 903 (8th Cir. 2005); Auguste v. Ridge, 395 F.3d 123, 132-33 & n.7 (3d Cir. 2005); Kay v. Ashcroft, 387 F.3d 664, 671 n.7 (7th Cir. 2004); Reyes-Sanchez v. Attorney General, 369 F.3d 1239, 1240 n.1 (11th Cir. 2004); Castellano-Chacon v. INS, 341 F.3d 533, 551 (6th Cir. 2003); Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003); Khalid v. Bush, 355 F. Supp. 2d 311, 327 (D.D.C. 2005). Moreover, no court, as far as the respondents are aware, has ever held to the contrary. In Malm, petitioner sought to avoid removal (deportation) for overstaying her visa.[9] After failing to appear

[9] Although the Malm decision's holding regarding the non-self-executing nature of the Convention Against Torture applies here, there are critical distinctions between removal and extradition in other respects. Removal, in contrast to extradition, involves only one sovereign — the United States. See McMullen v. INS, 788 F.2d 591, 596 (9th Cir. 1986) (contrasting extradition and deportation), overruled in part on other grounds Barapind v. Enomoto, 400 F.3d 744, 751 n.7 (9th Cir. 2005). Unlike removal, extradition is initiated by foreign states and is carried out pursuant to international agreements. It thus inherently concerns the reciprocal legal and political relationships of the United States with other countries, and the interpretation and application of treaty commitments with these countries — matters particularly within the expertise and constitutional authority of the Executive Branch. Whereas extradition matters are handled primarily by the Department of State, removal is governed by the Immigration and Nationality Act and regulations promulgated by the Immigration and Naturalization Service (continued...)

for her removal hearing before an immigration judge and filing a motion to reopen the proceedings, which was denied, she filed a second motion to reopen, asserting for the first time that her removal would be contrary to the Convention Against Torture. 16 Fed. Appx. at 198-99; see 8 C.F.R. §§ 208.16, 208.18 (implementing Convention Against Torture in removal proceedings). The Fourth Circuit upheld the immigration judge's denial of her second motion to reopen, relying on provisions in the governing regulations which imposed a time limit for such a motion and prohibited consideration of a second motion to reopen. 16 Fed. Appx. at 199-200; 8 C.F.R. § 3.2(c)(2) (2000). The court rejected petitioner's contention that reliance on these grounds was improper in that the Convention Against Torture does not itself impose such procedural limitations. 16 Fed. Appx. at 200-02. In so holding, the court observed that the Convention is not self-executing:

> [I]n passing a resolution of ratification, the United States Senate specifically stated that articles one through sixteen of [the Convention Against Torture] are not self-executing. 136 Cong. Rec. S17486, S17492 (Oct. 27, 1990). A treaty that is not self-executing is enforceable only to the extent that it is implemented by Congress.

Id. at 202. Therefore, the court held, assertions that removal should be withheld under the Convention are properly subject to the procedural requirements of the governing regulations. Id.

The petitioner here contends that the Senate's statement that the Convention Against Torture is not self-executing, in ratifying the Convention, meant only that "the treaty would not create a private cause of action," and that he "is not relying on the Convention as a basis for a

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[9](...continued)
within the Department of Justice (now Immigration and Customs Enforcement within the Department of Homeland Security).

cause of action." See Petition at 26, 27. But it is not only an independent cause of action that is unavailable. As the Fifth Circuit has noted, habeas relief is not available for an alleged violation of a treaty that is not self-executing. See Wesson v. U.S. Penitentiary, 305 F.3d 343, 348 (5th Cir. 2002). Similarly, in the Fourth Circuit's decision in Malm, cited above, the petitioner did not seek to bring a "cause of action" based on the Convention Against Torture, but to avoid removal on the basis that she would likely be subject to torture in her country of origin, just as the petitioner here seeks to avoid extradition on the same basis. 16 Fed. Appx. at 200, 201. The court nevertheless held that the Convention was not enforceable for such a claim. Id. at 202. In summary, since the Convention Against Torture is not self-executing, petitioner may not challenge his extradition directly under the Convention.

Petitioner also contends that his extradition would violate section 2242 of the FARR Act, in which Congress implemented the Convention Against Torture. See Petition at 18. However, section 2242 itself, and the regulations promulgated thereunder, expressly preclude petitioner's reliance on this statute in this regard. Section 2242 provides:

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention [Against Torture] or this section . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

Pub. L. 105-277, § 2242(d), 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). This statement clearly establishes that, by passing the Act, Congress did not intend to provide judicial review of extradition determinations by the Secretary of State. In any event, the FARR Act was passed long after the courts had fully developed the Rule of Non-Inquiry, and

nothing in the Act suggests that Congress meant to override this well-accepted doctrine. See, Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) ("Congress is presumed to enact legislation with knowledge of the law . . . .").

