Supreme Court of the United States

Richard Schwartz v. The United States of America

By Tyler Hall

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 48-15162-342

RICHARD M. SCHWARTZ,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA
Respondent-Appellee

PRIOR HISTORY: Appeal from the US District Court for the Eastern District of Pennsylvania

DISPOSITION: Affirmed

JUDGES: Before ALLEN, Walter R, PIERCE, Paul A, and GARNETT, Kevin M, Circuit Judges

MAJORITY OPINION BY: ALLEN, Circuit Judge
CONCURRING OPINION BY: PIERCE, Circuit Judge
DISSENTING OPINION BY: GARNETT, Circuit Judge

BACKGROUND

Richard Schwartz is a United States citizen accused of trafficking heroin between the US and Thailand. The Thai

government, seeking to try Schwartz on charges of non-violent drug trafficking, requested that the US extradite him to Thailand. As per the US-Thailand Extradition Treaty ratified in 1983, the United States government complied with this request.[1] The US arrested Schwartz and held an extradition hearing to determine if there was probable cause—a requirement before the US can legally extradite a person.[2] In the hearing, Judge Connor McManus ruled in favor of the government and ordered that Schwartz be taken into custody and extradited to Thailand.

Schwartz then petitioned for a writ of Habeas Corpus citing several arguments. First, he argued that a trial in Thailand would not have the same procedural safeguards as a trial in the United States. Consequently, extradition to Thailand would deny him the rights guaranteed to him under the Fifth Amendment. The Fifth Amendment states that "no person shall be…deprived of life, liberty, or property, without due process of law." Secondly, he claimed that extradition would deny him his Eighth Amendment protection against "cruel and unusual punishment," since Thai law allows for the death penalty for persons convicted of non-violent drug offenses. He did not, however, dispute the facts as decided by Judge McManus. He did not dispute that there existed probable cause for his extradition; he only disputed that extradition to Thailand would violate his constitutional rights.

On appeal, in the District Court hearing on Schwartz's Habeas petition, the US government argued that the Courts of the United States have long held a policy of not inquiring into extradition procedures. The judicial system of the requesting country, and any potential flaws it may have, are not issues that the Judge may examine.[3] Judge Warren Griswold agreed and denied Schwartz's petition. Because no inquiry was made into Thailand's court system, no judgment was made on whether or not it contains due process safeguards or permits cruel and unusual punishments. Following Judge Griswold's decision, Schwartz then appealed to this court.

EXTRADITION IN THE UNITED STATES

Extradition is the process in which an alleged criminal is rendered from the asylum state, where he or she is located, to the requesting state, where he will face prosecution for his alleged crimes. Extradition was originally a power of the Executive, independent of the judiciary branch of the government. For instance, the first US extradition agreement was with Great Britain, and it was implemented as a part of the Jay Treaty of 1794.[4] The agreement stated only that the executives in each country should surrender the alleged criminal; it made no reference to the judiciary.

Today, the United States is party to over 100 extradition agreements. Most extradition agreements, including the one between the US and Thailand, give primary responsibility for extradition to the President and the Secretary of State. They have the ultimate authority in determining whether or not the US will extradite an individual.[5] Nevertheless, before an individual can be extradited, an extradition hearing must take place before a federal or state judge. This is a limited hearing, where the presiding judge is limited to determining the validity of the treaty, and whether there is probable cause to believe the individual facing extradition committed the crime he is accused of. Traditionally, the courts do not inquire into the motivations or judicial systems of the requesting state, nor do they look into the conditions the accused individual faces if extradited. This refusal to examine the conditions in the requesting country has become known as the rule of "non-inquiry."

