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

BRIEF FOR THE RESPONDENT/APPELLEE REGARDING *EN BANC* CONSIDERATION

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INTRODUCTION

This Court has directed the parties to file simultaneous briefs "setting forth their respective positions as to whether the case should be reheard en banc."

The Court has asked this question because a prior panel of this Court issued an opinion in an earlier version of this case, stating a revolutionary new principle of law. Before that opinion, the Rule of Non-Inquiry had been established for decades, and had provided that the courts would not review extradition decisions by the Secretary of State based on their evaluation of foreign judicial systems and

what was likely to happen to returned fugitives within those systems. According to the prior panel here, without so providing in any statutory language, Congress nevertheless overturned this settled law and newly empowered the courts to evaluate foreign judicial systems and overrule determinations by the Secretary of State regarding extradition determinations.

Our short answer to the Court's question is that we continue to assert the position stated in our briefing: the panel to which this case is currently assigned can affirm the district court's judgment of dismissal in the Government's favor because petitioner's attack against the Secretary's decision to extradite him to Mexico as a murder suspect is not justiciable under the Rule of Non-Inquiry, a doctrine applied by this Court and its sister Circuits. The contrary discussion in a prior panel opinion from this Court is non-binding obiter dictum, and should not be adopted by the current panel. That dictum erroneously stated that, through the Foreign Affairs Reform and Restructuring Act of 1988 ("the FARR Act"), Congress for the first time provided that the courts can review extradition determinations made by the Secretary concerning the operation of foreign judicial systems, even though those decisions are inextricably interwoven with delicate foreign affairs considerations.

If the current panel does not reject the prior panel opinion as incorrect dictum, *en banc* treatment by the Court is fully warranted because the Rule of Non-Inquiry governs here. Any decision to the contrary will have significant foreign relations consequences, harming the Executive's ability to return fugitives to other nations pursuant to valid extradition treaty obligations. Indeed, in this case alone, the improper judicial proceedings have raised a potentially difficult issue in our dealings with Mexico, one of our most important foreign partners. Whether through a ruling by the current panel or by the *en banc* Court, this case should be dismissed.

We also note that other panels of this Court have in different contexts reiterated the erroneous dictum by the prior panel here. See *Barapind v. Reno*, 225 F.3d 1100, 1106 (9th Cir. 2000); *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). This troubling development should be arrested soon.

One final introductory point should be made because the petitioner/appellant Ramiro Cornejo-Barreto has mischaracterized our position in this litigation. We wish to make perfectly clear that, in light of the FARR Act, our position is ***not*** that the Secretary of State has discretionary authority to extradite the petitioner even if the Secretary decides that there are substantial grounds for believing that petitioner

is in danger of being tortured by Mexican authorities. Rather, as we explain below, 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 affairs-based discretion, and the courts lack authority to override that decision premised on their own evaluation of the requesting state's judicial system. We nevertheless reiterate that the Secretary is fully bound by the FARR Act.

DISCUSSION

A. Petitioner Ramiro Cornejo-Barreto, who is a Mexican citizen, is attempting to block his extradition to Mexico where he is wanted for armed robbery, kidnaping, and murder of a police officer.

After a Magistrate Judge certified Cornejo-Barreto for extradition in 1997, the latter sought habeas corpus relief from the district court. He claimed that, if he were returned to Mexico to face criminal charges, he would be tortured by Mexican police officials, and that his extradition was thus prohibited under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("the Torture Convention"). This treaty has been implemented in the United States through the FARR Act, which 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).

The district court denied habeas relief because petitioner's claim was not cognizable by the court. Cornejo-Barreto appealed. A panel of this Court (Judges B. Fletcher and Thompson; Judge Kozinski concurring) affirmed the denial of habeas relief on the different ground that Cornejo-Barreto's claim was unripe because the Secretary had not yet determined whether to exercise his authority to surrender petitioner to Mexico. *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000). However, the panel majority further directed that denial of the habeas petition be without prejudice so that petitioner could seek review under the Administrative Procedure Act if the Secretary subsequently decided to extradite Cornejo-Barreto.

