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March 8, 2001

BY HAND

The Honorable Viktor Pohorelsky
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: In the Matter of the Extradition of Pavel Borodin
Magistrate Docket No. 01 0082

Dear Judge Pohorelsky:

The government respectfully submits this letter in opposition to the Respondent's bail application of February 26, 2001. For the reasons set forth below, the government respectfully requests that the application be denied.

A. The Presumption Against Bail

As stated in the government's letter of January 24, 2001, there is a strong presumption against bail in extradition cases. As the Supreme Court held in Wright v. Henkel, 190 U.S. 40, 62 (1903), when a foreign government makes a proper request under a valid extradition treaty, the United States is obligated to deliver the person sought after he or she is apprehended. As the Supreme Court also recognized, this is

an obligation which it might be impossible to fulfill
if release on bail were permitted. The enforcement of

the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

Id. at 62.

In addition to its legal obligation, the United States has a compelling interest in fulfilling its duties under extradition treaties. It is important that the United States be regarded in the international community as a country that honors its agreements in order to be in a position to demand that other nations will meet their reciprocal obligations to the United States.

Accordingly, a respondent in an extradition proceeding bears a heavy burden in seeking release on bail. Specifically, as the Respondent concedes, he must establish both that there are "special circumstances" warranting his release and that he is not a flight risk. (Respondent's Memorandum of Law ("Resp. Mem." at 9). In this case, the Respondent cannot make either showing.

B. The Lack of Special Circumstances

At the January 25, 2001 bail hearing, the Court held that the Respondent's position as State Secretary of the Union of the Russian Federation and Belarus ("the Union") might constitute a "special circumstance" requiring his release on bail if the Respondent could make a "sufficiently detailed showing of the nature of the important work that Mr. Borodin does" (January 25, 2001 Transcript at 90).

Political Considerations

In alleging "special circumstances," Mr. Borodin claims that he is engaged in important political work for two sovereign nations, Russia and Belarus, and relies, in part, on an affidavit from Aleksander Lukashenko, the President of the Republic of Belarus and Chairman of the Supreme State Council of the Union, the highest position in the Union. As an initial matter, the State Department's Human Rights Report on Belarus, submitted to the Senate Foreign Relations Committee on February 26, 2001, states that "Most members of the international community . . . do not recognize the legitimacy of . . .

Alexsander Lukashenko's continuation in office beyond the legal expiration of his term in July 1999. . . . (Exhibit A).¹ The State Department has also not wholeheartedly endorsed the Union. As (then) Deputy Secretary of State Strobe Talbott said in 1999:

[I]ntegration among the New Independent States must reflect the voluntary will of the people expressed through the democratic process, must be mutually beneficial, and must not erect barriers to integration with the wider community of nations. A democratic process does not now exist in Belarus, and that calls into question the legitimacy of efforts there to realize a genuine Russian-Belarussian Union.

(Exhibit B).

Moreover, Mr. Borodin has another, more appropriate, avenue through which he can pursue his political claims. Courts consider legal, not political issues. The latter are committed by the extradition statutes (18 U.S.C. §§ 3184 and 3186) to the United States Secretary of State, who determines after a judicial determination of extraditability whether in fact to surrender the fugitive. As Respondent's counsel has written, this statutory provision provides the Secretary of State with the opportunity to weigh political considerations that may not be considered by courts during the litigation of the relevant legal issues. See Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings," 76 Cornell L. Rev. 1198, 1202, 1229. Or, stated another way by the Second Circuit:

the judicial officer's inquiry is confined to the following: whether a valid treaty exists; whether the crime charged is covered by the relevant treaty and whether the evidence marshaled in support of the

¹The State Department's report is entitled to substantial deference from the Court. See Jacques Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings," 76 Cornell L. Rev. 1198, 1234 (1991) ("[a] statute requires the State Department to prepare and submit to Congress an annual report on human rights conditions throughout the world. By entrusting this responsibility to the Department of State, Congress has manifested its confidence in that Department's ability to act as a responsible and impartial human rights observer in foreign lands.")

complaint for extradition is sufficient under the applicable standard of proof. . . . the Secretary of State has sole discretion to weigh the political and other consequences of extradition and to determine finally whether to extradite the fugitive.

