No. 02-56605

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMIRO CORNEJO-BARRETO,
Petitioner/Appellant,

v.

W. H. SIEFERT,
Respondent/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE RESPONDENT/APPELLEE

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Pursuant to this Court's order of October 21, 2003, we are filing this supplemental brief on behalf of the respondent/appellee. As explained below, this Court should affirm the judgment of the district court denying the petition for relief.[1]

In its order, this Court directed the parties to address three questions:

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[1] If the Court believes that further oral argument would be useful to address the questions posed, the Government would welcome such an opportunity.

1. "Assuming that *Cornejo-Barreto I* is not binding law of the circuit, what effect, if any, does the Foreign Affairs Reform and Restructuring Act of 1998 * * * have on 'the rule of non-inquiry' and *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997)"?

2. "Assuming that *Cornejo-Barreto I* is not binding law of the circuit, is the final action of the Secretary of State to extradite an individual subject to review under the [Administrative Procedure Act]"?

3. "Assuming that *Cornejo-Barreto I* is not binding law of this circuit, is review of the Secretary of State's decision to surrender a fugitive for extradition available, required, or unavailable under the court's habeas jurisdiction, 28 U.S.C. § 2241. If available, what should the standards be and how (if at all) is this case affected"?

INTRODUCTION

As the Court's questions reveal, the Rule of Non-Inquiry for extradition cases is at the heart of this case. We explain below that this doctrine is constitutionally based, and has been applied in numerous instances by this Court and its sister Circuits to deny habeas relief, based on a line of Supreme Court precedent, in attacks on extraditions. As this Court held in *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997), "under what is called the 'rule of non-

inquiry' in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely."

Petitioner Cornejo-Barreto argues that, in the Foreign Affairs Reform and Restructuring Act of 1988 ("the FARR Act"), Congress took a highly significant legal leap and abrogated the Rule of Non-Inquiry, thereby overriding a long-established principle of law and substantially undermining the power of the Executive Branch in the foreign relations realm. As we point out in this supplemental brief, that argument is mistaken because, far from demonstrating that Congress meant to accomplish a major upheaval in extradition law, the FARR Act states explicitly that it does ***not*** create new avenues of judicial review concerning extradition decisions. Further, no other provision of the FARR Act can possibly be read to accomplish the legal revolution that Cornejo-Barreto says Congress wrought.

At the outset here we also wish to correct a serious misunderstanding that pervades Cornejo-Barreto's Supplemental Brief concerning the position of the United States with regard to the impact of the FARR Act, and the Torture Convention that it implements.

The FARR Act states 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." 8 U.S.C. § 1231 note, Sec. 2242(a). Cornejo-Barreto emphasizes repeatedly in his brief that, because of this provision, the Secretary of State has a duty not to extradite a fugitive who is likely to be tortured once he is returned to face legitimate criminal charges in the requesting country.

It is essential for the Court to understand that we do ***not*** dispute this proposition. We do ***not*** contend that the Secretary has discretionary authority to extradite Cornejo-Barreto if the Secretary decides that it is more likely than not that he is in danger of being tortured by Mexican authorities. Rather, as we explain, once there has been a judicial extradition certification, the Secretary has the responsibility to decide whether or not to extradite a fugitive consistently with the law and his own foreign policy based discretion, and the courts lack authority to override that decision based on their own examination of the requesting state's judicial system. We nevertheless reiterate that the Secretary is fully bound by the FARR Act, and must comply with it, and we are not arguing otherwise.

ARGUMENT

A. The Rule of Non-Inquiry Governs Extradition Proceedings

1. As noted above, in *Lopez-Smith*, 121 F.3d at 1326-27, this Court reaffirmed the Rule of Non-Inquiry, refusing to grant a habeas writ to stop an extradition, despite the petitioner's contention that the legal procedures and punishment he faced in Mexico after extradition were "antipathetic" to the Court's "sense of decency." *Id.* at 1326. Instead, this Court applied the principle that "an extraditing court will not inquire into the procedures or treatment awaiting a surrendered fugitive in the requesting country." *Ibid.*

The Court so ruled even though Lopez-Smith argued that he should not be extradited, despite the requisite judicial certification of probable cause, because of his mental incompetence, and because the Mexican legal system was corrupt and would not treat him fairly. Lopez-Smith presented evidence of official extortion, through an offer to dismiss murder charges in exchange for a payment of $20,000. This Court nevertheless firmly rejected those arguments.