In June 2001, the Secretary indeed signed a warrant of extradition. Under the Administrative Procedure Act, Cornejo-Barreto then filed in the district court a second habeas petition, which is the subject of the current proceeding. In light of this Court's prior panel decision, the district court determined that it could review Cornejo-Barreto's second habeas petition under the APA. However, in July 2002,

the district court denied the petition on its merits, and Cornejo-Barreto appealed to this Court.

Because of these extended legal proceedings, it has to date been approximately eight years since Mexican law enforcement authorities sought Cornejo-Barreto's extradition to stand trial for the murder of a police officer, six and one-half years since the Magistrate Judge certified Cornejo-Barreto for extradition, and almost three years since the Secretary signed the warrant authorizing Cornejo-Barreto's surrender to Mexico.

B. The Rule of Non-Inquiry for extradition cases is at the heart of this case. This doctrine stems from Supreme Court extradition precedent, is constitutionally based, and has been applied many times by this Court and its sister Circuits to deny habeas relief in attacks on extradition orders.

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." In *Lopez-Smith*, this Court refused 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 contended that he should not be extradited, despite the requisite judicial certification of probable cause, because the Mexican legal system was corrupt and would not treat him fairly. This Court firmly rejected those arguments: "Extradition 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.

This Court added that, once an extradition certificate issues from a judge, a fugitive could attempt to make a presentation to the Secretary as to why actual surrender should be denied. "As for whether the Secretary of State considers the material [showing 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.

This holding in *Lopez-Smith* 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. 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, 1066-67 (2d Cir. 1990) (criticizing district court for considering merits of fugitive's claim that he would be physically harmed 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. * * * [I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation").

C. The Rule of Non-Inquiry ensures that the Judiciary and the Executive remain within their appropriate respective domains regarding extradition, a process fraught with foreign relations considerations. As the record here demonstrates, extradition determinations made by the Secretary in carrying out 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 requesting 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 inherently discretionary and intrinsically within the power to engage in delicate foreign relations. Thus, the Secretary of State might decide to surrender a fugitive whom he concludes is not likely to be tortured, to deny surrender of a fugitive whom he thinks likely will be tortured, or to condition extradition on the requesting foreign state's provision of appropriate assurances. The decision to seek assurances is made by the State Department on a case-by-case basis. ER 182-86.

Not surprisingly, calculating the need for assurances, and the reliability of assurances obtained, can involve sensitive and complex judgments about the following: 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 given; 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 difficult predictions

regarding the requesting state's incentives and capacities to fulfill assurances given. ER 183-84.

Under such circumstances, judicial review of a decision by the Secretary of State to extradite a particular individual 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 regarding subjects such as assurances, or to weigh the current situation within that country.

E. Nevertheless, based on the dictum by the prior panel of this Court, Cornejo-Barreto argues now that, in the FARR Act, Congress took a significant legal leap and abrogated the Rule of Non-Inquiry, thereby overriding that principle of law and substantially affecting the power of the Executive Branch in the foreign relations realm. The prior panel majority had stated that, if the Secretary later decided to proceed with Cornejo-Barreto's extradition, the latter could file a

subsequent habeas action under the Administrative Procedure Act, and the district court would have jurisdiction over such a claim despite the Rule of Non-Inquiry. *Cornejo-Barreto*, 218 F.3d at 1012-17.

As we have explained in our briefing to date, the current panel can find the prior panel majority's statements regarding the later availability of judicial review as non-binding dictum, in spite of the prior panel majority's description of its statement about APA review as part of the holding. The fact remains that all three members of the prior panel held that Cornejo-Barreto's first habeas petition was not ripe because the Secretary had not yet decided whether to grant the extradition request. Further, the parties had *not* briefed to the prior panel the possible applicability of the APA to a decision to be made later by the Secretary.

Under such circumstances, the current panel can conclude that the prior panel majority's opinion about later judicial review is dictum, *i.e.*, as a statement "not necessary to the decision" in the case. See *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995).[1]

F. Whether or not it is dictum, the opinion by the prior panel on the Rule of Non-Inquiry is mistaken because, far from demonstrating that Congress meant to

[1] We note though that there is currently considerable disagreement within this Circuit as to the proper definition of dictum. See, *e.g.*, *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001)(*en banc*); *Spears v. Stewart*, 283 F.3d 992 (9th Cir.), *cert. denied*, 537 U.S. 977 (2002).