United States v. Cheung, 213 F.3d 82, 88 (2d Cir. 2000).

Accordingly, to the extent that Mr. Borodin's application is based on political considerations, the Court should defer consideration of such issues to the Secretary of State, who can evaluate them in making the ultimate decision as to whether Mr. Borodin should be extradited.

Finally, Mr. Borodin's argument overlooks the significant concerns of two other sovereign nations -- the United States and Switzerland. These countries have a paramount interest in assuring that, if Mr. Borodin is certified extraditable, he be available for surrender.

The Swiss Allegations

The Court should also evaluate Mr. Borodin's application to resume his government post in light of the underlying allegations in this case, which relate directly to abuse of power. In support of his application, the Respondent points to the fact that from 1993 to 2000, he was Manager of the Affairs of the Office of President of the Russian Federation, in which capacity he had "particular responsibility for the preservation and renovation of Russian national historic sites." (Resp. Mem. at 3). However, as documented in the Extradition Complaint and Swiss Extradition Request filed with the Court on February 13, 2001, the Swiss Examining Magistrate who is investigating this case has concluded that Mr. Borodin abused this position to extract approximately \$30,000,000 in kickbacks from Swiss construction companies in return for awarding them contracts related to the reconstruction of the Kremlin, reparation work on the presidential plane, and the restoration of public buildings. (Extradition Complaint at ¶ 3). The Swiss Examining Magistrate specifically alleges that Mr. Borodin abused his position with the Russian government to "set up a secret organization" in order to "raise income through acts of abuse of administrative authority and of passive corruption." (Letter of Examining Magistrate Daniel Devaud of January 24, 2001 at 22).

In light of these allegations, which are painstakingly

detailed in the Swiss Extradition Request, Mr. Borodin's desire to resume his governmental duties should not be considered a "special circumstance" warranting his release on bail.

The Effect of Releasing Mr. Borodin on Bail

Even accepting that facilitating Mr. Borodin's return to work is a worthwhile goal, Mr. Borodin's application suggests that his release on bail would not have any significant impact on his work with the Union. The whole thrust of Mr. Borodin's application is that the effective management of the Union requires his physical presence on a day to day basis. See, e.g., Resp. Mem. at 8 ("Ultimately Mr. Borodin's personal presence will be required at the helm of the Constant Committee of the Union.") (Resp. Mem. at 8); Selivanov Affidavit (Resp. Ex. F at ¶ 5, ("The presence of . . . Mr. P.P. Borodin is necessary for carrying out the joint programs of the Union") and Kasyanov Affidavit (Resp. Ex. B) (use of "technical opportunities" would only ease Mr. Borodin's absence "in part.>"). However, Mr. Borodin concedes that even if on bail, he would not be able to manage the Union on a day to day basis or participate in the March 17, 2001 Supreme State Council meeting. (Resp. Mem. at 8).

Rather, Mr. Borodin suggests that if released he could assume his duties "by technical means" such as "telephone, fax, teleconference and daily contact with his staff." (Resp. Mem. at 8). However, as reported by the New York Times on February 19, 2001, the Metropolitan Detention Center is doing everything in its power to accommodate Mr. Borodin's work needs and Mr. Borodin "has nothing but praise for his treatment at the detention center: he calls Russia daily, talks to his family and directs work at his office. Prison doctors are watching his diabetes. The Russian consul in New York visits almost every day." Neela Banerjee, "A Moscow Pooh-Bah, Bearing Up in Brooklyn," New York Times, February 19, 2001 (attached as Exhibit C).

Accordingly, the application makes clear that Mr. Borodin's release on bail would only minimally broaden his participation in the Union by simply allowing him to send and receive faxes and participate in meetings by teleconference more easily. By contrast, as set forth below, releasing Mr. Borodin on bail would create a substantial opportunity for him to flee. In evaluating Mr. Borodin's application, the Court should weigh the risk of flight against the marginal improvements in Mr. Borodin's ability to participate in the Union and conclude that no "special circumstance" exists in this case.

C. The Respondent is a Flight Risk

Mr. Borodin presents an overwhelming risk of flight. The cases relied upon by Respondent make clear that, in evaluating whether an extraditee is a flight risk, courts focus on the extraditee's ties to the United States and grant bail only upon a showing of strong ties to some community in the United States - a showing that is entirely absent in this case.