THE RULE OF NON-INQUIRY

The rule of non-inquiry arose not in foreign extraditions, but in extradition agreements between states within the US. The policy of non-inquiry was developed to facilitate the extradition of fugitive slaves from northern states (which had abolished slavery) back to southern states. Non-inquiry allowed the courts to bypass the different slavery laws in the north and south.[6] The rule outlasted the end of slavery, however, and eventually became an explicit part of US law. The Supreme Court approved the rule of non-inquiry in *Neely v. Henkel* (1901),

where it upheld the extradition of an American citizen to Cuba. Writing for the majority, Justice Harlan stated:

> "The provisions of the U.S. Constitution relating to the writ of habeas corpus ... have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[7]

Non-inquiry persists today largely because judges presume that if the individual was in danger of unfair treatment in the requesting country, the Secretary of State would simply deny the extradition request. Lower courts have upheld the non-inquiry rule even when faced with the possibility of a defendant being subject to torture or murder in the requesting country.[8]

LIMITATIONS TO NON-INQUIRY

Attempts to weaken and attack the rule of non-inquiry on constitutional and humanitarian grounds can generally be traced back to *Gallina v. Fraser*, a 1960 decision of the Second Circuit Court of Appeals. Gallina, a US citizen, was convicted in absentia in Italy, which subsequently sought his extradition from the US. Gallina argued that if extradited, he would be imprisoned without a retrial, something which would violate his due process rights. Though the Second Circuit upheld his extradition, it noted its reservations concerning the rule of non-inquiry. The court discussed that it might be appropriate to reconsider the rule in cases where a defendant faced procedures sufficiently "antipathetic to a federal court's sense of decency."[9]

Though the Supreme Court has never addressed the *Gallina* opinion—and indeed, has not examined the rule of non-inquiry since *Neely v. Henkel in* 1901—the Second Circuit itself has expressed a strong endorsement for *Gallina.* In *Rosado v. Civiletti* (1980), the circuit court cited *Gallina* in stating that "the presumption of fairness routinely accorded the criminal process of a foreign sovereign may require closer scrutiny if a relator persuasively demonstrates that extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency.'"[10]

Additionally, the Second Circuit tried in that case to limit the applicability of *Neely*, arguing that *Neely* simply held that a defendant "cannot prevent his extradition *simply by alleging* that the criminal process he will receive fails to accord with constitutional guarantees."[11] The implication is that if a defendant could prove that he faced unfair criminal proceedings upon extradition, he could prevent his extradition.

More recently, the Ninth Circuit Court of Appeals decided the case of *Paretti v. United States*. Breaking with the Supreme Court's holdings in *Neely*, the Ninth Circuit found that Fourth Amendment protections apply to extradition procedures.[12] Referring to the federal government, the Fourth Amendment states that "no warrants shall issue, but upon probable cause." This protection, which requires that the government present reasonable evidence before receiving a warrant from a judge, is one of the most fundamental constitutional safeguards in domestic criminal trials. Before *Paretti*, the government had not been required to present evidence to obtain a warrant for the arrest of an alleged criminal in an extradition matter.

The Ninth Circuit then went on to overturn another long-held principle of extradition—that a fugitive arrested on an extradition warrant should be denied bail. The court ruled that the burden of proof rested upon the government to prove that the defendant presented a flight risk, and thus should be denied bail. Previously, the burden had been upon the defendant to prove that he was not a flight risk. To justify this change, the Ninth Circuit held that a denial of bail amounts to a violation of the Fifth Amendment if the government cannot show that the defendant is a flight risk.[13]

In a more general sense, the US Supreme Court has held in *Reid v. Covert* (1957) that the Constitution is applicable on foreign soil when a case involves a US citizen and the violation of fundamental constitutional rights. Though *Reid* implies a broad view of constitutional protections for individual rights, it referred only to a case where an individual was under the control of US officials. A court has yet to find a defendant's

treatment by foreign officials on foreign soil to be within the scope of constitutional protections.[14]

