

No. 06-6457

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETRU MIRONESCU,

Petitioner/Appellee,

v.

**HARLON E. COSTNER, United States Marshal for the Middle District
of North Carolina, et al.,**

Respondents/Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BRIEF FOR THE APPELLANTS

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STATEMENT OF JURISDICTION

Petitioner Petru Mironescu asserted jurisdiction in the district court under 28 U.S.C. § 2241, and the Administrative Procedure Act (5 U.S.C. §§ 701-706) (“the APA”). Contrary to Mironescu’s contention, the APA does not provide jurisdiction. See *Califano v. Sanders*, 430 U.S. 99, 104-07 (1977). Rather, the APA provides a waiver of the sovereign immunity of the United States, while jurisdiction is generally provided by 28 U.S.C. § 1331.

On January 20, 2006, the district court issued a memorandum opinion and a preliminary injunction, ordering the United States Government not to surrender Mironescu to Romanian authorities, and ordering the United States to turn over to the district court for *in camera* inspection the State Department record supporting the

decision by the Secretary of State to extradite Mironescu to Romania. JA 123-45.¹ (The district court’s opinion and order are published at 2006 WestLaw 167981.)

The Government filed a timely notice of appeal on March 17, 2006. This Court has appellate jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

Petitioner Mironescu is a citizen of Romania. In this action, he challenges a decision by the Secretary of State to extradite him to Romania, to serve a four-year sentence there for crimes relating to auto theft. Mironescu argues that he cannot be extradited to Romania because he alleges that he would be tortured in that country. Mironescu contends that his extradition is therefore barred under the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the “Convention Against Torture”), which the United States has ratified and implemented through domestic legislation.

In issuing a preliminary injunction barring Mironescu’s surrender to Romanian authorities, the district court rejected the Government’s argument based on the long-established Rule of Non-Inquiry, applied by the Supreme Court and the courts of appeals. That doctrine directs that courts will not review extradition determinations made by the Secretary of State concerning fugitives’ claims involving conditions in the receiving foreign country.

The issue presented by this appeal is whether the district court erred in finding that Congress had, while implementing the Convention Against Torture through domestic legislation, overruled the Rule of Non-Inquiry, even though no statutory language nor legislative history even hints at such a revolutionary result.

¹ “JA ____” citations refer to the pages in the Joint Appendix filed in this Court.

STATEMENT OF THE CASE

As noted already, this suit involves a claim by Mironescu that he cannot legally be extradited to Romania because he asserts that he will likely be tortured there. This matter began when Romania sought Mironescu's extradition from the United States in 2003. Mironescu was arrested and was found by a Magistrate Judge to be extraditable. Mironescu sought habeas review of that determination, contending, among other claims, that he would likely be tortured in Romania. His habeas petition was denied at that time by the district court because the Secretary of State had not yet decided whether to surrender Mironescu to Romanian authorities.

The Secretary of State thereafter determined that Mironescu could indeed legally be extradited to Romania. Mironescu was given notice of the Secretary's decision. Mironescu then filed the current habeas petition, and the Government moved to dismiss in light of the Rule of Non-Inquiry, asserting that Mironescu's request that the district court review any confidential dealings between the United States and Romania was not justiciable.

The district court denied the Government's motion to dismiss, and preliminarily enjoined the Secretary from surrendering Mironescu to Romanian authorities. In addition, the court directed the Government to provide for *in camera* review the State Department record concerning the Secretary's decision, which could include negotiations and dealings with the Romanian government concerning Mironescu's torture claims. The U.S. Government now appeals the district court's order.

STATEMENT OF THE FACTS

I. The Statutory Scheme Governing Extradition

An understanding of the extradition scheme in the United States is essential for this appeal.

A. Extradition is a means by which a fugitive is returned to a foreign country to face criminal charges there. The proper procedures for extraditions are well established by statute, and by practice in this Circuit. The judicial role in the process is governed by 18 U.S.C. § 3184, which confers jurisdiction on a federal judge to conduct an extradition hearing to determine whether the extradition request meets the statutory and treaty requirements.