This Court first explained that "[e]xtradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function." *Id.* at 1326. Thus, the court ruled that it was

not appropriate for the magistrate judge to consider the claims made on behalf of the fugitive as the judge considered certifying extraditability.

This Court went on to note that, once the extradition certificate issued from a judge, the fugitive could attempt to make a presentation to the Secretary of State as to why actual surrender should be denied. The Court nevertheless made clear that "[a]s for whether the Secretary of State considers the material [showing mental incompetence and corruption] against other considerations, that is a matter exclusively within the discretion of the executive branch and not subject to judicial review." *Id*. at 1326.

Finally, and most critically for our purposes today, this Court refused to violate the Rule of Non-Inquiry by examining the Mexican legal system and consider overriding the decision by the Secretary of State to extradite Lopez-Smith. *Id.* at 1326-27.

This holding by the Court in *Lopez-Smith* was not revolutionary; it came against the backdrop of numerous rulings both by this Court and its sister Circuits denying habeas petitions in light of the Rule of Non-Inquiry as applied to extradition decisions by the Secretary of State. See, *e.g.*, *Matter of Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995) ("courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations

policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems"); *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (the "rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers"); *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) ("[t]he 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"). See J. Semmelman, "Federal Courts, The Constitution, And The Rule Of Non-Inquiry In International Extradition Proceedings," 76 Cornell L. Rev. 1198 (1991).

These decisions build on a line of Supreme Court precedent holding that habeas review of extradition decisions is limited to determining if the magistrate who certified for extradition had jurisdiction, whether the offense charged was within the extradition treaty involved, and whether there was sufficient evidence to provide reasonable grounds to believe the fugitive is guilty. See, *e.g.*, *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

As the Second Circuit explained in *Ahmad*, 910 F.2d at 1066, the courts also may determine if the fugitive is charged with "an offense of a political nature * * *." But that court criticized the district court there for exploring the merits of the

fugitive's claim that he would be badly mistreated if he were extradited to Israel for trial: "consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge." *Ibid.* The court further explained that "it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Ibid.*

Further, as the First Circuit discussed in *Kin-Hong*, 110 F.3d at 110, the extradition system contains "split responsibilities" because it involves both legal issues suitable for judicial determination and foreign policy issues, such as whether and to what extent the Secretary of State should "use diplomatic methods to obtain fair treatment for the [fugitive]." That court noted that the Rule of Non-Inquiry is one of the means of ensuring "that the judicial inquiry does not unnecessarily impinge upon executive prerogatives and expertise." *Ibid.* As the First Circuit concluded, "[i]t is not that questions about what awaits the [fugitive] 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." *Id.* at 110-11 (footnote omitted).

2. We reiterate that the Government does not argue that the type of discretion mentioned by the courts of appeals includes an ability by the Secretary of State to extradite a fugitive if the Secretary thinks he likely will be tortured. That question is answered by the FARR Act. Nevertheless, the extradition process contains a great amount of discretion that the Secretary must exercise in deciding whether there are serious questions about possible torture and how best to guard against it.

Thus, as the Declaration of Samuel M. Witten, who was then the Department of State's Assistant Legal Adviser for Law Enforcement and Intelligence, explained in some detail, the Secretary of State might decide, depending on the circumstances of a particular case, to surrender a fugitive because he concludes the fugitive is not likely to be tortured, to deny surrender of a fugitive that he thinks likely will be tortured, or to condition extradition on the requesting foreign state's provision of appropriate assurances. The latter can relate to torture or other aspects of the requesting state's criminal justice system and serve to protect against mistreatment, for example by having the requesting state ensure that the fugitive will have regular access to counsel and the protections afforded under that country's laws. The decision to seek assurances is made by the State Department on a case-by-case basis. ER 182-83.

Not surprisingly, evaluating the need for assurances, and the reliability of assurances obtained, can itself involve sensitive and complex judgments about: the identity, position, or other information relating to the foreign official relaying the assurances to the State Department; political or legal developments in the requesting country that would provide the needed context for the assurances provided; and the nature of diplomatic relations between the United States and the requesting foreign state at that moment. The State Department officials analyzing the relevant information may also make sensitive judgments regarding the requesting state's incentives and capacities to fulfill assurances given. ER 183-84. See *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977) ("The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States").