EXTRADITION AND FOREIGN POLICY CONSIDERATIONS

In evaluating current extradition procedures and the rule of non-inquiry, courts must also take into account the implications for US foreign policy. For example, in *In re Geisser* (1981), the Fifth Circuit refused to block the defendant's extradition to Switzerland. In the decision, the court noted that Switzerland was representing the United States in negotiations during the Iran hostage crisis. The Fifth Circuit remarked that "[t]his Court cannot conclude that the case of [this defendant] must take precedence over the other important friendly and cooperative relationships between the two nations involved."[15]

In addition to greater knowledge of US foreign affairs, the Secretary of State is able to operate with more flexibility than the courts. Whereas the judiciary can only deal in the absolutes of allowing or denying extradition, the Secretary of State can extradite subject to conditions, such as a guarantee that the requesting country will not seek the death penalty. Finally, a decision by the judiciary not to extradite could affect the relationship between the US and the requesting country. At the least, it might offend the requesting country and adversely impact the ability of the United States to obtain fugitives from other nations.[16]

It can be argued, however, that these foreign policy considerations are outweighed by the potential of the executive branch to violate the constitutional rights of individuals. As Alexander Hamilton, a principal framer of the US Constitution, stated in *The Federalist Papers*, the judiciary was designed to be an "excellent barrier to the encroachments and oppressions of the representative body." If one agrees that the judiciary is the only branch that can provide "impartial administration of the laws," then perhaps the rights of the individual outweigh the foreign policy concerns of the executive branch.

OPINIONS OF THE THIRD CIRCUIT

ALLEN, Circuit Judge, Joined by PIERCE:

In this case, an appeal from the US District Court for the Eastern District of Pennsylvania, the petitioner asks us to bar his extradition to the Kingdom of Thailand on the grounds that such an extradition would violate the rights accorded to him under the Eighth Amendment and the Due Process Clause of the Fifth Amendment. Fundamentally, this case presents us with two basic questions.

First, is it within the scope of this court to examine and pass judgments upon the laws and judicial proceedings of Thailand?

Second, if that inquiry is within our reach, do we find proof that the petitioner will likely be "deprived of life, liberty of property, without due process of law" or be subjected to "cruel and unusual punishments"?

Only if we answer "yes" to both of these questions can the petitioner's extradition be overturned. We will first address the question of inquiry into Thai law.

The doctrine of non-inquiry was first articulated by the Supreme Court in the US Supreme Court case of *Neely v. Henkel* (1901), where Justice Harlan stated that "[t]he provisions of the U.S. Constitution…have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[17] This is a strong and unambiguous precedent from the high Court, and it has not been addressed or overturned by the Supreme Court. That is evidence enough for this court to deny the claims of the petitioner and affirm the ruling of the district court.

Furthermore, though the Supreme Court has had no need to rule on the issue of non-inquiry since the *Neely* decision, the question has since been raised before several circuit courts. None have overturned the rule of non-inquiry. In fact, in the case of *Ahmad v. Wigen* (1990), the Second Circuit refused to inquire into the petitioner's claims that he would be tortured and denied a fair trial upon his extradition to Israel. The court stated that "[i]t is the function of the Secretary of State to

determine whether extradition should be denied on humanitarian grounds."[18]

In conclusion, we see absolutely no reason to abandon the long-held and respected precedent of the Supreme Court. Because we uphold the rule of non-inquiry, there is no need to examine the court system of the Kingdom of Thailand. The judgment of the district court is affirmed, and the extradition of the petitioner shall proceed at the discretion of the Secretary of State.

So ordered.

* * *

PIERCE, Circuit Judge, Concurring:

Though I agree with my esteemed colleague that the Supreme Court decision in *Neely* provides ample support for the rule of non-inquiry, I wish to address claims that the value placed upon individual rights since the *Neely* decision should render it—and the non-inquiry doctrine—obsolete. I certainly acknowledge that over the past century, criminal defendants have been granted increasingly valuable rights. See cases such as *Weeks v. United States* (1914), *Brown v. Mississippi* (1936), *Miranda v. Arizona* (1966), *Katz v. United States* (1967).