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

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

Having made these findings, the district court's function is complete. See 18 U.S.C. § 3184; *Sidali v. INS*, 107 F.3d 191, 194-195 (3d Cir. 1997) (describing operation of extradition mechanism).

A judicial determination of extraditability is not appealable, but “limited” collateral review is available through the habeas corpus process. See *Peroff*, 563 F.2d at 1102. In that review, the district court determines whether the extradition judge had jurisdiction, whether there was jurisdiction over the fugitive individual, whether the extradition treaty was in force and covered the crime at issue, and whether any evidence supported the extradition judge’s finding of probable cause. See *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984) (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)); accord *Plaster*, 720 F.2d at 347-48, 349 & n.10. This review is “exceedingly narrow”; “[t]hat [the fugitive] may be able to assert a strong defense and avoid being convicted in no way implies that extradition is improper.” *Prushinowski*, 734 F.2d at 1018.

B. Once a fugitive has been found extraditable by the Judicial Branch, responsibility transfers by the governing statute to the Secretary of State. Significantly for this case, that statute commits to the Secretary’s discretion the decision whether the fugitive will actually be surrendered to the requesting foreign government. See 18 U.S.C. § 3186 (“The Secretary of State *may* order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged”) (emphasis added).

The Supreme Court has made clear that, as this statutory provision reflects, the surrender of a fugitive to a foreign government is “purely a national act * * *. performed through the Secretary of State,” within the Executive’s “powers to conduct foreign affairs.” See *In re Kaine*, 55 U.S. 103, 110 (1852). As this Court has explained: “Within the parameters established by the Constitution, the ultimate decision to extradite is, as has frequently been noted, reserved to the Executive as

among its powers to conduct foreign affairs.” *Plaster*, 720 F.2d at 354. Accord *Martin v. Warden, Atlanta Pen.*, 993 F.2d 824, 829 (11th Cir. 1993).

Thus, for extraditions “[t]he Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations – factors that may be beyond the scope of the magistrate judge’s review.” *Sidali*, 107 F.3d at 195 n.7. In determining whether or not to extradite a particular fugitive, the Secretary takes into account humanitarian claims and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country. See *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999).

Of considerable importance to this case, “[t]he Secretary may * * * decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations. Additionally, the Secretary may attach conditions to the surrender of the relator * * *. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator.” *United States v. Kin-Hong*, 110 F.2d 103, 109-10 (1st Cir. 1997).

One type of condition the Secretary may place on an extradition is a demand that the requesting country provide assurances regarding the individual’s proper treatment. See *Jimenez v. United States District Court*, 84 S. Ct. 14, 16-17 n.10 (1963) (Goldberg, J., in chambers) (describing commitments made by foreign government to Department of State as a condition of surrender); *United States v. Baez*, 349 F.3d 90, 92-93 (2d Cir. 2003) (referring to assurances provided by United States upon extradition of fugitive by another country).

II. The Rule of Non-Inquiry

Because extradition matters necessarily implicate the foreign relations of the United States and have traditionally been entrusted to the broad discretion of the Executive, the federal courts have for many decades adhered to a Rule of Non-Inquiry

regarding humanitarian challenges to extradition to a foreign country. This doctrine is constitutionally based, and has been applied in numerous instances by the federal courts of appeals – based on a line of Supreme Court precedent – to deny habeas relief in attacks on extraditions.

As the Circuits have explained, the Rule of Non-Inquiry “is shaped by concerns about institutional competence and by notions of separation of powers.” *Kin-Hong*, 110 F.3d at 110. As discussed above, “[e]xtradition is an executive, not a judicial, function. The power to extradite derives from the President’s power to conduct foreign affairs.” *Martin*, 993 F.2d at 828. Cf. *Sidali*, 107 F.3d at 195 n.7 (“The Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations”).

The Second Circuit has thus stated that “[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. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.” *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) (citation omitted).