Under such circumstances, judicial review of a decision by the Secretary of State to extradite a particular individual to a specific requesting foreign country would place the federal courts in an unfamiliar and obviously inappropriate position. For example, if the Secretary accepts the assurance of a foreign government that, despite a history of human rights abuses in that country, the person will not be tortured – thereby complying with the policy of the FARR Act

and the Torture Convention – a district court or court of appeals could evaluate this decision only by second-guessing the expert opinion of the State Department 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 state or to weigh the current situation within that country.

Moreover, to the extent that judicial review of the Secretary's extradition decision would require the disclosure of State Department officials' judgments and assessments on the likelihood of torture – which could include judgments on the reliability of information and representations provided, and communications with the requesting government – such disclosure could be quite harmful to our foreign policy. Disclosure could chill important sources of information and could interfere with the ability of our foreign relations personnel to interact effectively with foreign states. ER 184-85.

Consistent with the diplomatic sensitivities that surround the State Department's communications with requesting states concerning torture allegations, the Department does not make public its decisions to seek assurances in particular extradition cases. ER 184. Seeking assurances may be seen as raising questions about the requesting country's institutions or commitment to the rule of law, even where the assurances are sought merely to ensure that the foreign

government is aware of the concerns that have been raised. If the State Department were required to make public its communications with a requesting state concerning allegations of torture, that foreign state, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning the treatment of fugitives who have raised allegations of torture. ER 185.

Further, judicial review could lead to serious difficulties in foreign relations if there were public disclosure of even the fact that the United States Government had demanded written assurances from high-level officials of a foreign state, and insisted on the right to monitor that country's treatment of its own citizen in its criminal justice system.

Such public disclosure would also pose problems because extradition requests do not take place in isolation; rather, such requests typically are part of a broader law enforcement relationship between the two governments. For example, if it were disclosed publicly that the United States Government had required a requesting state to provide assurances, that foreign government might feel domestic pressure to seek comparable assurances from the United States in future cases in which the United States sought the extradition of a fugitive, however inappropriate that might be.

Even if confidentiality of communications and judgments could somehow be protected by a court, judicial consideration of the Secretary's extradition decision would also add delays to the already lengthy extradition process, as shown by this very case. In this matter, for example, the Mexican government's desire to obtain the return of Cornejo-Barreto to face grave criminal charges has been frustrated for nearly eight years to date. Delays such as this one could impair a foreign government's ability to prosecute a fugitive when he finally is returned, and could also harm our efforts to press other countries to act more quickly in surrendering fugitives for trial in the United States. ER 186.

Thus, the extradition determinations made by the Secretary of State in light of the FARR Act and the Torture Convention can depend on a host of factors, ranging from an evaluation of the requesting foreign state's government and its degree of control over the various actors within the foreign judicial system, to predictions about how the foreign state is likely to act in actual practice in light of its past assurances and behavior, and to assessments as to whether confidential diplomacy or public pronouncements will best protect the interests of the fugitive. These determinations are all inherently discretionary and intrinsically within the power to engage in highly sensitive foreign relations.

Accordingly, the Rule of Non-Inquiry makes perfect sense in the extradition context, and, as the courts of appeals have recognized, ensures that the Judiciary and the Executive remain within their appropriate respective domains regarding extradition, a process that is fraught with serious foreign relations considerations.

B. Congress Did Not Abrogate the Rule of Non-Inquiry in the FARR Act.

Cornejo-Barreto contends in his Supplemental Brief (at 6-12) that, in the FARR Act Congress abrogated the Rule of Non-Inquiry, as well as all of the case law applying it. He contends that this happened because that statute placed a duty on the Secretary of State not to extradite fugitives when there are substantial grounds for believing the person would be in danger of being subjected to torture.

The language and history of the FARR Act, as well as its implementing regulations and the Torture Convention that it carries out, demonstrate that Cornejo-Barreto is wrong because Congress had no intent to work such a radical alteration of our law.

This statutory language and legislative background confirm that Congress placed enforcement of the Torture Convention policies in the extradition context within the responsibility of the Executive Branch. The Secretary of State is to determine the best methods to protect individuals from torture, using his various

diplomatic tools and sources of information, and to decide if extradition can proceed consistently with the terms of the FARR Act and the Torture Convention. See ER 44-50 (district court's rejection of the first habeas petition).