The Department of State's regulations implementing section 2242 also reflect the lack of any right to judicial review. The regulations provide:

> Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section 2242(d) of the [FARR Act], notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242 . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

22 C.F.R. § 95.4. Especially in light of Congress's explicit delegation of authority to promulgate regulations to "implement" the Convention Against Torture, see Pub. L. 105-277, § 2242(b), 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note), these regulations deserve substantial deference as published agency interpretations of the Act. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

The Department of State's decision-making process in extradition cases, sensitive in even the ordinary case, raises even more sensitive issues when the fugitive makes claims under the Convention Against Torture. In assessing such claims, the Department may need to weigh conflicting evidence from various sources regarding the situation in the requesting country. It may need to decide whether to raise with foreign officials the often delicate question of possible

mistreatment, and, if so, with which officials and in what format. The Department must then determine whether to seek assurances from the requesting country. Necessarily, it must also determine whether such assurances are likely to be reliable and credible. Those determinations can depend on a host of factors, ranging from an evaluation of the requesting country's government and its degree of control over the various actors within the foreign judicial system, to predictions about how the country's government is likely to act in practice, in light of its past assurances and behavior, to assessments as to whether confidential diplomacy or public pronouncements would best protect the interests of the fugitive. These determinations are all inherently discretionary, and intrinsically within the power of the Executive to engage in highly sensitive foreign relations. Neither the Convention nor its implementing statute provide a basis for judicial review of the Secretary's extradition decision.

II. The Administrative Procedure Act Provides No Basis for Reviewing the Secretary's Extradition Decision

In addition to relying on the Convention Against Torture and section 2242 of the FARR Act, petitioner seeks review of the Secretary of State's extradition decision under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 [hereinafter APA]. See Petition at 5. The provision on which petition seeks to rely provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the APA is precluded, however, both by the language of section 2242 and the history of the Rule of Non-Inquiry in the courts, and by several provisions of the APA itself.

First, section 2242 of the FARR Act provides that, [n]otwithstanding any other provision of law," nothing in the statute is to be construed as providing jurisdiction to "consider or review claims raised under the Convention or this section, or [to review] any other determination made with respect to the application of the policy [against extraditing a fugitive who will likely be subjected to torture]." Pub. L. 105-277, § 2242(d), 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note) (emphasis added). This language evidences a clear congressional intent not to provide for judicial review, in the FARR Act, of the Secretary's determination regarding whether a fugitive is likely to be subjected to torture after extradition.

Second, the APA was initially enacted in 1946. See Act of June 11, 1946, ch. 324, § 10(a), 60 Stat. 243 (1946). Nevertheless, much of the case law establishing and explaining the Rule of Non-Inquiry was decided after that year. See supra text at 11-16. If the APA had provided a basis for judicial review of the Secretary's extradition determinations, all of the cases on the Rule of Non-Inquiry that were decided after 1946 would have been in error. As the Supreme Court has written, courts should be very skeptical of arguments for the "sudden discovery" of "new, revolutionary meaning in reading an old judiciary enactment." Romero v. International Terminal Operating Co., 358 U.S. 354, 370 (1959).

And third, several provisions in the APA itself foreclose judicial review of extradition determinations thereunder. To begin with, the very section of the APA that generally provides a "[r]ight of review" also says: "Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . . ." 5 U.S.C. § 702. This provision incorporates both express and implied

preclusions of judicial review. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (finding no APA review of denial of visa by American consulate). As stated by the Administrative Conference of the United States in proposing this language for the APA, the courts would "refuse to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action." Id. The Administrative Conference also noted that "much of the law of unreviewability consists of marking out areas in which legislative action or traditional practice indicate that courts are unqualified or that issues are inappropriate for judicial determination." Id. Adoption of the Rule of Non-Inquiry regarding extradition determinations is one instance in which the courts have "marked out" such an area.

Further, the APA also provides that judicial review is precluded where "statutes preclude judicial review," or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). To qualify under the first provision, the statute in question need not expressly bar judicial review; rather, the Supreme Court has explained that APA review can be foreclosed by virtue of "the collective import of legislative and judicial history behind a particular statute [or] by inferences of intent drawn from the statutory scheme as a whole." Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984). This exception to judicial review applies here because the extradition statute gives the Secretary non-reviewable discretion over the ultimate decision about extradition, see 18 U.S.C. §§ 3184, 3186, and because the courts' repeated application of the Rule of Non-Inquiry constitutes a "judicial history" of not reviewing such determinations. Moreover, as noted above, section 2242 of the FARR Act expressly provides that nothing in that

statute shall be construed as reversing this history. See Pub. L. 105-277, § 2242(d), 112 Stat. at 2681-822.

