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I. EXTRADITION

A. Extradition and the U.N. Convention against Torture: *Mironescu v. Costner*

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On March 22, 2007, the U.S. Court of Appeals for the 4th Circuit in Richmond, Virginia, ruled that a 1998 federal statute precludes federal courts from reviewing a decision by the U.S. Secretary of State to extradite a fugitive, despite claims that he will likely be tortured in the requesting state. In *Mironescu v. Costner*,[2] the court reversed a U.S. District Judge in the Middle District of North Carolina who had ruled that the 1998 statute, section 2242 of the Foreign Affairs Reform and Restructuring Act, or "FARR" Act,[3] did not deprive him of the authority to review the Secretary's decision for compliance with the U.S. government's obligations under the U.N. Convention Against Torture[4] ("Torture Convention" or CAT). The fugitive, Petru Mironescu, obtained a stay of the appellate ruling while he petitions the U.S. Supreme Court for certiorari.[5]

The 4th Circuit ruling is the first clear appellate ruling nationwide that the FARR Act commits enforcement of the Torture Convention in extradition cases exclusively to the Secretary of State. In reaching its decision, however, the court brushed aside the "rule of non-inquiry" that for years had shielded executive branch extradition policies from anything beyond cursory review. If the 4th Circuit's lead is followed, the government can only rely on the FARR act to avoid judicial review in extradition cases involving allegations of torture. As for the statutory shield, the 4th Circuit suggested that to the extent the FARR Act precludes habeas actions it might be challenged by future litigants as a violation of the Suspension Clause.[6] Given the ambiguity in the FARR Act revealed by Mironescu's case, it is not beyond possibility that the Supreme Court, if it takes the case, would rule that courts can review torture claims in extradition cases. Similarly, Congress could some day modify the FARR Act to permit such review.

1. Background

a. The Torture Convention and FARR Act

The Torture Convention, adopted by the U.N. on December 10, 1984 and signed by the United States on April 18, 1988, became effective in the U.S. on November 20, 1994. The Senate's 1990 resolution of advice and consent indicated that the Convention was not self-executing, as did the President's statement of ratification.[7] The Convention was not implemented in U.S. law until eight years later, through 1998's FARR Act.

Article 3 of the Convention provides that 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."[8] It also provides that the "competent authorities" shall take into account "all relevant

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[2] 480 F.3d 664 (4th Cir. 2007).

[3] Pub. L. No. 105-277, div. G, 112 Stat. 2681-822 (codified at 8 U.S.C. §1231 note).

[4] United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 3, 23 I.L.M. 1027, 1028, 1465 U.N.T.S. 85, 114.

[5] U.S. Court of Appeals for the 4th Circuit, Case No. 06-6457, docket entry dated April 16, 2007, granting motion to stay the mandate pending application for a writ of certiorari.

[6] The U.S. Constitution in Article I, sec. 9, clause 2 provides that the "privilege of the writ of habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[7] 480 F.3d at 666-67; *see also Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 211-12 and n. 11 (3d Cir. 2003).

[8] Under this standard, the U.S. Department of State decides whether the person facing extradition is more likely than not to be tortured. *See Cornejo-Barreto v. Siefert*, 218 F.3d 1004, 1011 (9th Cir. 2000); 22 C.F.R. § 95.2. The CAT defines torture as: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession[,] punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by

considerations" including the existence of, in the State concerned, "a consistent pattern of gross, flagrant or mass violations of human rights."[9]

b. Mironescu

Petru Mironescu, a Romanian national, was prosecuted in Targu Mures, Romania, in connection with his alleged role supervising a gang of thieves who stole cars and drove them to nearby Moldova for resale. In the midst of these proceedings Mironescu fled Romania; he was subsequently convicted in absentia and sentenced to four years imprisonment. Mironescu was located and arrested in North Carolina on October 31, 2003, on a Romanian extradition request. In December 2003, he was found extraditable by the U.S. District Court for the Middle District of North Carolina.

Mironescu then asked the Secretary of State to deny his extradition, arguing that as a local leader of the Roma he and his family had been physically abused by Romanian authorities in the past. Asserting that his prosecution on the car theft charges was a sham, he claimed that he would face physical abuse amounting to torture if returned to Romania, again invoking the CAT and the Secretary's power to refuse extradition on humanitarian grounds. After an investigation by attorneys at the State Department and the Department of Justice through the U.S. Embassy in Bucharest uncovered no basis for crediting Mironescu's allegations, the Secretary issued a surrender warrant.