1. The text of the FARR Act contradicts any notion that Congress suddenly created judicial review of extradition determinations by the Secretary of State. To the contrary, the FARR Act points in exactly the opposite direction, as it states: "[N]otwithstanding 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 [Torture] Convention or this section * * * except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. § 1231 note, Sec. 2242(d).

This clear textual statement establishes that, by passing this statute, Congress did not intend to change the law and newly create judicial review of extradition decisions. Accord H.R. Conf. Rep. No. 432, 105th Cong., 2nd Sess., at 150 ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). And, Cornejo-Barreto points to no other part of the statute that could possibly be seen as overruling the Rule of Non-Inquiry and the numerous precedents of the various Circuits.

Moreover, Cornejo-Barreto's argument would render the entire last phrase of Section 2242(d) of the FARR Act – "except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act" – superfluous. Section 242 of the INA already provides courts with subject matter jurisdiction and a cause of action to review a final order of removal. See 8 U.S.C. § 1252(d). The "except" clause can thus be given meaning only if the first part of the provision is understood to reflect Congress' view that there will be no judicial review under the FARR Act, "except" for review of final orders of removal under the INA.

Thus, interpreting Section 2242(d) consistently with the axiom that courts should "avoid[] interpreting statutes in a way that 'renders some words altogether redundant'" (see *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 347 (1998) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)), requires the conclusion that Congress did not intend to create judicial review of extradition claims under the FARR Act.

Furthermore, this Court ruled in *Lopez-Smith* that the courts cannot second-guess extradition determinations by the Secretary of State "except to the extent that the statute interposes a judicial function." 121 F.3d at 1326. Plainly, the FARR Act did not interpose any new judicial function for extradition cases.

2. The regulations promulgated by the State Department under the express authority of the FARR Act firmly support the proposition that nothing in the FARR Act established a new right to judicial review of extradition decisions. On their face, these regulations affirm that there is no judicial review of the Secretary's extradition decisions. See 22 C.F.R. § 95.4.

These regulations deserve substantial deference as published agency interpretations of the FARR Act because Congress explicitly delegated to the Secretary the authority to "implement" the obligations of the United States under the Torture Convention. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where there has been a Congressional delegation of administrative authority, courts must defer to reasonable agency interpretation).

3. In addition, the Torture Convention itself cannot serve as the source of a cause of action in court by Cornejo-Barreto. See discussion at ER 40-44 (original district court decision denying habeas petition); *Hawkins v. Comparet-Cassani*, 33 F. Supp.2d 1244, 1257 (C.D. Cal. 1999), *partially reversed on other grounds*, 251 F.3d 1230 (9th Cir. 2001); *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash 1998). The Senate expressly conditioned its consent to this treaty upon a declaration "that the provisions of Articles 1 through 16 of the Convention *are not*

self-executing." 136 Cong. Rec. S17486-01 at S17492 (Oct. 27, 1990); S. Exec. Rep. 101-30, at 31 (emphasis added).

The Senate Report regarding the Torture Convention, to which the Resolution of Ratification was appended, also included the Executive's analysis that the term "competent authorities" in Article 3 "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*." S. Exec. Rep. 101-30, at 17-18 (emphasis added).

Such a non-self-executing treaty does ***not*** confer any judicially enforceable rights upon a private party. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect"); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir), *cert. denied*, 444 U.S. 832 (1979); *Restatement (Third) of Foreign Relations Law of the United States*, § 111(4)(a), at 43 (1987).

Accordingly, the Senate's declaration that Article 3 of the Torture Convention was not "self-executing" establishes that, at the time of ratification, the Senate did not intend to create any judicially enforceable rights.

4. As we have discussed, the Rule of Non-Inquiry is premised in large part on the Executive's exercise of its constitutional foreign affairs powers. Therefore, this Court should not conclude that Congress meant to supersede that rule in the absence of a clear legislative statement establishing such an intent. Otherwise, the Court cannot be certain that Congress intended to attempt to undermine the President's authority.

"In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision. * * * Legislation regulating presidential action * * * raises 'serious' practical, political, and constitutional questions that warrant careful congressional and presidential consideration." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Accord *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

Such a clear statement would also have given the President notice that Congress was launching a legislative challenge to the Executive Branch's historically-recognized powers, and an opportunity to veto such an attempt. Under these circumstances, petitioner's argument that the Court should read the FARR Act as some form of stealth legislation that silently eroded the Executive's foreign affairs powers must be rejected.