Even if APA review of the Secretary of State's extradition determinations were not precluded by 5 U.S.C. § 701(a)(1), in that "statutes preclude" such review, it would be barred because the Secretary's resolution of a claim under the Convention Against Torture is otherwise "committed to agency discretion." 5 U.S.C. § 701(a)(2). The language of the Convention and section 2242 of the FARR Act illustrate the necessarily discretionary nature of the extradition decision. For example, section 2242 merely paraphrases the substantive standard from the Convention (which, as noted earlier, is not self-executing), and states the standard in terms of "policy" rather than "duty." See Pub. L. 105-277, § 2242(a), 112 Stat. at 2681-822. Additionally, the "obligation" of the United States under Article 3 of the Convention is to refuse extradition if the "competent authorities," taking into account "all relevant considerations," determine that there are "substantial grounds" for believing that there is a danger of torture. See 22 C.F.R. § 95.2(a). Such a standard "fairly exudes deference" to the decisionmaker. See Webster v. Doe, 486 U.S. 592, 600 (1988).

Also, in determining which categories of agency action are unreviewable under section 701(a)(2), the Supreme Court has considered whether the actions in question have, by tradition, been left to agency discretion. See Lincoln v. Vigil, 508 U.S. 182, 191-92 (1993) (holding that allocation of lump sum appropriation is "traditionally regarded as committed to agency discretion," and is therefore unreviewable). Thus, in Heckler v. Chaney, 470 U.S. 821 (1985), the Court held that an agency's decision not to bring an enforcement action has traditionally been

committed to agency discretion, and accordingly would be presumptively unreviewable under section 701(a)(2). And in Webster v. Doe, the Court refused to review a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, "an area of executive action 'in which courts have long been hesitant to intrude.'" Lincoln v. Vigil, 508 U.S. at 192 (citing Webster, 486 U.S. at 599-601). As discussed above, the Secretary's extradition decisions have traditionally been "committed to agency discretion," not only pursuant to the judicial Rule of Non-Inquiry, but also pursuant to statute. See 18 U.S.C. § 3186.[10]

Petitioner also argues that the Secretary of State must produce the administrative record of her extradition determination for this Court's review under the APA. See Petition at 12-13, 17-18 & n.2. Such a request is unfounded, and seeks to undermine the very point of the Rule of Non-Inquiry. The only purpose to be served by production of materials related to the Secretary's

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[10] In seeking review of the Secretary's extradition decision under the APA, petitioner relies heavily on the decision of a Ninth Circuit panel in Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000). Respondents submit that that decision's commentary regarding APA review is incorrect, for all of the reasons stated in the text herein. In any event, besides not being binding on this Court, the language on which petitioner relies in that decision was dicta, given that the habeas petition under review by the panel was dismissed because the Secretary had not yet made her extradition decision, just as Mr. Mironescu's first habeas petition was dismissed. As pointed out in the concurring opinion by one member of the Cornejo-Barreto panel, and in a later decision by a different Ninth Circuit panel in relation to Cornejo-Barreto's second habeas petition, the availability or unavailability of judicial review after a final extradition decision was not properly before the first panel. See id. at 1017 (Kozinski, C.J., concurring); Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1079 (9th Cir. 2004) (holding that prior panel's "discussion is advisory and we are not bound by it"), vacated as moot Cornejo-Barretto v. Siefert, 389 F.3d 1307 (9th Cir. 2004) (en banc); see also Karsten v. Kaiser Found. Health Plan, 36 F.3d 8, 11 (4th Cir. 1994) (noting that courts should refrain from "solving questions that do not actually require answering in order to resolve the matters before them"). The issue never reached the en banc Ninth Circuit in Cornejo-Barreto, because the case was dismissed as moot after the applicable statutory limitations period expired and the requesting country withdrew its extradition request. See 389 F.3d 1307.

decision would be to ask the court to look behind that decision. Disclosure of the administrative record would also severely damage the foreign policy interests behind the Rule of Non-Inquiry, and that damage further illustrates the importance of adhering to the Rule. The administrative record would presumably reveal such things as the sources of the Secretary's information regarding the treatment of prisoners in the requesting country, whether the Secretary has sought assurances from the requesting government in connection with the requested extradition, the nature of those assurances, the foreign government's response(s), and other sensitive information and communications in connection with the United States' foreign relations.