Yet the Supreme Court has also held that constitutional rights are not absolute and inviolate. For example, in *Ferber v. New York* (1982), the Supreme Court held that the First Amendment right to free speech did not forbid states from banning the sale of child pornography. The Court held that the government's compelling interest in preventing the sexual exploitation of children outweighed the petitioner's right to free speech.[19]

Similarly, the issue of extradition contains government interests that outweigh any claims of individual rights by the petitioner. As courts have admitted, extradition cases often affect complex foreign policy matters. Furthermore, the full information surrounding these foreign affairs is often known only to high level members of the executive branch, but not the

judges who rule on extradition cases.[20] These policy implications are, however, known to the Secretary of State, an executive branch official who also has absolute discretion in refusing to extradite. Using the diplomatic weight of the United States, as well as his ability to deny all extraditions to an uncooperative country, the Secretary of State can work with requesting countries and ensure that extraditions take place only under sufficiently fair conditions. In addition, he can accomplish this without jeopardizing US foreign policy interests—interests that are, with the US now involved in a global war on terror, certainly compelling.

Finally, inquiry into foreign judicial procedures would be wholly impractical in its implementation. Most notably, the evaluation of foreign judiciaries is a difficult task. It is inevitable that different courts, applying different subjective standards, would reach different results as to the validity of foreign courts. This would be in stark opposition to *Holmes v. Jennison*, an 1840 Supreme Court case that recognized the importance of "uniformity" in extradition decisions.[21]

In sum, while one should appreciate of the broadening of individual rights that took place during the twentieth century, that broadening of rights is sufficient neither to overrule a Supreme Court precedent nor to outweigh the tremendous practical and foreign policy implications that elimination of the rule of non-inquiry would have.

Therefore, I **concur.**

* * *

GARNETT, Circuit Judge, Dissenting:

Though I agree with my colleagues that the first fundamental issue in this case is a challenge to the rule of non-inquiry, I believe they have erred—and erred grievously—in upholding that rule.

The main argument in favor of non-inquiry is the infamous 1901 Supreme Court decision of *Neely v. Henkel*. Those in favor of

non-inquiry claim that this century-old decision should be followed without question. The Constitution, though, was designed to be a fluid and living document, not a weight to drag America into an archaic past. The founders thus wrote into the constitution clauses which could and can be adapted to an ever-changing world. Congress is empowered to make all laws that it deems "necessary and proper," and the government is forbidden from violating an individual's "liberty." What a society considers "necessary and proper" and what rights it considers fundamental to "liberty" may change and adapt to the modern world. As Thomas Jefferson once said: "Laws and institutions must go hand in hand with the progress of the human mind."

With that concept as a background, we can understand the *Neely* holding for what it is today: an outdated and unjust decision. Over the past century, the Supreme Court has presided over an enormous and unprecedented expansion of individual liberties. In 1901, when *Neely* was decided, the ideas that a court could throw out illegally obtained evidence[22] or that a police officer must read a suspect his or her rights upon an arrest[23] would have seemed unconscionable. Today, both precedents are universally accepted as necessary and just protections for criminal defendants.

Though the Supreme Court has not addressed the non-inquiry doctrine since its original decision in 1901, several circuit courts have, in recent decades, held that the rule of non-inquiry is flawed and limited. Though the Second Circuit upheld the non-inquiry rule in its 1960 *Gallina* case, it "confess[ed] to some disquiet"[24] over the rule and stated that reconsideration might be necessary when an individual faced judicial proceedings that were sufficiently "antipathetic to a federal court's sense of decency."[25] The Second Circuit confirmed this distaste for the non-inquiry rule in *Rosado v. Civiletti* (1980), where it held that the US Constitution "does govern the manner in which the United States may join the effort"[26] of a foreign government to restrict the rights of a defendant. This does not imply that a US court may inquire into the judiciary of the requesting country, but that it *must* inquire into the laws of the requesting country. This is particularly true when the

requesting country's laws shock the conscience, and an execution for a non-violent crime certainly does.