Therefore, “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.” *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997). Accord *Kin-Hong*, 110 F.3d at 110. For example, courts are not to consider evidence regarding the requesting country’s “law enforcement procedures and its treatment of prisoners”; such evidence is irrelevant and improper in a court challenge to extradition. *Ahmad*, 910 F.2d at 1067. “[I]t is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian

grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.” *Ntakirutimana*, 184 F.3d at 430.

As described by a district court within this Circuit, under the “well established rule of non-inquiry * * * [i]nquiry is prohibited into the conditions and treatment which a relator might face upon extradition.” *In re Extradition of Atuar*, 300 F. Supp.2d 418, 432 (S.D. W. Va. 2003), *aff’d*, 2005 WL 3134081 (4th Cir. Nov. 23, 2005) (not precedential) (copy attached hereto pursuant to 4th Cir. Rule 36(c)). “Humanitarian considerations are not within the province of the Court. Rather, they are for consideration of the Department of State.” 300 F. Supp.2d at 426 (citations omitted).

III. The Convention Against Torture and the FARR Act

Mironescu nevertheless contends that Congress has abrogated the Rule of Non-Inquiry; he asserts that he cannot be extradited to Romania in light of the Convention Against Torture, adopted by the United Nations General Assembly in 1984. See S. Exec. Rep. No. 101-30, at 2 (1990). Thus, this Convention and its implementing domestic legislation lie at the heart of this case.

The most pertinent part of the Convention is Article 3, which provides:

“1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

S. Treaty Doc. No. 100-20, at 20 (1988).

The United States signed the Convention in 1988. See S. Exec. Rep. No. 101-30, at 2. (The ratification history of this convention is described in *Auguste v. Ridge*, 395 F.3d 123, 130-32 (3d Cir. 2005).)

The U.S. Senate provided its “advice and consent” to the Convention in 1990. 136 Cong. Rec. S17486-01, at S17491 (Oct. 27, 1990). The Senate conditioned its consent on a Resolution of Ratification, declaring that “the provisions of Articles 1 through 16 of the Convention are not self-executing.” *Id.* at S17492; see S. Exec. Rep. 101-30, at 31. When the President ratified the Convention for the United States, he made that action subject to this declaration by the Senate. *Auguste*, 395 F.3d at 132.

Additionally, the Senate committee report regarding the Convention, to which the text of the proposed Resolution of Ratification was appended, explained that the “competent authorities” reference in Article 3 of the Convention refers to those officials who make the determination whether to extradite – “[b]ecause the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.” See S. Exec. Rep. 101-30, at 17-18.

After the President ratified the Convention, it entered into force for the United States in November 1994.

Given that the Senate made clear that the Convention Against Torture was not self-executing, domestic implementing legislation was needed. Congress therefore passed, and the President approved, Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (“the FARR Act”). See Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note).

This section paraphrases Article 3 of the Convention, noting that it is “the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” *Ibid.* Thus, the central issue under Article 3 of the Convention and its implementation under the FARR Act

is whether it is “more likely than not” that a fugitive would be tortured if extradited. *Auguste*, 395 F.3d at 149.

Of critical importance to this case, Section 2242(d) states that the FARR Act does not create any jurisdiction for judicial review, except in the area of removal in the immigration context:

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

8 U.S.C. § 1231 note (emphasis added).

In Section 2242, Congress also directed the heads of the appropriate Executive Branch agencies to prescribe implementing regulations. *Id.* at § 2242(b). The State Department’s implementing regulations provide that “the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition.” 22 C.F.R. § 95.2(b).

These State Department regulations describe the course of proceedings when a fugitive – such as Mironescu – makes allegations regarding torture with regard to an extradition: “appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.” *Id.* at § 95.3(a). Thereafter, “[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.” *Id.* at § 95.3(b).