Disclosure of this information would have adverse consequences. For example, some sources of information regarding conditions in other countries may be reluctant — or even unable — to provide such information in the future if they know that their communications may be made public. Also, a request for assurances by the United States might be seen as raising questions about the requesting country's institutions or commitment to the rule of law. Thus, disclosure of a request for assurances may be publicly embarrassing to the requesting country, and would likely make foreign governments reluctant, in the future, to communicate frankly with the United States concerning the treatment of fugitives who have raised allegations of torture. Further, public disclosure of the fact that the United States had required a requesting country to provide assurances may cause that country to feel domestic pressure to demand comparable assurances from the United States in future cases in which the United States sought the extradition of a fugitive, however inappropriate such a demand might be.

Finally, APA review of the Secretary's extradition decisions, with disclosure and review of the administrative record, would add further delays to the already lengthy extradition process. Such delays may impair a foreign government's ability to prosecute a fugitive when he finally is returned, since witnesses may die, their recollections may fade, and evidence may become stale. Such delays could also harm the efforts of the United States to press other countries to act more quickly in surrendering fugitives for trial in the United States.

As one court has noted, "[e]xtradition treaties have produced a global network of bilateral executive cooperation that aims to prevent border crossing from becoming a form of criminal absolution. Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system." Blaxland v. Commonwealth Director of Public Prosecutions, 323 F.3d 1198, 1208 (9th Cir. 2003).

III. 18 U.S.C. § 3188 Does Not Compel Petitioner's Release

Finally, petitioner contends that he should be released because more than two months have passed since this Court last acted on his prior petition for a writ of habeas corpus. See Petition at 35-39. This argument is based on 18 U.S.C. § 3188, which provides:

> Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment . . . any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

Acknowledging that his own habeas petitions have delayed his surrender to Romanian authorities, petitioner contends that the delay attributable to respondents' appeal from the Court's order on his first petition "should not be excluded from the running of the sixty day period." See Petition at 39. He also asserts that, "while an action filed by him prior to the expiration of the sixty-day period might toll the running of the period during the pendency of the action, it does not establish a new sixty-day period." Id.

Petitioner's argument misunderstands the law regarding when the two-month period begins, and, in any event, "sufficient cause" would exist to deny release under section 3188 even if the statutory period were held to have passed. In Jimenez v. United States District Court, Justice Goldberg rejected a contention that "the two-month period in § 3188 [begins] to run from the time of the original commitment order," rather than "from the time [the alien's] legal rights were finally determined." 84 S. Ct. 14, 18 (1963) (in chambers). Thus, he held, the period does not even begin to run until the alien petitioner's case is "finally adjudicated" in the U.S. courts. Id. The lower courts have held to the same effect. See, e.g., Liberto v. Emery, 724 F.2d 23, 25 n.2 (2d Cir. 1983) ("two-month period does not begin to run until there has been a final adjudication of the extradition request").

In this case, the order certifying petitioner for extradition was entered on December 9, 2003. Mr. Mironescu filed his first habeas petition less than two months later — on January 20, 2004. That petition was denied by an order dated November 9, 2004, in which the Court also required the Secretary of State to notify the petitioner of any decision to surrender him for extradition. One month later, the government requested reconsideration of that aspect of the

order, and the motion for reconsideration was denied on February 11, 2005. The government appealed on April 1, 2005, and the appeal was dismissed on July 18, 2005. The present petition for habeas corpus was filed a few weeks later, on August 3, 2005.

Obviously, therefore, the two-month period of 18 U.S.C. § 3188 has not even begun to run, since petitioner's claims have not yet been "finally adjudicated." See Jimenez, 84 S. Ct. at 18 (1963) (Goldberg, J., in chambers). Petitioner seems to contend that the period began to run on December 9, 2003 (when the extraditability order was first entered), and that it ran intermittently during any period when no habeas proceedings were pending. If that were the rule, however, a candidate for extradition could, conceivably, force the two-month period to expire merely by filing a series of petitions, each separated from the others by sufficient time so that the intervening hiatuses would add up to a period of more than two months. A petitioner should not be allowed to manipulate section 3188 in that way.