The Ninth Circuit has also begun to take the bountiful harvest of constitutional liberties that are accorded to domestic criminal defendants and apply them to extradition defendants. In the landmark decision of *Paretti v. United States* (1997), the Ninth Circuit held that many of the fundamental rights inherent in the Fourth and Fifth Amendments apply to defendants in extradition hearings.[27] *Paretti* is yet another modern example of a court realizing that it is well past time that our archaic extradition laws caught up to the liberties and protections that are the bedrock of our current society.

This progress is not found only within the United States, either. Both Canada and the United Kingdom have traditionally utilized a system of judicial non-inquiry similar to that of the United States.[28] In the British case of *Soering v. United Kingdom* (1989), the European Court of Human Rights forced the UK to deny extradition of an admitted murderer to the United States, where he may have received the death penalty.[29] The court also ruled that the UK's extradition procedure violated the European Convention on Human Rights because it did not allow the judiciary to inquire into potentially unfair treatment in the requesting country.[30] Furthermore, Canada traditionally applied a non-inquiry system nearly identical to ours. Courts could not deny extradition, and the power instead resided with the Canadian Minister of Justice. In the 2001 case of *United States v. Burns*, the Canadian Supreme Court overturned the non-inquiry rule, holding that the Minister of Justice could not extradite a defendant to the United States (where he might face the death penalty) at least without assurances from the US that capital punishment would not be imposed.[31]

Proponents of non-inquiry also claim that judicial review of foreign courts is either unnecessary or outweighed by the harm it might cause to US interests abroad. These claims are not only false, but run counter to the spirit and purpose of the American judicial system. Some might claim that inquiry is unneeded because the United States would not enter into an extradition treaty with countries known to be unjust. Yet the

United States currently has extradition treaties with four countries—Burma, Cuba, Haiti, and Zimbabwe—which are listed among the 18 worst violators of human rights.[32]

Similarly, the mere possibility that US foreign policy may be impacted by our denial of extradition is not sufficient to justify the denial of fundamental rights. My esteemed colleague argued that constitutional rights are not absolute. He was correct in that assessment, but incorrect in determining that those rights are inapplicable to extradition proceedings. In assessing a law that infringes upon a constitutional right, courts must balance the necessity of the law against the harm being done to the constitutional right. It is true that in *Ferber*, the Supreme Court held that free speech was trumped by the government's interest in protecting children.[33] *Ferber* involved a certain and unimpeachable interest—protecting children from sexual exploitation—and only a minor intrusion into free speech protections. This case, however, involves an uncertain impact on US foreign affairs, and an intrusion that cuts to the core of due process and Eighth Amendment rights.

Given that the rights of the individual are, in this case, more important than the possible interests of the government, I see no reasonable way that the decision to extradite can be left to the executive branch. As a political branch, it is inevitable that the executive branch will place its own inferior interests above the interests of a defendant. Consequently, the decision to extradite must lie upon the judiciary, the only truly independent and impartial arbiter of justice. As the scholar Laurence Tribe so eloquently put it, it is the duty of the courts to "preserve from transient majorities those human rights and other principles to which our legal and political system is committed."[34]

Given the responsibility to look into the judicial procedures of a foreign country before condoning extradition, one can now turn to the much simpler question: Does Thai law violate the rights of the petitioner? As the Second Circuit held in *Rosado v. Civiletti*, a defendant cannot prevent his extradition simply by *alleging* that the criminal process he receives will fail to accord with constitutional guarantees."[35] This indicates that

the burden of proof rests with the petitioner to demonstrate that his rights will be violated. There is little evidence that the procedures of a Thai court would be sufficiently unjust as to constitute a violation of the petitioner's due process rights. However, the punishment of death for a non-violent drug offense is unquestionably a violation of the Eighth Amendment. In *Kennedy v. Louisiana* (2008), the Supreme Court held that "the death penalty should not be expanded to instances where the victim's life was not taken."[36] Not only is the petitioner being charged with a crime where the victim's life was not taken, he is being charged with a non-violent crime. Thus, extradition to Thailand would constitute a gross violation of the Eighth Amendment, and cannot be upheld.