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.

The relevant text of the FARR Act reads: "[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 textual declaration establishes that Congress did not intend to change the law and establish through the FARR Act 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, neither Cornejo-Barreto nor the prior panel of this Court pointed to any 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 applying it.

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.

The Torture Convention itself also cannot serve as the source of a cause of action for Cornejo-Barreto. See discussion at ER 40-44 (original district court decision denying habeas petition). 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. No. 30, 101st Cong., 2d Sess., 31 (1990). 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").

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.

G. 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 legal principle in the absence of a clear legislative statement establishing such an intent.

"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).

Such a clear statement would have given the President notice that Congress was launching a legislative challenge to the Executive Branch's historically-recognized powers in the extradition field, and an opportunity to veto such an attempt. Under these circumstances, the 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.

Our position here is in no way undermined by the fact that 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, this Court described this language 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 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.

H. Moreover, contrary to the statements by the prior panel, for several reasons, the Administrative Procedure Act cannot serve as a basis for avoiding the Rule of Non-Inquiry.

First, in the very section providing a right of review, the APA states: "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 preclusions of judicial review. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999).

This description certainly fits the 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 outlined briefly above, the process by which the Secretary reaches an informed conclusion concerning a fugitive's expected fate if extradited and minimization of the likelihood of torture often involve difficult judgments and 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.

Second, 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).

This exception to judicial review applies here because, as already noted, the extradition legislative scheme gives the Secretary discretion over the ultimate decision about extradition (see 18 U.S.C. § 3186), and the courts have created a judicial history of no review through the Rule of Non-Inquiry. And, as pointed out earlier, 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).

Third, 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's resolution of a Torture Convention claim is "agency action [that] is committed to agency discretion." In determining which categories of administrative decision are not reviewable in light of Section 701(a)(2), the Supreme Court has considered whether certain types of determinations have, by tradition, been left to agency discretion. See *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993).

Thus, 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*, 508 U.S. at 192.

For the reasons already described here, the process for determining the likely treatment a fugitive will receive on his forced return to the requesting country and the best methods to lessen the risk of torture require substantial exercises of the Secretary's discretion, and are obviously not amenable to informed judicial review.

These points about the grave problems posed by judicial review of the Secretary'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. 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).

I. The fact that Cornejo-Barreto is seeking habeas relief here also does not override the Rule of Non-Inquiry. The precedents from the Supreme Court and this Court make clear that simply because a district court has jurisdiction over a habeas petition does not abrogate the Rule of Non-Inquiry.

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 v. Phillips*, 268 U.S. 311, 312 (1925). 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. See, *e.g.*, *Lopez-Smith*, 121 F.3d at 1327; *Kin-Hong*, 110 F.3d at 110-11; *Ahmad*, 910 F.2d at 1066-67.

Thus, the Rule of Non-Inquiry has been applied by the courts in habeas cases. This fact is significant because the Supreme Court has expressed deep 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 new component of federal jurisdiction that has never been recognized in the past.

This Court's conclusion that Congress did not through the FARR Act eliminate existing habeas jurisdiction invoked by individuals in *removal* proceedings (see *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); accord *Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003)) is inapposite here. 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 changing that rule of law.

CONCLUSION

We urge that either the current panel affirm the judgment here because petitioner's claim is non-justiciable and the prior panel's statements to the contrary constitute mistaken dictum, or the Court set this case for *en banc* consideration.

Respectfully submitted,

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May 20, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-3(3), I certify that the foregoing brief is proportionally spaced, has a type face of 14 points, and contains 4,182 words, according to the word processing system used to prepare this brief. The brief thus complies with this Court's April 30, 2004 order that it be limited to 15 pages because the word count, divided by 280, does not exceed the designated page limit.

_____

Douglas Letter

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2004, I filed and served the foregoing Brief for the Respondent/Appellee Regarding *En Banc* Consideration upon the Clerk of this Court and counsel listed below by Federal Express overnight service:

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