The State Department’s decision-making process in extradition cases often involve sensitive issues when a fugitive raises torture claims. In assessing such claims, the State Department may need to weigh conflicting evidence from various

sources regarding the situation in the requesting country. It may need to decide whether to raise with foreign officials the often delicate question of possible prisoner mistreatment, and, if so, with which officials and in what format. The State Department must then determine whether to seek assurances from the requesting country in order to protect the fugitive. Necessarily, it must also determine whether such assurances are likely to be reliable and credible.

These determinations made by the State Department can depend on various factors, ranging from an evaluation of the requesting country's government and its degree of control over particular actors within its judicial system, to predictions about how the foreign regime is likely to act in practice, in light of its past assurances and behavior, to assessments of whether confidential diplomacy or public pronouncements would best protect the safety of the fugitive. These determinations are all inherently discretionary, and intrinsically within the power of the Executive to engage in highly sensitive foreign relations.

In sum, before deciding whether or not to actually direct Mironescu's surrender to Romania, the State Department was required by its regulations to investigate and analyze a variety of facts and considerations, including humanitarian concerns, as well as the governing law in the FARR Act. The State Department also had to determine whether or not to engage in sensitive diplomatic communications and actions regarding whether assurances of proper treatment should have been sought from Romania.

The State Department FARR Act implementing regulations also provide that “[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.” *Id.* at § 95.4.

IV. The Extradition Request for Mironescu

A. Mironescu, was prosecuted and convicted in Romania, in absentia, on various crimes relating to auto theft. He received a sentence of three years on each charge, which were merged for an aggregate sentence of four years. See JA 48 (published at *In re Extradition of Mironescu*, 296 F. Supp. 2d 632, 633 (M.D.N.C. 2003)).

Romania submitted a request to the United States for petitioner's extradition, under the applicable extradition treaty between the United States and Romania (44 Stat. 2020 (1924)).² Mironescu was arrested in the United States in October 2003, and Magistrate Judge Dixon held an extradition hearing. The judge found that the evidence presented had "establishe[d] probable cause to believe that Defendant committed the charged offenses," and the court certified petitioner's extraditability to the Secretary of State. JA 58; 296 F. Supp. 2d at 638.

Mironescu then sought habeas relief from the district court on the grounds that the Extradition Treaty "does not apply to petitioner," and that the order "violates both Article 3 of the Torture Convention and 8 U.S.C. § 1158(c)" (governing asylum cases). See *Mironescu v. Costner*, 345 F. Supp. 2d 538, 542 (M.D.N.C. 2004) (reprinting recommendation of Dixon, M.J.).

Magistrate Judge Dixon recommended denial of Mironescu's petition without prejudice, finding that habeas review of an order certifying extraditability is available only after the Secretary of State actually issues a warrant for petitioner's surrender to the requesting country. *Id.* at 550. Judge Dixon also found, however, that "the presiding magistrate judge [in the extradition hearing] clearly had jurisdiction, the

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

plain language of the treaty includes the offense charged, there was certainly evidence to support a probable cause finding as Petitioner had actually been convicted of the crime charged as detailed in extensive documents passed through the American Consulate in Romania,” the Extradition Treaty “does apply” to Mironescu, and 8 U.S.C. § 1158(c) does not bar his extradition. *Id.* at 544-46 (footnotes omitted). The magistrate judge noted that Mironescu’s habeas claims based on the Convention Against Torture might be judicially reviewable. *Id.* at 546-50 (citing *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001)).

On review, the district court “adopt[ed] the Magistrate Judge’s finding that Petitioner’s certification for extradition is valid and the extradition treaty between the United States and Romania does apply.” *Id.* at 540. The court also concurred that “within the narrow habeas review allowed by the Fourth Circuit of extradition certification, no review is presently allowed to consider Petitioner’s evidence of a violation of Article 3 of the United Nations Convention Against Torture.” *Ibid.*

The district court, however, “disagree[d] with” and “reject[ed]” the magistrate judge’s recommendation that Mironescu “would be able to re-file his habeas petition, after the Secretary of State makes a determination as to whether to extradite Petitioner, on the question of whether the Secretary’s determination violates Article 3 of the Convention Against Torture.” *Id.* at 540-41. The court found “uncertainty” regarding the continuing vitality of the *Cornejo-Barreto* opinion relied on by the magistrate judge, and a lack of “court authority applying *St. Cyr* to extradition.” *Id.* at 540-41. The court noted, however, that Mironescu would “be able to bring his humanitarian concerns to the attention of the Secretary of State, who is charged with appropriately applying the Convention Against Torture.” *Id.* at 541.

