1-1-1991

Abandoning the Rule of Non-Inquiry in International Extradition

David B. Sullivan

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation

David B. Sullivan, Abandoning the Rule of Non-Inquiry in International Extradition, 15 Hastings Int'l & Comp. L. Rev. 111 (1991). Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol15/iss1/5

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Abandoning the Rule of Non-Inquiry in International Extradition

By David B. Sullivan*
Member of the Class of 1992

The United States regularly extradites individuals to foreign countries to face trials for crimes they allegedly committed in those countries. United States courts do not inquire into the procedures or treatment which await these surrendered fugitives in the requesting countries. Instead, the courts apply a rule of non-inquiry, restricting their focus to the issues of whether sufficient evidence exists to extradite the relator and whether the terms of the extradition treaty have been met.

The rule of non-inquiry bars the courts from denying extradition even when it is clear that the relator will be the victim of torture or cruel and inhumane treatment. Torture and inhumane treatment have always been a widespread problem in many countries. Despite universal condemnation, credible claims of torture exist against more than one-third of the world's governments. Torture is used to extract information, suppress ideas, or simply torment persons perceived as enemies.

Claims by relators concerning their potential treatment in the requesting country fall within the exclusive purview of the executive branch of the United States government. The executive branch has exclusive discretion to decide whether to protect an individual from poten-

* B.A., University of San Francisco, 1989. The author dedicates this Note to George H. Sullivan, who practiced law in San Francisco from 1923 to 1990.
1. David Lauter, There's No Place to Hide, NAT'L L.J., Nov. 26, 1984, at 1. In 1982, the United States was involved in 350 extraditions, both as the sending and receiving state.
2. The relator is the person sought by the requesting state under the extradition treaty.
4. Karl R. Moor & Alan H. Nichols, Combatting Torture in the '90's, 17 HUM. RTS. 28 (1990). In Iran's prisons, whippings, burnings, electric shock treatments and mock executions persist. In South Korea, pro-democracy students and workers are beaten, water-tortured, and threatened with death. In Turkey, methods of torture against political prisoners include beatings of the soles of their feet, electric current applied to their genitals, and the extraction of teeth, fingernails and toenails. Other countries which have reputedly tortured persons are Libya, Burundi, Sudan, Sri Lanka, Somalia, Ireland, and South Africa. The United States is a party to bilateral extradition treaties with Turkey, Sri Lanka, Ireland, and South Africa.
tial human rights abuses in a foreign country.⁵ The Secretary of State has discretionary power to refuse, grant, or conditionally grant extradition on technical, political, or humanitarian grounds.

This Note will argue that the rule of non-inquiry should be discarded and replaced by a rule more sensitive to humanitarian concerns. A court should allow inquiry when the alleged offender presents evidence of treatment in the requesting state which is "antipathetic to a federal court's sense of decency."⁶ This standard would return to that which was first suggested in 1960, in dicta by the Second Circuit in Gallina v. Fraser,⁷ and was later recognized by many other courts. The Gallina dicta was excised by the Second Circuit in Ahmad v. Wigen in 1990.⁸ This Note proposes that the Gallina dicta be adopted as the standard of inquiry.

The Note begins with a short description of the international extradition process. Next, it sets forth the origins of the rule of non-inquiry and the dicta of Gallina v. Fraser. The Note then analyzes the most common arguments supporting the rule of non-inquiry and proposes a limited exception to the rule. The limited exception is supported by arguments, constitutional authority, and domestic and international precedent.

I. THE EXTRADITION PROCESS

Extradition is the "legal process based on a treaty, reciprocity, comity,"⁹ or national law, whereby one state delivers to another, a person charged or convicted of a criminal offense against the laws of the requesting state or in violation of international criminal law to be tried or punished in the requesting state."¹⁰ Absent a treaty obligation, however, international law imposes no duty upon a country to extradite a person who has sought asylum within its boundaries.¹¹

In the United States, international extradition is a national power controlled by the federal government and denied to the states.¹² The

⁵. See Quinn v. Robinson, 783 F.2d 776, 789 (9th Cir. 1986).
⁶. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960).
⁷. Id.
⁸. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).
⁹. "The principle of comity is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th Ed. 1990).
¹⁰. M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 405-06 (1986).
federal government controls extradition pursuant to federal statute and treaties with foreign governments. A foreign state must have signed a treaty with the United States in order to invoke the extradition process. The United States has bilateral extradition treaties with over 100 countries and is a party to a regional multilateral treaty with Latin American countries. Many of these treaties date back to the early 1900s. The United States is also a signatory to a number of multilateral conventions on various subjects of international criminal law which contain extradition provisions.