Mironescu then brought a habeas action before the district court. That court ordered the government to produce information from its files about Mironescu's CAT claim and the Secretary's decision for *in camera* review and stayed extradition. The district judge indicated that he would not substitute his judgment for the Secretary's, but would review the State Department's administrative record to determine whether the Secretary "did, in fact, consider [Mironescu's] evidence, if only to subsequently and validly reject it."[10] The court adopted a standard of review under the Administrative Procedure Act (the "APA"),[11] to determine whether the Secretary's decision on the torture claim was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or unsupported by substantial evidence.

2. The 4th Circuit Decision

a. Rule of Non-Inquiry

On appeal, the Department of Justice argued that the "rule of non-inquiry" prevents the district court from considering Mironescu's claims of torture under the CAT and the FARR Act in a habeas action. Under this rule, U.S. courts may not inquire into the treatment that an extraditee might face in the requesting country's legal system or prisons. The 4th Circuit's opinion carefully describes the rule of non-inquiry and its origins in two Supreme Court cases from the late 19th century.[12] The court then considered its own decision in *Plaster v. U.S.*,[13] where it upheld a district court's jurisdiction in a habeas proceeding to enjoin an extradition that it had found was in violation of a plea agreement and thus violated due process rights. According to the panel, *Plaster's* reasoning controlled in Mironescu's case, and *Plaster* recognized the power of the courts to consider claims that an extradition might violate the Constitution. *Plaster*, moreover, specifically rejected the government's argument that only the executive branch could consider alleged constitutional violations in extradition proceedings.

The 4th Circuit dismissed the government's proffered reasons underlying the rule of non-inquiry: extradition is an executive branch function; the courts are ill-equipped to second-guess the Secretary's extradition decisions; and the executive is better-suited to handle extradition, with its unique mix of foreign policy and legal judgments. Brushing aside these concerns, the panel reasoned that a court would "answer only the straightforward

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or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions." Torture Convention, Art. 1 (1); *see also* 8 C.F.R. §208.18 (a) (1), (3).

9 Torture Convention, Art. 3 (1) and (2), 23 I.L.M. at 1028.

10 480 F.3d at 668.

11 5 U.S.C. §§701-06.

12 *Benson v. McMahon*, 127 U.S. 457 (1888) and *Oteiza v. Jacobus*, 136 U.S. 330 (1890).

13 720 F.2d 340 (4th Cir. 1983).

question of whether a fugitive would likely face torture in the requesting country,"[14] as U.S. courts currently do in asylum proceedings and in applying the political offense exception in extradition cases.

b. The FARR Act

The 4th Circuit panel then turned to the FARR Act, concluding that it precludes the district court from considering Mironescu's claim. The Act implements the Torture Convention and provides that it "shall be the policy" of the U.S. not to expel, extradite, or return any person to a country where there are "substantial grounds" for believing that person will be tortured.[15] The State Department regulations issued under the act identify the Secretary as the official responsible for determining whether to extradite.[16] To implement Article 3 of the Convention, the Department's test is whether a person facing extradition "is more likely than not" to be tortured in the State requesting extradition. The regulations also assert that the Secretary's decisions concerning surrender of fugitives "are matters of executive discretion not subject to judicial review."

Section 2242(d) of the FARR Act reads in part: "Notwithstanding any other provision of law … nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section." except in connection with review of an immigration removal order. The crucial question in *Mironescu* was whether this language means that courts lack jurisdiction in habeas actions to consider torture claims.

The 4th Circuit found that this language "plainly conveys" that courts may consider or review CAT or FARR Act claims only as part of their review of a final order of removal in an immigration case. Because Mironescu brought his claim as part of a challenge to his extradition, rather than removal, the district court was "clearly precluded" from exercising jurisdiction. The court cited *Cornejo-Barreto v. Siefert* [*Cornejo-Barreto II*],[17] the 9th Circuit case that reached the same result in interpreting this language. The court cited and distinguished rulings in five other circuits[18] that had considered the FARR Act in immigration removal cases and found that the statute did not preclude habeas actions to adjudicate these Torture Convention claims.[19]

The *Mironescu* court also distinguished the U.S. Supreme Court's decision in *INS v. St Cyr*,[20] which construed similar jurisdiction-stripping statutes in immigration matters. The Supreme Court held that judicial review via habeas cannot be abrogated unless Congress specifies that habeas and the federal statute implementing it, 28 U.S.C. §2241, are not available. The *Mironescu* court concluded, however, that section 2242(d) of the FARR Act plainly showed Congress's intent to bar CAT and FARR Act claims on habeas review in an extradition case. There was no other "plausible reading" of the statute and Congress had "unambiguously expressed [its] intention." Holding to the contrary would require that Congress "must always explicitly mention habeas or [28 U.S.C.] §2241 in order to bar habeas review."[21] The 4th Circuit acknowledged that in the future the Supreme Court could require Congress to explicitly mention habeas if it wishes to bar it.