B. After learning that a warrant to surrender him to Romanian authorities had been signed, Mironescu filed the present habeas petition in August 2005. JA 6-45. Mironescu asserts that the Secretary’s decision to extradite him to Romania is “arbitrary and capricious” in violation of the Administrative Procedure Act, and that the court’s order certifying his extraditability violates the Convention Against Torture and FARR Act Section 242 . *Id.* at 5, 18.

As noted earlier, the Government moved to dismiss Mironescu’s petition in light of the Rule of Non-Inquiry. The Government recognized that the Secretary of State is bound by the policy of the Convention Against Torture as implemented by U.S. domestic legislation and State Department regulations, and that Mironescu thus could not be extradited to Romania if it was likely he would indeed be tortured there. However, the Government contended that the Rule of Non-Inquiry means that the courts cannot review the Secretary’s extradition decision, which might be based on various confidential communications and agreements with Romanian officials. Further, the Government argued that Congress gave no evidence in the text or history of the FARR Act that it was taking the extraordinary step of abrogating that rule, and suddenly making subject to judicial review claims by fugitives concerning foreign legal systems.

In its January 20, 2006 ruling, the district court first denied Mironescu’s request for immediate release, and granted the Government’s request that the Secretary of State be removed from the case as an improper habeas respondent. JA 126-28.

The district court next denied the Government’s motion to dismiss, relying heavily on the Ninth Circuit’s original panel opinion in *Cornejo-Barreto* in doing so. In that opinion, a panel of Ninth Circuit had dismissed a fugitive’s habeas petition as unripe because the Secretary of State had not yet determined whether or not to

surrender the fugitive to Mexico. 218 F.3d 1004, 1016 (9th Cir. 2000). The panel majority also stated its view in the opinion that, if the Secretary should later decide in favor of surrender, Cornejo-Barreto would be able to file a new habeas action in district court, challenging the validity of the Secretary's decision in relation to the FARR Act under the APA. *Id.* at 1012-16.

When the Secretary did indeed decide to extradite Cornejo-Barreto to Mexico, the latter filed a new civil action, and a second Ninth Circuit panel determined that the first panel's statements about justiciability under the APA were dicta, and that the FARR Act had not changed the Rule of Non-Inquiry. *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1079 (9th Cir. 2004) (holding that prior panel's "discussion is advisory and we are not bound by it"). The Ninth Circuit then decided to hear the matter *en banc*, but before that court could reach a decision, the case became moot under Mexican law because of the lengthy period in which it had been sitting before the U.S. courts. Accordingly, the second Ninth Circuit panel decision was vacated as moot, leaving the first panel opinion in place. *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (*en banc*).

The district court here found that, while the statements about justiciability in the first *Cornejo-Barreto* decision might be dicta, they were nevertheless "persuasive." JA 139. The court recognized that the Rule of Non-Inquiry had been established in Supreme Court precedent at least as early as 1901. JA 135-36 n.3. It also conceded that, before the FARR Act, "judicial review of extradition decisions by the Secretary were precluded." JA 140-41 (citing *Peroff v. Hylton*, 565 F.2d 1099, 1102 (4th Cir. 1977)). The district court nevertheless viewed the key question as whether, when it passed the FARR Act, Congress meant to "specifically preclude" habeas review of claims under the Convention Against Torture. JA141.