The extradition process has traditionally involved all three branches of government. The executive branch has the authority to grant extradition requests based on its power to conduct foreign affairs. However, the Senate has the power to "advise and consent" in treaty ratification. Extradition is also a legal process which is subject to judicial review and the constitutional protections relating to individual liberty.

A. Judicial Involvement in the Extradition Process

Judicial involvement in the extradition process is initiated when the requesting state submits a complaint charging the commission of a crime by the relator within its jurisdiction. At a hearing, a judge establishes the identity of the relator and determines whether the charges are ex-

17. The U.S. is a member of the Montevideo Convention, signed at Montevideo, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882, with seventeen Latin American states.
22. Id.
23. Id. at 418.
tradable under the treaty. The judge then decides whether the evidence presented in support of the request constitutes "probable cause" for extradition. The extradition hearing is not a full hearing on the merits of the case, and the actual guilt or innocence of the relator is not at issue in the hearing. The issue is limited to whether evidence exists to justify the extradition of the relator to the foreign jurisdiction where he or she will stand trial for the crimes charged. If the judge finds that sufficient evidence exists, the request will be certified and passed to the executive branch.

The federal judiciary must determine that the relator has been availed of all United States constitutional guarantees before the request will be certified. This requirement has long been perceived as essential. In 1852 United States Supreme Court Justice Catron wrote that "extradition without an unbiased hearing before an independent judiciary... [is] highly dangerous to liberty, and ought never to be allowed in this country." The federal extradition statute agrees with this proposition by providing for judicial determination of the propriety of the issuance of a certificate of extradition. This statute gives judges, as members of the least political branch, an important role in the extradition process. The court determines whether the relator is subject to extradition and, if so, must certify the supporting record to the Secretary of State. However, as Judge Friendly of the District of Columbia Circuit observed in In re Mackin, the certification itself is "non-judicial because the Secretary of State is not bound to extradite even if the certificate is granted."

Once a request for extradition has been certified, the Secretary of State determines whether or not extradition will be granted. The actual surrender of the relator to a foreign state is within the President's consti-

---

25. Collins v. Loise, 259 U.S. 309, 311-12 (1922). Under extradition treaties, the requesting state usually may seek extradition only if the offense is deemed a crime by both the requesting and requested state.
28. Id.
30. Id.; see also Factor v. Laubenheimer, 290 U.S. 276, 304 (1933).
31. BASSIOUNI, supra note 10, at 407.
34. Gill, 747 F. Supp. at 1038.
37. BASSIOUNI, supra note 10, at 424.
tutional power to conduct foreign affairs.38 The President, as a matter of practice, has delegated this power to the Secretary of State.39 The Secretary of State may exercise discretion to either deny, grant, or conditionally grant extradition40 for any reason including technical, political, or humanitarian concerns.41 As the Fifth Circuit Court of Appeals stated in Escobedo v. United States, "the ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its power to conduct foreign affairs."42

B. Judicial Review of Extradition Hearing

If the court certifies extradition, the relator has no statutory right to a direct appeal of the court's decision.43 However, the relator may seek collateral relief by petitioning for a writ of habeas corpus44 or by seeking a declaratory relief judgment to challenge the extradition order.45 A denial of habeas corpus may be appealed all the way to the United States Supreme Court.46

The scope of habeas corpus review by the courts generally has been restricted to questions relating to the identity of the relator, the existence of a treaty, the extraditability of the crime charged,47 the requirement of "double criminality,"48 the existence of probable cause, and the absence of any grounds for denial of extradition.49 Most courts have followed the Second Circuit's statement that "[r]eview by habeas corpus . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide."50 However, in 1984 the Seventh Circuit in In re Burt, stated that: "[F]ederal courts

38. Id.; see Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313 (1962); U.S. CONST. art. I, § 8, cl. 11.
39. BASSIOUNI, supra note 10, at 424.
41. See generally Note, supra note 38.
44. BASSIOUNI, supra note 10, at 421; Miller, 252 U.S. at 364.
45. See Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965).
46. BASSIOUNI, supra note 10, at 421.
48. Double criminality requires that the offense charged must also constitute a crime under the criminal laws of the requested and requesting state. BASSIOUNI, supra note 10, at 412.
49. Id. at 421.
50. Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (quoting Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965)).
undertaking habeas corpus review of extraditions have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights.”