Indeed, we note that, even when Congress has explicitly provided for judicial review, the Supreme Court will not so interpret a statute if such review would interfere with the President's constitutionally-premised authority to conduct the foreign relations of the United States. See *Chicago & Southern Air Lines v. Waterman S.S. Corporation*, 333 U.S. 103, 111-12 (1948).

Our position here is in no way undermined by the fact that, as Cornejo-Barreto points out (Supp. Br. at 13), this Court has indicated that the Rule of Non-Inquiry might not apply if a fugitive would, upon extradition, "be subject to procedures or punishment so antipathetic to a federal court's sense of decency." *Arnbjornsdottir-Mendler*, 721 F.2d 679, 683 (9th Cir. 1983). In *Lopez-Smith*, 121 F.3d at 1326, the Court described the language relied upon by Cornejo-Barreto as "frequently quoted (but not followed) dictum * * *."

Further, even if this were the law in this Circuit, it would not apply here because we are not arguing that the Secretary of State has the authority to extradite a fugitive who is likely to be tortured. Thus, this is not a situation in which the fugitive would likely be subject to procedures and punishment so antipathetic to the Court's sense of decency. Rather, we are asserting that the Secretary of State has the responsibility to implement the FARR Act and the Torture Convention,

extraditing fugitives only if he thinks there are no substantial grounds for believing that they would be in danger of torture.

* * * * * * *

In sum, the answer to this Court's first question is that, when the FARR Act was passed, the law of this Circuit (and of its sister Circuits), based on Supreme Court precedent, mandated that, under the Rule of Non-Inquiry, the courts would not second-guess extradition decisions by the Secretary of State based on their own views of foreign judicial systems and what might happen to a fugitive after his return. As shown by *Lopez-Smith,* this was the rule even if a fugitive claimed that he would be mistreated or would not receive fair treatment in the requesting country. Nothing in the FARR Act evidences any intention by Congress to overturn this governing principle. Indeed, the language and history of the statute show exactly the opposite.

C. The Rule of Non-Inquiry Has Been Applied in Numerous Cases, and the Administrative Procedure Act has Never Been Thought To Override It.

The Court's second question is whether the Administrative Procedure Act ("the APA") provides a basis for the courts to overrule extradition determinations by the Secretary of State based on their judgments about foreign legal systems. It does not, as shown by the fact that this Court and its sister Circuits have applied

the Rule of Non-Inquiry in numerous cases without any indication that a citation to the APA would have changed the result.

1. The APA provides a right of judicial review for flawed agency action, but it has several provisions excepting matters from judicial review.

First, in the very section providing a right of review, the APA states that "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(1). This provision includes express or implied preclusion of judicial review. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (finding no APA review of overseas American Consulate denial of visa).

As the Administrative Conference of the United States report proposing this specific statutory language explained, in applying the APA, the courts would still refuse "to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action." *Ibid.* The report 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." *Ibid.*

This description certainly fits the long-established extradition practice involving shared, but quite distinct, responsibilities for the Judicial and Executive Branches. By statute, the extradition process confers on federal judges the initial responsibility to conduct hearings to determine if the extradition request meets the applicable statutory and treaty requirements. 18 U.S.C. § 3184. Once a court issues an extradition certification, the question whether the fugitive shall actually be surrendered is committed to the discretion of the Secretary of State. 18 U.S.C. § 3186.

For the reasons stated above (at 9-13), the process by which the Secretary of State reaches an informed conclusion concerning a fugitive's likely fate if extradited, and minimization of the likelihood of torture involve difficult judgments often involving delicate exercises of discretion in the highly sensitive foreign relations realm. As we have shown, the Secretary's decision actually to carry out an extradition has traditionally been considered beyond judicial review. Thus, the exception for judicial review built into APA Section 702(1) applies here.

In addition, the APA further provides that judicial review is inappropriate where "statutes preclude judicial review" (5 U.S.C. § 701(a)(1)), or when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

To qualify under the first provision, the relevant statute need not include a specific statement barring judicial review. To the contrary, 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 Institute*, 467 U.S. 340, 349 (1984). Accord *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

This exception to judicial review applies here because, as already noted, the extradition legislative scheme gives the Secretary non-reviewable discretion over the ultimate decision about extradition (see 18 U.S.C. § 3186), and the courts have created a judicial history of no judicial review by applying on many occasions the Rule of Non-Inquiry. And, as argued above (at 14-15), nothing in the FARR Act can reasonably be read as any indication of a Congressional intent to provide a new system of judicial review of extradition decisions; to the contrary, Congress stated explicitly that nothing in the FARR Act should be interpreted to so provide. See 8 U.S.C. § 1231 note, Sec. 2242(d).