The district court concluded, again relying heavily on *Cornejo-Barreto*, that, because in Section 2242 of the FARR Act Congress did not expressly preclude habeas jurisdiction, the Government's motion to dismiss based on the Rule of Non-Inquiry should be denied. The court therefore enjoined the Government from turning Mironescu over to Romanian officials. Further, the court determined that it must examine the Secretary of State's actual reasoning (which could include reviewing confidential diplomatic dealings between the United States and Romania) regarding Mironescu's torture claims. The court provided that the Government could file its records under seal "so as to reduce any concerns as to foreign policy." JA 144.

SUMMARY OF ARGUMENT

Our argument that the district court erred here is straightforward because we believe that the court asked the wrong question. The district court looked for unequivocal evidence that, when Congress passed Section 2242 of the FARR Act in 1998, it meant to and did preclude habeas jurisdiction of claims being raised under the Convention Against Torture, such as Mironescu's assertions here. The proper question instead was whether, because Congress enacted the FARR Act with the Rule of Non-Inquiry as an essential part of the established extradition legal framework, did it intend to, and indeed actually legislated, an abrogation of that venerable doctrine. There is no evidence of such a legislative intent or action, and neither the district court nor Mironescu has pointed to any. Accordingly, the Rule of Non-Inquiry should have governed here, as it had governed challenges to extradition decisions for decades.

As explained above, the Rule of Non-Inquiry establishes that claims about how a fugitive will be treated by the receiving country are properly made to the Secretary of State, and are not appropriate for judicial consideration. The Rule of Non-Inquiry therefore defeats Mironescu's claim for habeas relief unless he can demonstrate that

the Torture Convention, the FARR Act, or the APA abrogates it. Actually, the opposite is true – there is no evidence that the President or Congress meant to, or did, bring about a radical change in extradition practice by making the Secretary’s surrender decisions judicially reviewable in the FARR Act. Rather, the evidence points to the conclusion that the political branches intended to continue in force longstanding federal law and efficient extradition processes compatible with international law enforcement cooperation. Further, nothing in the APA changed to suddenly make extradition challenges reviewable under that statute when they had not been justiciable before.

Thus, the district court erred by not dismissing this case, and by requiring the Secretary to submit the record behind her decision, which could include discussion of highly confidential dealings between the United States and Romania.

ARGUMENT

I. Standard Of Review

Although this appeal seeks review of a preliminary injunction, because the district court’s decision was based purely on an interpretation of law, that court’s decision is freely reviewable by this Court on appeal. See *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006); *Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002). “A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996).

II. The Rule of Non-Inquiry Governs Extradition Proceedings

As discussed earlier, under the Rule of Non-Inquiry “an extraditing court will not inquire into the procedures or treatment awaiting a surrendered fugitive in the requesting country.” *Lopez-Smith*, 121 F.3d at 1326-27. “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. Accord *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”); *Kin-Hong*, 110 F.3d at 110 (the “rule on non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers”). 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*, 268 U.S. at 312.

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 a 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).

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 and the State Department’s implementing regulations. 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 noted earlier, 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.

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. See *Peroff*, 563 F.2d at 1102 (“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.

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. 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.

Even if confidentiality of communications and judgments can 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 Romanian government's desire to obtain the return of Mironescu to serve his sentence has been frustrated for several 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.

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. The district court therefore should have dismissed this case, and should not have required the Secretary to submit the record concerning her decision to extradite Mironescu.

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

The ruling by the district court here depends on the conclusion that, in the FARR Act, Congress abrogated the Rule of Non-Inquiry, as well as all of the case law applying it. The Ninth Circuit's opinion in *Cornejo-Barreto* reasons 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 Convention Against Torture that it carries out, demonstrate that 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 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 her various diplomatic tools and sources of information, and to decide if extradition can proceed consistently with the terms of the FARR Act and the Convention Against Torture.

A. 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 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, Mironescu has pointed 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, Mironescu’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 that statute 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 Immigration and Nationality Act.

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)), requires the conclusion that Congress did not intend to create judicial review of extradition claims under the FARR Act.

B. The regulations promulgated by the State Department under the express authority of the FARR Act firmly support the proposition that nothing in that statute 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.

The State Department 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).