The court thus asserted that federal courts could review substantive as well as procedural claims.

II. THE RULE OF NON-INQUIRY

The rule of non-inquiry has been invoked most often when the relator has raised concerns that he or she is likely to encounter treatment in the requesting state that is significantly offensive to the United States minimum standards of justice and basic human rights.

The focus of extradition hearings is restricted to whether sufficient evidence exists to extradite the relator and whether the terms of the applicable treaty have been met. Under the rule of non-inquiry, the court is barred from denying extradition even when it is clear that the relator will be the victim of torture or cruel and inhumane treatment.

Courts will not consider the criminal procedures in the requesting state, instead referring these concerns to the Secretary of State. In Garcia-Guillern v. United States, the Fifth Circuit observed that it was not “permitted to inquire into the procedure which awaits the appellant upon his return” to Peru. Similarly, in Peroff v. Hylton, the Fourth Circuit refused to consider the accused’s claim that he would be an assassination target in a Swedish prison. In Peroff, the court held that “[a] denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice.”

Courts also refuse to consider the threat of persecution, extreme forms of punishment, or other humanitarian concerns as a bar to extradition. A glaring example of non-inquiry into the threat of persecution is

51. In re Burt, 737 F.2d 1477, 1484 (7th Cir. 1984); see also Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).
54. INTERNATIONAL EXTRADITION, supra note 52, at 372.
57. Id.
the case of *In re Normano.* There, the District Court of Massachusetts refused to take judicial cognizance of the potential abuse that Normano, a Jew, might suffer at the hands of Nazi Germany during the 1930s. Similarly, in the case of *Escobedo v. United States,* Mexico sought the accused’s extradition on charges of attempted kidnapping of the Cuban consul and a related murder. The Fifth Circuit refused to entertain the accused’s objections to the Mexican criminal proceedings despite the fact that his confession to Mexican authorities may have been obtained by “means of torture.”

Finally, United States courts do not examine a foreign government’s motives for seeking extradition or the fairness of a foreign judicial system. *In re Sindona* is an example of the rule’s application. In that case, Sindona argued that his extradition should be denied because he would not receive a fair trial in Italy. He submitted affidavits swearing that he would likely be assassinated if extradited to Italy and that he

---

59. *Id.* at 330-31.
61. *Id.* at 1102 n.3.
62. See, e.g., Glucksman v. Henkel, 221 U.S. 508, 512 (1910) (“We are bound by the existence of an extradition treaty to assume that the trial will be fair.”); Quinn v. Robinson, 783 F.2d 776, 789 (9th Cir. 1986) (“[T]he Secretary of State has sole discretion to determine whether a request for extradition should be denied because it is a subterfuge.”), *cert. denied,* 107 S.Ct. 271 (1986); Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985) (“[T]his court will not inquire into the procedures which will apply after [the accused] is surrendered to Israel”); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) (“An extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country.”); Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir.), (The court, in declining to take judicial notice that Israel tortures prisoners stated, “[T]his court has no jurisdiction to determine the requesting country’s motives under this Treaty.”) *cert. denied,* 454 U.S. 894 (1981); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (“[T]he degree of risk to Sindona’s life from extradition is an issue that properly falls within the exclusive purview of the executive branch.”); Ihird v. Ferrandina, 536 F.2d 478, 484-85, (2d Cir.) (“It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.”); *cert. denied,* 429 U.S. 833 (1976) Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), (“Neither are we permitted to inquire into the procedure which awaits the appellant upon his return. . . Such matters . . . are left to the State Department. . .”) *cert denied,* 405 U.S. 989 (1972); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (“[T]he conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government.”); *In Re Locatelli,* 468 F. Supp. 568, 575 (S.D.N.Y. 1979) (“I am simply without jurisdiction to look behind the charges . . . and must . . . yield this inquiry to the Secretary of State.”); Ramos v. Diaz, 179 F. Supp. 459, 463 (S.D. Fla. 1959) (“The motive of the Cuban government in demanding the extradition of the Defendants is not controlling.”); *In re Lincoln,* 228 F. 70, 74 (E.D.N.Y. 1915), *aff’d per curiam,* 241 U.S. 651 (1916).
could not obtain a fair trial. He also offered press excerpts which indicated he would not be provided with a fair trial. The District Court for the Southern District of New York observed that only the Secretary of State could deny extradition for those reasons:

The general rule is that an argument of this kind is not properly addressed to the court in the extradition hearing, but must be made to the Department of State, which has the primary responsibility for determining whether the treaties with foreign countries are being properly respected and carried out. The Department of State has the discretion to deny extradition on humanitarian grounds, if it should appear that it would be unsafe to surrender Sindona to the Italian authorities.64

A. Origins of the Rule of Non-Inquiry

The rule of non-inquiry was set forth in 1901 in Neely v. Henke.65 In that case, Neely was an American citizen who was being extradited to Cuba on charges of embezzling from the Cuban postal department. He appealed the extradition decision, claiming that he would not receive the same due process guarantees found in the United States Constitution. The United States Supreme Court held that constitutional due process guarantees are inapplicable to extradition proceedings in foreign states for crimes committed outside the United States:66

[These] provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country. In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.67

The constitutional protection against “cruel and unusual” treatment is thus inapplicable to extradition proceedings.68 In 1972, in Holmes v. Laird, the District of Columbia Circuit cited Neely with approval. The court wrote that “surrender of an American citizen required by treaty for the purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects

64. Id. at 694.
66. Id.
67. Id. at 122-23.
68. BASSIOUNI, supra note 10, at 417.
equivalent to those constitutionally enjoined upon American trials." 69

The rationale for the rule of non-inquiry is that it is not the courts' business to assume responsibility for supervising the integrity of the judicial system of another sovereign nation. Such a role would directly conflict with the principle of comity upon which extradition is based. 70 In 1987, in *In re Extradition of Singh*, the New Jersey District Court found that conducting an evidentiary hearing on the practices of the government of India and the fate of the relators would "plainly 'establish an American position on the honesty and integrity of a requesting foreign government.'" 71 Moreover, any judicial determination of the requesting countries' criminal system might embarrass the United States and harm its foreign relations. 72

**B. The Dicta of Gallina v. Fraser**

In *Gallina v. Fraser*, decided in 1960, the Second Circuit court proposed an exception to the rule of non-inquiry. 73 In *Gallina*, Vincenzo Gallina was denied habeas corpus relief despite the fact that he would be imprisoned in Italy without an opportunity to defend himself. 74 The Second Circuit followed the rule of non-inquiry. However, the court in dicta noted that "we can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the [rule of non-inquiry]." 75 Thus, in some situations a court could inquire into the potential treatment a relator would receive in the requesting country and deny extradition where the relator would be subjected to inhumane treatment or punishment.

Although no court has expressly used the *Gallina* dicta as a basis for denying extradition, one district court did use the language from *Gallina* to grant a temporary restraining order which prevented extradition. In *Starks v. Seaman*, 76 Jan Starks was an American serviceman charged, tried, and convicted by a Chinese court for a drug offense. Starks was to be transferred to Chinese authorities under an executive agreement. 77

---

72. *Id*.
73. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960).
74. *Id.* at 78.
75. *Id*.
77. *Id*.
The Eastern District Court of Wisconsin, for the purposes of a temporary restraining order, found that Stark’s trial was a mockery of justice and that the executive agreement had therefore been breached. The court granted the temporary restraining order. Although the court based its decision on the breach of the executive agreement, the court quoted Gallina stating, “failure to grant a temporary restraining order in this matter would result in a ‘punishment . . . antipathetic to a federal court’s sense of decency.’” Although the temporary restraining order was issued, Stark’s motion for dismissal was denied.

The Gallina dicta recognizes a humanitarian concern for the relator and provides the judiciary with a limited exception to the rule of non-inquiry. While courts have repeatedly held that such inquiry is the exclusive province of the Secretary of State, they have at the same time repeated the Gallina dicta.