Nor does the fact of the government's appeal, or the government's conduct in relation to the appeal, mean that the period began to run when the Court denied the government's motion for reconsideration on February 11, 2005. Contra Petition at 37. If, as Justice Goldberg held in Jimenez, the two-month period does not begin to run until "the time [when the alien's] legal rights [are] finally determined," 84 S. Ct. at 18, then surely an appeal from an order regarding those rights delays the time when the period begins to run. Petitioner does not contend — and there would be no basis to contend — that the government's appeal was frivolous or in bad faith. Indeed, the government's appeal challenged a requirement to notify the petitioner of any decision to surrender him, such that his "legal rights" to any such notification had not been "finally

determined." Petitioner also argues that the government "took no action" on the appeal from April 1, 2005 (when the notice of appeal was filed) until June 13, 2005. See Petition at 36. But no formal "action" could have been taken during that period, for the Fourth Circuit did not actually docket the appeal until June 27, 2005.[11]

In any event, even if the two-month period of 28 U.S.C. § 3188 were somehow held to have begun and expired already, "sufficient cause" exists for not releasing the petitioner on that basis. A determination as to whether "sufficient cause" exists is fact-sensitive, based on all of the circumstances in the case. See Barrett v. United States, 590 F.2d 624, 626 (6th Cir. 1978). For example, "sufficient cause" to deny release may exist when the alien's surrender is delayed by trial on domestic criminal charges. See Hababou v. Albright, 82 F. Supp. 2d 347, 349-50 (D.N.J. 2000). Thus, for purposes of this case, even if the government's appeal from this Court's earlier order did not delay commencement of the two-month period under section 3188, the pendency of that appeal would constitute "sufficient cause" for not releasing the petitioner on that basis.

## IV. Secretary Rice Should Be Dismissed as a Respondent, and the Case Caption Changed to Reflect Her Dismissal

Regardless of the Court's ruling on any of the above-described bases for denying and dismissing the present petition, the U.S. Secretary of State should be dismissed as a respondent herein, and the caption of this matter changed to reflect her dismissal. The caption should be so modified even if the petition is dismissed on its merits, to avoid any inference that the Secretary is a proper respondent in cases of this nature. Generally, the only proper respondent on a habeas

[11] A copy of the appellate docket is Attachment C hereto.

petition is the officer having immediate custody of the petitioner. The federal habeas statute provides that the proper respondent is "the person who has custody over [petitioner]." 28 U.S.C. § 2242; see id. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."); see also Rumsfeld v. Padilla, 542 U.S. 426, 124 S. Ct. 2711, 2717 (2004). As the Supreme Court has written, "The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition. This custodian, moreover, is 'the person' with the ability to produce the prisoner's body before the habeas court." Padilla, id.; see United States v. Moussaoui, 382 F.3d 453, 464-65 (4th Cir. 2004) ("Ordinarily, a habeas writ must be served on a prisoner's immediate custodian — the individual with day-to-day control over the prisoner.") (internal quotation marks omitted).

Under this "immediate custodian rule," the proper respondent on a federal habeas petition is generally "the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Padilla, 542 U.S. 426, 124 S. Ct. at 2718. Courts have recognized a limited exception to the immediate custodian rule where the petitioner is a non-United States citizen who is under federal custody but held in a local detention facility under an arrangement with federal officials. In such cases, the federal official having immediate control over the petitioner's confinement is held to be a proper respondent to a habeas petition. See Roman v. Ashcroft, 340 F.3d 314, 320 (6th Cir. 2003) (holding that INS district director was proper respondent where alien was held for removal after domestic conviction of crimes).

The respondents named here are the Sheriff of Forsyth County, North Carolina, who allegedly "control[s]" the detention facility where petitioner is located; the United States Marshal for the Middle District of North Carolina, who allegedly has "custody" of the petitioner and presumably took him into custody; and the United States Secretary of State, who has neither custody nor control of the petitioner. See Petition at 3. Under the rules described above, only the Sheriff or the United States Marshal can be an appropriate respondent in this matter. The Sheriff has immediate physical custody of the petitioner, and the Marshal may be said to be a proper respondent because petitioner is in federal custody. In no sense, however, can the Secretary of State be said to have "custody" of Mr. Mironescu.

Thus, the Secretary of State should be dismissed as a respondent. The caption of this matter should also be changed to reflect her dismissal — even if the petition is dismissed on its merits — to avoid any inference, in future cases, that the Secretary is a proper respondent under such a petition. See Arnett v. United States, 845 F. Supp. 796, 798 (D. Kan. 1994) (restyling case caption to name proper defendant); Gonsalves v. United States, 782 F. Supp. 164, 166 n.1 (D. Me.) (same), aff'd, 975 F.2d 13 (1st Cir. 1992).

## CONCLUSION

Accordingly, the petition for writ of habeas corpus should be denied and dismissed. Also, the Secretary of State should be dismissed as a respondent herein, and the caption of the case modified to reflect that dismissal.

Date: October 3, 2005

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2005, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I also certify that I have mailed the foregoing document to the following non-CM/ECF participant(s):

William Schatzman
Sheriff of Forsyth County
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/s/ W. Scott Simpson
W. SCOTT SIMPSON