3. Analysis

The Department of Justice cannot be happy with the panel's conclusion that "in light of the Secretary's conceded obligation under the FARR Act not to extradite Mironescu if he is likely to face torture,"[22] the rule of non-inquiry does not bar habeas review of the Secretary's extradition decision. While the Department could seek further

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[14] 480 F.3d at 672.

[15] Section 2242(a).

[16] These regulations are found at 22 C.F.R. §95.1 to 95.4.

[17] 379 F. 3d 1075 (9th Cir. 2004), vacated as moot, 389 F. 3d 1307 (9th Cir. 2004) (en banc). Interestingly, the 4th Circuit all but ignored the 9th Circuit case, *Cornejo-Barreto v. Siefert* [*Cornejo-Barreto I*], 218 F.3d 1004 (9th Cir. 2000), that had likewise concluded that the Torture Convention and the FARR Act supersede the rule of non-inquiry.

[18] 480 F. 3d at 674, *citing Cadet v. Bulger*, 377 F.3d 1173, 1182-83 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 216-18 (3rd Cir. 2003); *Saint Fort*, 329 F.3d 191, 200-02 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 141-43 (2nd Cir. 2003).

[19] In 2005 the REAL ID Act, Pub. L. No. 109-13, div. B, 119 Stat. 231, amended the Immigration and Nationality Act ("INA") to preclude habeas and ensure that direct review of a final order of removal by a U.S. court of appeals is the only route for review of Torture Convention claims in an immigration case. *See* INA §242 (a)(4) and (5); 8 U.S.C.A. §1252 (a)(4) and (5).

[20] 533 U.S. 289 (2001).

[21] 480 F.3d at 676.

[22] *Id.* at 673.

judicial review, there is no indication that it will do so. Regarding the court's interpretation of the FARR Act, Congress is experienced at writing statutes that bar habeas review. The 4th Circuit's efforts to read section 2242(d) as barring habeas for Mironescu's torture claim and to distinguish *St. Cyr*, as well as five other Circuit courts' cases that had held that the FARR Act did not bar habeas in immigration cases, seems forced and unpersuasive.

The 4th Circuit rightly notes the ability of courts to adjudicate Torture Convention claims in the immigration removal context. Those cases begin with evidentiary hearings at the administrative level, where the immigrant's attorney develops the factual record to show it is "more likely than not" that the immigrant will be tortured if returned. This record is constructed with general country condition reports by the Department of State and various human rights groups, the immigrant's and perhaps an expert's testimony, and other documents. Although this record is developed through the adversarial process before an immigration judge, both sides are largely "flying blind" without access to embassy-based investigation within the country in question. Neither the government nor the immigrant's attorneys have access to the assistance of U.S. embassies' legal attachés or DOJ attorneys, a weakness in the process of litigating Torture Convention claims in immigration court.

In an extradition case, by contrast, this assistance is available to the State Department lawyers who prepare the surrender warrant memorandum for the Secretary of State. A fugitive who claims he will be tortured and seeks a humanitarian or political denial of extradition triggers a set of inquiries and analyses within the Department. In investigating Torture Convention claims in an extradition case, lawyers within the Departments of State and Justice may question their counterparts in the requesting state's ministries of foreign affairs and justice about the factual details of the case and the torture claim. Where there is a claim that the requesting country's prosecution was a sham, as in *Mironescu*, U.S. embassy officials might talk to the police and prosecutors involved in that prosecution or those who might be familiar with alleged prior persecution of the extraditee in his country. Foreign officials are usually willing to answer questions and produce information, since their support of their government's extradition request is needed to secure the return of a fugitive. While this does not amount to a comprehensive investigation of the torture claims, these extradition- related inquiries produce information of higher quality and specificity than in an immigration case.

In a significant sense, the factual record on torture claims is better developed within the U.S. executive branch in an extradition case than in an adversarial setting in an immigration case.[23] Marrying the fact-gathering and verification capacity of the Departments of State and Justice in an extradition case – particularly their ability to reach out to U.S. embassy staffs and foreign legal officials – with the adversarial setting of an immigration removal hearing on torture claims would improve the accuracy and fairness of both systems and ensure that no one is returned to a country where he is likely to be tortured.