For example, in United States v. Taitz, 130 F.R.D. 442, 445, (S.D. Cal. 1990), the court relied upon the fact that the defendant was a permanent United States resident with substantial ties to the Southern California-Nevada area, was seeking to become a United States citizen, had invested substantial time and effort in building a business in the United States and had no means to leave the United States. Similarly, in Hu Yau-Leung v. Soscia, 500 F. Supp. 1382, 1382 (E.D.N.Y. 1980), affirmed in part and reversed in part, 649 F.2d 914 (2d Cir. 1981), the district court noted that the respondent had been living in the United States with his parents for "some years," was enrolled in a public school where he had made a "good adjustment," and had many friends among his contemporaries. In Nacif-Borge, 829 F.Supp. at 1221, the court based its decision in part on the fact that the defendant had strong ties to Las Vegas and had purchased a residence there. In Extradition of Morales, 906 F. Supp. 1368, 1377 (S.D. Cal. 1995), the court gave weight to the fact that the defendant was a United States citizen who had lived in San Diego with his wife and children for 14 years, had been employed in the United States for 17 years, and had two children who were enrolled in San Diego public schools. In Extradition of Kirby, 106 F.3d 855, 858 (9th Cir. 1997), the court noted that all three extraditees had "strong ties of family and friendship in California" and that bail had been set so that "each man's family and friends would pay a high financial price if he attempts to flee." The Second Circuit has also made clear that even very strong ties to the United States are often not sufficient to warrant an extraditee's release on bail. For example, in United States v. Leitner, 784 F.2d 159, 159 (2d Cir. 1986), the Second Circuit affirmed the district court's decision to deny bail to an extraditee who was a United States citizen, had grown up in the United States, had been living openly with his parents in Queens at the time of his arrest, had a New York City taxi license in his own name, and had completed a semester at Pace Law School.

The cases relied upon by the Respondent also

demonstrate that, in evaluating risk of flight, courts consider the respondent's motive and opportunity (or lack thereof) to return to his home country. For example, in both Morales, 906 F. Supp. at 1377 and Nacif-Borge, 829 F. Supp. at 1221, the courts relied on the fact that the respondents had demonstrated a "sincere desire" not to return to Mexico. In Taitz, 130 F.R.D. at 445, the court noted that the respondent had no place to go other than South Africa and that there were substantial limitations on his ability to obtain a visa or to immigrate and that he had no assets to fund flight. In Sindona, 450 F. Supp. at 674, the respondent had left Italy several years prior to the extradition proceeding and had not returned there since. Finally, in Leitner, the court noted that the respondent had fled from Israel, where he was the subject of death threats. 784 F.2d at 159.

Evaluation of Mr. Borodin's application in light of these standards makes clear that he presents a substantial risk of flight if released on bail. In contrast to all of the cited cases, Mr. Borodin has not claimed any ties to the United States. In contrast to the situation in Taitz, Mr. Borodin's substantial financial resources and position in the Union provide him with the means to flee. See also Hababou v. Albright, 82 F. Supp. 2d 347, 352 (D.N.J. 2000) ("financial wherewithal and potential international safe harbors, . . . would [provide] enormous incentive and opportunity to flee.") Moreover, in contrast to Morales, Nacif-Borge, Taitz, Sindona and Leitner, he has every motive to flee to Russia, particularly in light of the fact that the Russian government has exonerated him of all criminal wrongdoing and has repeatedly stated that his personal presence is required to administer the affairs of the Union on a day to day basis. (Resp. Mem. at 8, 13)².

²Mr. Borodin's contention that he poses no risk of flight because he has not been charged with a crime in Switzerland (Resp. Mem. at 13) is absurd. As the Court is aware, Mr. Borodin is the subject of two Swiss warrants seeking his arrest for money laundering and participation in a criminal organization. Moreover, the diplomatic note contained in the Swiss Extradition Request states unambiguously that "Mr. Borodin is wanted by the Swiss authorities to be prosecuted and stand trial for the facts that are mentioned in the enclosed warrants, specifically for money laundering and participation in a criminal organization." The Court should also reject Mr. Borodin's argument that he is not a flight risk because he is not "a fugitive" and did not flee Switzerland. See Hababou, 82 F. Supp. 2d at 352 (rejecting the notion that an extraditee is

D. The Respondent's Proposed Bail Package is Inadequate

Rather than attempting to identify any ties to the United States, the Respondent again relies on the assurances of the Russian Ambassador made at the January 25, 2001 bail hearing. However, at the bail hearing, the Court pointed out that such assurances had to be evaluated in light of the fact that the Russian government could change its position or that the Russian government itself could change. (Transcript of January 25, 2001 at 67).