In sum, the century-old rule of non-inquiry is ancient, unjust, and unnecessary. Judicial opinion, both here and abroad, is moving towards its elimination, and the possibility of foreign policy complications is not sufficient to warrant a denial of fundamental constitutional rights. Upon examination into the judicial procedures of the Kingdom of Thailand, it is apparent that the laws allowing a sentence of death are in clear violation of the petitioner's Eighth Amendment rights.

Therefore, I respectfully **dissent.**

ENDNOTES

[1] U.S.-Thail., arts. 3-7, Dec. 14, 1983, 1983 U.S.T. 418.
[2] *In re Extradition of Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986).
[3] *Neely v. Henkel,* 108 US 109; 21 S Ct. 302 (1901).
[4] Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-U.K., art. 27, 8 Stat. 116, 129.
[5] 37 Tex. Int'l L.J. 277
[6] Christopher H. Pyle, Extradition, Politics, and Human Rights 35-36 (2001).
[7] *Neely v. Henkel* 180 U.S. 109 (1901)
[8] *In re Singh*, 123 F.R.D. 127, 127-29 (D.N.J. 1987)
[9] *Gallina v. Frasier* 278 F.2d 77 (2d Cir.), *cert. denied,* 364 U.S. 851 (1960)
[10] *Rosado v. Civiletti* 621 F.2d 1179 (2d Circ.), *cert. denied,* 449 U.S. 856 (1980)
[11] *Ibid*
[12] *Paretti v. United States* 112 F.3d 1363, 1367 (9th Cir. 1997)
[13] *Ibid*
[14] 76 Cornell L. Rev. 1198 (1991)
[15] *In re Geisser*, 627 F.2d 745 (5th Cir. 1980), *cert. denied,* 450 U.S. 1031 (1981)
[16] 76 Cornell L. Rev. 1198 (1991)
[17] *Neely v. Henkel* 180 U.S. 109 (1901)
[18] *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir.), *stay denied,* 111 S. Ct. 23 (1990)
[19] *New York v. Ferber*, 458 U.S. 747 (1982)
[20] *In re Geisser*, 627 F.2d 745 (5th Cir. 1980), *cert. denied,* 450 U.S. 1031 (1981)
[21] *Holmes v. Jennison*, 39 U.S. 540, 578 (1840)
[22] The Exclusionary Rule, adopted in *Weeks v. United States*, 232 U.S. 383 (1914)
[23] The "Miranda Warning," adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966)
[24] *Gallina v. Frasier* 278 F.2d 77 (2d Cir.), *cert. denied,* 364 U.S. 851 (1960)
[25] *Ibid*
[26] *Rosado v. Civiletti* 621 F.2d 1179 (2d Circ.), *cert. denied,* 449 U.S. 856 (1980)
[27] *Paretti v. United States* 112 F.3d 1363, 1367 (9th Cir. 1997)
[28] 45 Washburn L.J. 657
[29] *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 478 (1989)
[30] *Ibid*
[31] *United States v. Burns*, 1 S.C.R. 283, 360 (2001)
[32] 45 Washburn L.J. 657
[33] *New York v. Ferber*, 458 U.S. 747 (1982)
[34] Blum, JM *Years of Discord: American Politics and Society, 1961-1974*. New York: WW Norton and Company
[35] *Rosado v. Civiletti* 621 F.2d 1179 (2d Circ.), *cert. denied,* 449 U.S. 856 (1980)
[36] *Kennedy v. Louisiana*, 554 U.S. ___ (2008)