In addition, even if judicial review is not precluded under 5 U.S.C. § 701(a)(1), it is barred under APA Section 701(a)(2) because the Secretary of State's resolution of a Torture Convention claim is "agency action [that] is

committed to agency discretion." 5 U.S.C. § 701(a)(2). In determining which categories of administrative decision are, under Section 701(a)(2), not reviewable, the Supreme Court has considered whether certain types of decisions 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 was traditionally committed to agency discretion, and was therefore unreviewable).

Thus, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme 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*, 486 U.S. 592 (1988), the Supreme 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*).

For the reasons already described above (at 9-13), the process for determining the likely treatment a fugitive will face on his forced return to the requesting country and the best methods to minimize the risk of torture require substantial exercises of the Secretary's discretion, which are obviously not amenable to informed judicial review. And, there is a long tradition of judicial

non-inquiry into matters relating to extradition. Congress is deemed to be aware of this legal principle applied in so many cases by the federal courts. See *Shapiro v. United States*, 335 U.S. 1, 16 (1948). This tradition therefore lends considerable support for the argument that Congress did not, in a statute containing absolutely no indication of such an intention, mean to override this long practice and make certain of the Secretary's extradition decisions suddenly subject to judicial review.

2. Our arguments about the grave problems posed by judicial review of the Secretary of State's extradition determinations are in no way undermined by the fact that there can be judicial review of a Torture Convention claim in the deportation context under 8 U.S.C. § 1252. As the plain language of the FARR Act shows, Congress drew a clear distinction between review in a deportation context and in an extradition context. This selection by Congress of one type of procedure for review and the omission of any other is obviously significant. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Further, as this Court has explained, extradition and deportation are quite different processes; the former occurs only pursuant to an international agreement

and is invoked by a foreign government. *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986). Extradition thus can involve international relations and treaty responsibilities to a highly substantial degree. See discussion *infra*, at 30.

Thus, the APA does not provide a ground for carrying out judicial examination of a foreign state's judicial system, and using that examination to review a determination by the Secretary to extradite in the face of torture claims.

D. Habeas Jurisdiction Does Not Abrogate the Rule of Non-Inquiry

As a final question, the Court has asked if review of the Secretary of State's extradition decision is available, required, or unavailable under habeas jurisdiction (28 U.S.C. § 2241). The precedents from the Supreme Court and this Court, combined with the unique responsibilities of the Secretary of State that were established during the ratification process of the Torture Convention and reiterated by the full Congress in the FARR Act, make clear that the fact that a district court has jurisdiction over a habeas petition does not override the Rule of Non-Inquiry.

1. As already discussed, the Supreme Court has explained that habeas review in the extradition context is limited to determining if the magistrate who certified the fugitive for extradition had jurisdiction, whether the offense charged is within the extradition treaty involved, and whether there was sufficient evidence to provide reasonable grounds to believe that the fugitive is guilty. See *Fernandez*,

268 U.S. at 312. This Court and its sister Circuits have then applied this principle through the Rule of Non-Inquiry specifically in cases arising under the courts' habeas jurisdiction.

For example, in *Lopez-Smith*, 121 F.3d at 1327, this Court affirmed the denial of a habeas petition because it held that the district court properly refrained from examining the Mexican judicial system. And, based in part on the Rule of Non-Inquiry, in *Kin-Hong*, 110 F.3d at 110-11, the First Circuit reversed the grant of habeas relief. Accord *Ahmad*, 910 F.2d at 1066-67 (affirming denial of habeas relief and criticizing district court for reviewing Israeli judicial system's likely treatment of fugitive).

Thus, the Rule of Non-Inquiry has been applied by the courts specifically in cases where jurisdiction has been based on the habeas statute. This fact is significant in answering this Court's question because the Supreme Court has expressed skepticism about 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). The grant of jurisdiction set out in 28 U.S.C. § 2241 has not changed in any relevant sense in many years. Thus, Cornejo-Barreto is asking this Court to discover in the habeas statute a

revolutionary new component of federal jurisdiction that has never been recognized in the past.