Respondent's contention that the Ambassador's assurance "constitutes a solemn obligation, binding on the Government of Russia as a matter of law" (Resp. Mem. at 14) is inaccurate and his reliance on the Restatement (Third) of the Foreign Relations Law of the United States (1987) (the "Restatement") is misplaced. Section 301 of the Restatement defines an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law." Comment b to Section 301 provides that a "unilateral statement" (such as Ambassador Ushakov's representation at the bail hearing) "is not an agreement, but may have legal consequences and may become a source of rights and obligations on principles analogous to estoppel." (emphasis added). Restatement (Third) The Foreign Relations Law of the United States Section 301, Reporter's Note 3. Accordingly, as set forth in the attached letter to the Court from the United States Department of State, "[t]he cited sections of the Restatement are not relevant . . . in the absence of mutual agreement between two or more states." (Exhibit D).

Moreover, the Russian government's assurances do not provide an adequate remedy in the event of breach. As stated in the government's letter of January 24, 2001, Article 61, Section 1 of the Russian Constitution provides that citizens of the Russian Federation "may not be deported out of Russia or extradited to another state." The Respondent has never disputed that the Russian Constitution prohibits Russia from deporting him and his current application does not explain how this Constitutional impediment would be overcome if Mr. Borodin fled to Russia or the Russian Consulate.

The Respondent also states that he is willing to

not a flight risk because he is not a "fugitive in the sense of one who flees from criminal charges.")

accept any of the restrictions typically imposed on persons released on bail, including electronic monitoring and house arrest in an apartment or hotel. However, the Respondent does not specify where he will live³ or how much money he will post. Moreover, given the substantial risk of flight presented by the Respondent because of his lack of domestic ties and strong connections to foreign governments, monitoring him would place a substantial burden on the government and pre-trial services. As Judge Gershon has recently noted, "such extraordinary burdens on government resources are not contemplated by the Bail Reform Act in order to allow an individual to be released who otherwise should be detained." United States v. Agnello, 101 F.Supp.2d 108, 116 (E.D.N.Y. 2000). See also United States v. Bellomo, 944 F. Supp. 1160, 1167 (S.D.N.Y. 1996) ("[t]he government is not obligated to replicate a jail in [defendant's] home so that he can be released.") If courts are reluctant to go beyond the requirements of the Bail Reform Act in ordinary domestic criminal cases, they should be even less willing to do so in extradition cases, in which the Bail Reform Act does not apply.

The Respondent's offer to post an unspecified cash bond also does not warrant his release. The Respondent and his associates in the Russian and Belarussian governments clearly control substantial assets and may well be willing to forfeit money in order to prevent Borodin's criminal prosecution in Switzerland. More importantly, though, in contrast to a domestic bail situation, in which forfeiture of a bond provides the prosecuting authority with compensation in the event of breach, forfeiture in this case would leave the Swiss government without any remedy. In short, the primary obligation of the United States government in this case is to satisfy its treaty obligation to Switzerland by delivering Mr. Borodin for prosecution. None of the measures suggested by the Respondent provide adequate assurance that the government will be able to meet that obligation. Accordingly, his application to be released on bail should be denied.

³The Respondent has apparently conceded that his previous proposal to live in the Russian Consulate in New York pursuant to monitoring by Pretrial Services and the United States Marshals Service is unacceptable. (Resp. Mem. at 15, n.4). Such a proposal is unworkable in light of the fact that the premises of the Russian Consulate General in New York are inviolable. (Exhibit D).

For all of the foregoing reasons, the Respondent's desire to return to his position with the Union is not a "special circumstance" warranting his release on bail.

E. Conclusion

For the reasons stated, the government respectfully requests that the respondent be detained pending an extradition hearing.

Respectfully submitted,

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By:

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cc: Barry Kingham, Esq.
Clerk of the Court (VP)