The court's statutory interpretation is also at odds with its earlier conclusion that the rule of non-inquiry in extradition cases is no bar to considering CAT and FARR Act claims on habeas review. Under *Plaster*, the 4th Circuit recognized that federal courts may adjudicate claims that an extradition would violate a relator's Constitutional rights. In *Mironescu* the court recognizes that the CAT and FARR Act change the non-inquiry rule's principle, articulated by the Supreme Court in *Neely v. Henkel*,[24] that fugitives are "not constitutionally entitled to any particular treatment abroad." The court recognizes that fugitives today do have a "federal right to particular treatment in the requesting country," because "the FARR Act now has given petitioners the foothold that was lacking when the Court decided *Neely*."[25] If true – and it seems persuasive – then why does the court hold that the FARR Act both grants the right not to be tortured if extradited or returned (via the immigration process) to a foreign state and, incongruously, divests the courts of jurisdiction to enforce that right? Why would Congress undermine the non-inquiry rule and open the door to judicial involvement in torture claims, while stripping courts of jurisdiction to hear these claims in habeas actions? Finally, why does the 4th Circuit derogate from a long-standing common law doctrine that allowed the executive branch *carte blanche* in extradition matters to permit judicial review of torture claims, but in its next breath find that Congress preserved Executive exclusivity and forbade judicial involvement to secure a person's right not to be tortured when the U.S. government sends him to a foreign

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[23] In another parallel between the U.S. immigration and extradition systems, both permit the Department of State to seek assurances from the foreign county involved that it will not torture the person being returned or extradited. *See* 8 C.F.R. §208.18(c) (immigration cases). Moreover, in immigration proceedings to terminate "deferrals" of removal in torture cases, the Department of State is allowed to provide its "comments." *See* 8 C.F.R. §208.17(d).

[24] 180 U.S. 109 (1901).

[25] 480 F.3d at 671.

country? Perhaps the Supreme Court will grant certiorari to consider these questions, especially in an era when torture or torture-like conduct by U.S. government personnel has sullied this country's human rights record.

4. Lessons for the Extradition Practitioner

As the result of *Mironescu*, practitioners in the 4th Circuit may not bring habeas actions in extradition cases on Torture Convention claims, but those practicing in other Circuits ought to bring such claims. They may use *Mironescu* to defeat Justice Department arguments that the rule of non-inquiry bars these claims. They should invoke the FARR Act in arguing this point, then draw upon FARR Act-based immigration cases from the court of appeals and *St. Cyr* to assert that the Act's language does not explicitly bar habeas actions to raise Torture Convention claims in extradition proceedings. Practitioners should also argue that such a bar, whether explicit or the result of judicial interpretation, would violate the Suspension clause. This argument would need to be developed according to existing precedents, which is beyond the scope of this review, and must be raised in district court on habeas, lest it be barred on appeal.

Extradition counsel should also be careful to raise the CAT and FARR Act claims before the Department of State, prior to issuance of the Secretary's surrender warrant (usually three to four weeks after district court "certification" that a relator is extraditable). This is done not only to exhaust administrative remedies, but to encourage the Department to notify counsel when the surrender warrant is issued. The safest way to ensure notice is for a court to order it. Raise these claims in district court in either the certification process or a habeas action; you may need to bring an "unripe" habeas motion simply to create your right to notification. After the warrant is issued and you file the habeas case, you must also obtain a stay of your client's surrender – otherwise he may be sent to the requesting State while the habeas is pending.

If extradition counsel is outside the 4th Circuit and able to obtain *in camera* review of the State Department file, you will have to make your arguments without the benefit of seeing that file. Using the APA directly or by analogy, argue that the Secretary's decision to extradite is "arbitrary, capricious, and an abuse of discretion" and that her decision is without substantial evidence in the record to support it. Draw upon the State Department's own regulations (22 CFR 95.1-4) to argue that the Department has the burden of showing that the Torture Convention and FARR Act standard – that it is "more likely than not" that the fugitive will be tortured if returned – is not met. Ask the judge to ensure that all the "relevant information" was included (including material submitted by the fugitive), and to review the quality of the "review and analysis" of that information.[26] Ask the judge to examine any conditions or assurances that the Department received from the Requesting State for their adequacy in protecting the fugitive upon his surrender.

Another issue to consider is whether the anticipated treatment of your client after his surrender meets the legal definition of "torture" found in the Convention, FARR Act, and applicable regulations. Foreign governments will be fully aware of the course of your litigation in the courts on their extradition requests. Where the Secretary or a court ultimately denies extradition on grounds of torture, the requesting state may take it as a wake up call to improve its criminal justice system and prisons to comply with the U.N. Convention against Torture. Improving the extradition process can make a profound difference in reducing torture worldwide.

[26] *See* 22 CFR §95.3.