Nevertheless, as noted, Cornejo-Barreto has argued that, through the FARR Act, Congress abrogated the Rule of Non-Inquiry. We have already shown that this contention is incorrect; Cornejo-Barreto has not identified any reason why that doctrine and this Court's precedent applying it are no longer appropriate defenses to a habeas action.

2. In attempting to overcome this serious problem in his argument, Cornejo-Barreto discusses at some length in his Supplemental Brief (at 19-22) the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001), to the effect that Congress must unambiguously so provide if it intends to repeal habeas jurisdiction for a type of case. There, in order to avoid raising serious constitutional issues, the Supreme Court held that, absent a clear statement from Congress, statutes should be interpreted not to repeal pre-existing habeas jurisdiction. *Id.* at 298-303.

The *St. Cyr* decision is inapplicable here because we are not arguing that Congress has repealed any existing habeas jurisdiction. As explained earlier, habeas jurisdiction continues to exist to review challenges to a magistrate's decision to certify a fugitive for extradition. However, nothing in *St. Cyr* requires that this Court should suddenly disregard the time-honored doctrine that, in

exercising their habeas jurisdiction, the courts are not to overstep their role and attempt to judge foreign judicial and penal systems in the extradition context, a decision that would require extensive interference with the Executive's exercise of its constitutional foreign affairs authority.

The allocation of responsibility between the courts and the Executive Branch in international extradition matters is unambiguous, expounded both through decades of judicial precedent and, notably for purposes of Cornejo-Barreto's novel *St. Cyr* argument, in the FARR Act. The courts have a distinct role in international extradition matters: to determine whether a fugitive is extraditable under the relevant treaty and applicable U.S. law. If the courts respond to these inquiries in the affirmative, it is for the Secretary of State to determine the proper discharge of the responsibilities assigned to him under U.S. law (18 U.S.C. §§ 3184 and 3186), the relevant international extradition treaty, and the Convention Against Torture. The latter two bodies of law are uniquely within the responsibility of the Secretary in the international extradition context and require particular attention to the sensitive matters of international relations and interpretation of treaty responsibilities discussed above (at 9-13). The courts repeatedly have affirmed this allocation of responsibility, and the Congress unambiguously endorsed it in 1998, when it reiterated the assignment of responsibility to the Secretary that had

already been made clear in the 1994 ratification process of the Convention Against Torture.

3. Cornejo-Barreto has further pointed out (Supp. Br. at 22-25) that this Court and others have found that Congress did not through the FARR Act eliminate habeas jurisdiction invoked by individuals in removal proceedings. See *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003). These decisions are inapposite here for two reasons.

The most obvious is that, in this matter, we are not arguing that in the FARR Act Congress limited the authority of the courts to overturn extradition decisions based on the courts' judgments concerning foreign legal systems. Instead, we contend that precedent from this Court – based on Supreme Court case law and separation of powers considerations – had previously imposed such a result and Congress made clear in the FARR Act that it was not acting to change that rule of law. Thus, Congress left in place the system that has operated for many decades in which the Judicial Branch makes the necessary legal and factual determinations at the beginning of the extradition process, and the matter then moves to the Secretary of State to make the actual extradition determination, based on applicable law and current policy based on foreign relations considerations.

In addition, and linked to the first reason, there are fundamental differences between extradition and removal under the immigration process. 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. As explained above, extradition decisions also require difficult predictive judgments based on sensitive foreign relations considerations and communications between the Executive Branch and its foreign counterparts. These features of the extradition process explain why courts have developed and applied the Rule of Non-Inquiry only in the particular context of extradition. These features also explain why Congress limited judicial review under the FARR Act to the removal context, and did not seek to change in that Act the historically limited role of the courts in extradition cases.

In short, for many years the Rule of Non-Inquiry has operated as a constitutionally-based exception to the habeas power of the courts. Nothing has occurred since this Court's ruling in *Lopez-Smith*, either through passage of the FARR Act or otherwise, to cause a change for that legal principle. Accordingly,

the Rule of Non-Inquiry should continue to operate as it has for decades in the face of habeas claims.

CONCLUSION

For the foregoing reasons and those stated in our earlier brief, the judgment denying the petition for relief should be affirmed because the district court had no authority to review the Secretary of State's determination to surrender Cornejo-Barreto to the Mexican government in order to face criminal charges in that country.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2004, I filed and served the foregoing Supplemental Brief for the Respondent upon the Clerk of this Court and counsel listed below by Federal Express overnight service:

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