C. In addition, the Convention Against Torture cannot itself serve as the source of a cause of action in court by Mironescu. As explained earlier, 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 Convention Against Torture, 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).

As this Court has made clear, a treaty is an agreement between or among two or more nations, and is “not presumed to create rights that are privately enforceable.” *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). A non self-executing treaty does not create obligations enforceable in the federal courts, even when, by its terms, that treaty protects individual civil rights. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

This Court has already ruled that the Convention Against Torture is not self-executing. See *Malm v. INS*, 16 Fed. Appx. 197, No. 00-2371 (4th Cir. Aug. 10, 2001) (copy attached hereto pursuant to 4th Cir. Rule 36(c)); accord *Auguste*, 395 F.3d at 132-33 & n.7, 140; *Raffington v. Cangemi*, 399 F.3d 900, 903 (8th Cir. 2005);

Reyes-Sanchez v. Attorney General, 369 F.3d 1239, 1240 n.1 (11th Cir. 2004); *Castellano-Chacon v. INS*, 341 F.3d 533, 551 (6th Cir. 2003).

Accordingly, the Senate’s declaration that Article 3 of the Convention Against Torture was not “self-executing” establishes that, at the time of ratification, the Senate did not intend to create any judicially enforceable rights. And, habeas relief is not available for an alleged violation of a treaty that is not self-executing. See *Wesson v. U.S. Penitentiary*, 305 F.3d 343, 348 (5th Cir. 2002).

D. 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, Mironescu’s argument that the courts 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 some courts have 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 Ninth Circuit 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 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, when the FARR Act was passed, the established law, 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.

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

The district court nevertheless postulated that (JA 140-41) the APA provides a basis for the courts to overrule extradition determinations by the Secretary of State based on the courts' judgments about foreign legal systems. This theory is mistaken, as shown by the fact that the 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.

A. 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, 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, require 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 tradition of no judicial review by applying the Rule of Non-Inquiry on numerous occasions. And, as argued previously, 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 claim under the Convention Against Torture is "agency action [that] is committed to agency discretion." 5 U.S.C. § 701(a)(2). In determining which categories of administrative decision are not reviewable under Section 701(a)(2), 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*, 508 U.S. at 192 (citing *Webster*).

For the reasons already described above, 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 *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (“Congress is presumed to enact legislation with knowledge of the law”). 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.

B. 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, 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.

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.

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

Precedents from the Supreme Court and the Circuits, combined with the unique responsibilities of the Secretary of State that were established during the ratification process of the Convention Against Torture 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.

A. 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. The courts of appeals 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, the Ninth Circuit 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 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, the habeas statute should not now suddenly be read to provide jurisdiction that has never been recognized in the past.

B. In attempting to overcome this serious problem, the district court relied on (JA 141-43) 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 judge's decision to certify a fugitive for extradition. However, nothing in *St. Cyr* requires that this Court should abruptly 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 the district court's reliance on *St. Cyr*, 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. The courts repeatedly have affirmed this allocation of responsibility, and 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.

C. The district court further pointed out (JA 142) that the courts of appeals have found that Congress did not through the FARR Act eliminate habeas jurisdiction invoked by individuals in immigration removal proceedings. See, *e.g.*, *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 the courts of appeals 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 could 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 – either through passage of the FARR Act or otherwise – since the many rulings applying that doctrine, to cause a change of 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, the preliminary injunction entered by the district court, and the order to submit the Secretary's record should be vacated, and this case should be dismissed.

Respectfully submitted,

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May 2006

REQUEST FOR ORAL ARGUMENT

The United States respectfully requests oral argument in this case because it raises an issue of first impression of considerable importance to the foreign relations of the United States, and its ability to speedily and efficiently carry out appropriate extraditions.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 10,229 words in the brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2006, I caused the foregoing brief to be served upon the Court by causing the correct number of copies to be delivered via Federal Express service to the court clerk, and caused two copies to be delivered by electronic mail and by Federal Express service to the following counsel:

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