III. SUPPORT FOR THE RULE OF NON-INQUIRY

Many commentators and courts strongly support the rule of non-inquiry. Steven Lubet, Professor of Law at Northwestern University, argued for the validity of the rule of non-inquiry in testimony before the House Committee on the Judiciary. He stated that inquiries forbidden by the rule are inextricably tied to the formulation and conduct of foreign policy. Any erosion of the rule by the judiciary would be an encroachment upon the executive’s prerogative in foreign affairs. He also reminded the committee that a foreign nation may only request extradition pursuant to a valid treaty which has been negotiated and executed by the President and ratified by a two-thirds majority of the Senate. In other words, “a political decision already will have been made concern-

78. Id. at 1256.
79. Id. at 1257 (quoting Gallina v. Fraser, 278 F.2d at 79).
80. Id. at 1255.
81. See Quinn v. Robinson, 783 F.2d 776, 789 (9th Cir. 1986).
84. Id. at 95.
85. Id. at 96.
86. Id.
ing the general appropriateness of extradition to the foreign state.\textsuperscript{87}
Thus, the existence of a valid extradition treaty establishes the acceptability of trial procedures in the requesting state.\textsuperscript{88}

Two major reasons are put forth supporting the view that extradition decisions are an appropriate subject only for discretionary executive review: (1) the executive branch has foreign policy experience, and (2) the executive branch has flexibility in conditioning extradition. Furthermore, the Second Circuit has explicitly rejected \textit{Gallina}-style inquiry, stating that it is improper for courts to inquire into the conditions a relator may face upon extradition.\textsuperscript{89}

A. Experience of Secretary of State in Foreign Policy

Courts consistently hold that potential abusive treatment in a requesting country is an appropriate subject only for discretionary executive review.\textsuperscript{90} Courts take the position that the executive branch of government is responsible for the conduct of United States foreign policy.\textsuperscript{91} Thus, the judiciary is reluctant to question the good faith actions of a country with whom the United States has entered into an extradition treaty.\textsuperscript{92}

The Secretary of State is arguably in a superior position to the courts in considering the foreign relations consequences of denying extradition.\textsuperscript{93} The Secretary of State has experience in dealing with foreign countries and has access to both intelligence sources and diplomats. In addition, the Secretary of State has diplomatic tools not available to the judiciary, which can be used to ensure that the requesting state provides a fair trial.\textsuperscript{94} In \textit{Eain v. Wilkes},\textsuperscript{95} the Seventh Circuit accepted the reasoning that the Secretary of State is superior:

\begin{quote}
Evaluations of the motivation behind a request for extradition so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion . . . . Thus, the Judici-
\end{quote}

\textsuperscript{87} Id.
\textsuperscript{88} Glucksman v. Henkel, 221 U.S. 508, 512 (1910).
\textsuperscript{89} Ahmad v. Wiger, 910 F.2d 1063 (2d Cir. 1990). \textit{See infra} notes 102-119 and accompanying text.
\textsuperscript{91} \textit{See supra} note 62.
\textsuperscript{92} Glucksman, 221 U.S. at 512.
\textsuperscript{94} Id.
\textsuperscript{95} Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981).
ary's deference to the Executive on the 'subterfuge' question is appropriate since political questions would permeate any judgment on the motivation of a foreign government. 96

The good faith of the requesting state and possibility that the criminal charge is a cloak for political action against the relator is not within the scope of the court's proceedings. 97 Moreover, the Secretary of State can furnish the requested individual with adequate safeguards to ensure that the requesting country intends to live up to its treaty obligations. 98

B. Flexibility of the Secretary of State in Extradition

Determination of extradition by the Secretary of State offers more flexibility than by the judiciary. 99 The Secretary of State has the power to conditionally grant extradition subject to a variety of requirements. Furthermore, the Secretary of State, through its diplomatic channels, has the power to ensure that these requirements are met. For example, in Eain v. Wilkes, 100 the Secretary of State allowed an extradition only after Israel agreed to a number of conditions. Israel pledged that the accused would receive a public trial in a civilian court, that normal rules of criminal procedure would apply, and that the relator would have counsel of choice. Israel also agreed the prosecution would have to prove guilt beyond a reasonable doubt, that the relator would have a right of appeal if convicted, and that the death penalty would not be imposed. 101

Courts, on the other hand, have no power to attach conditions to extradition because they can only grant or deny certification of extradition. If courts deny certification, they must divest themselves of jurisdiction over the relators and let them go free. In In re Extradition of Singh, 102 the relators claimed that they would be denied a fair trial and faced torture or murder upon their return to India. They were prepared to present affidavits, press reports, and reports from Amnesty International to support their claim. The court, in applying the rule of non-inquiry, observed that the Secretary of State has much greater flexibility in extradition than the judiciary. The court stated that:

Were the court to conclude that defendants face 'torture and/or mur-

_________________________  
96. Id. at 518.  
98. In re Lincoln, 228 F. at 74.  
102. Id. at 127.
der upon their return to India,' the only alternative presumably open

to the Court would be to divest itself of jurisdiction over them. How-

ever, were the Secretary to make such a determination, he could never-

evertheless permit extradition, albeit subject to conditions.103

C. Rejection of Gallina Dicta

In Ahmad v. Wigen, the Second Circuit chastised the district court

for inquiring into the potential treatment that Ahmad might receive in

Israel after making a Gallina-style inquiry at a habeas corpus hearing.104

The relator in Ahmad petitioned the district court for a writ of habeas

corpus to prevent his extradition to Israel.105 He had been charged with

firebombing and firing automatic weapons on a passenger bus in territory

occupied by Israel. Ahmad contended that if he were extradited to

Israel, torture would be used to force a confession. He claimed that he

would not receive even a semblance of due process and that he would be

housed in indecent detention and prison facilities.106

The Eastern District Court of New York found that it was "empow-

ered to hold an evidentiary hearing to determine the nature of treatment

probably awaiting petitioner in a requesting nation."107 The court’s

opinion concluded that a due process exception to the rule of non-inquiry

was justified, and the court thus made an extensive inquiry into the evi-
dence supporting Ahmad’s claim.108 After this inquiry, the district court

found that the relator “failed to meet his burden of proving that, if extrad-
dited, he would be subject to procedures or treatment so offensive to our

country’s sense of decency as to obligate the court to block his extradi-
tion.”109 This was the first court to make such an extensive investigation

into a requesting country’s procedures. The district court cited the Gal-

lina dicta in justifying its extensive inquiry.110

Ahmad appealed the denial of the writ of habeas corpus to the Sec-

ond Circuit.111 The Second Circuit “question[ed] the district court’s de-
cision to explore the merits” of the petitioner’s contention.112 The

Second Circuit cited Gallina solely for the proposition that "considera-

103. Id. at 137.
104. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).
106. Id at 409.
107. Id at 410.
108. Id at 410-20.
109. Id. at 420.
110. Id at 413.
111. Wigen, 910 F.2d at 1063.
112. Id at 1066.
tion of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge.” 113 The court then went on to say that it was “improper” for the district court to “take testimony from both expert and fact witnesses and receive extensive reports, affidavits, and other documentation concerning Israel’s law enforcement procedures and its treatment of prisoners.” 114

The Second Circuit’s holding has had the effect of excising the dicta in Gallina v. Fraser from habeas corpus hearings. Thus, Ahmad v. Wigen holds that habeas courts have no cause to consider the conditions to which a relator may be subjected in the requesting country. 115 However, the ruling does not hold that such considerations are beyond the lawful purview of the extradition judge or magistrate at the certification hearing itself. 116

Subsequent decisions have reaffirmed the proposition that Ahmad v. Wigen has foreclosed a Gallina style inquiry in habeas corpus proceedings. In Gill v. Imundi, 117 the relators petitioned for a writ of habeas corpus in the Southern District Court of New York. They offered extensive evidence that they would be subjected to treatment antipathetic to a federal court’s sense of decency. 118 The district court observed that “this substantial, chilling proffer from sources with at least surface credibility had convinced this court of the justification for further judicial inquiry lest ‘we... blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction.’ ” 119 However, the court, citing Ahmad v. Wigen, held that although the Gallina claim was facially compelling, it could not be heard by the court and did not provide any basis for the grant of a writ of habeas corpus. 120 In sum, a judicial inquiry is now foreclosed to a habeas proceeding since Gallina’s dicta was rejected by the Second Circuit in Ahmad v. Wigen. 121

IV. PROPOSAL FOR A LIMITED EXCEPTION TO THE RULE

Judicial review of extradition requests should include an inquiry

113. Id.
114. Id. at 1067.
115. Id. at 1066.
118. Id.
119. Id. at 1048 (citing Ahmed v. Wigen, 726 F.Supp. 389, 410 (E.D.N.Y. 1989)).
120. Id. at 1050.
121. Id. at 1049.
into the circumstances that the relator will face in the requesting country following extradition. When the alleged offender provides evidence of potential mistreatment in the requesting state which is antipathetic to a federal court’s sense of decency, the extradition request should be denied. This standard is the same as that which was proposed in dicta in *Gallina v. Fraser*. There are several reasons why a limited exception to the rule of non-inquiry should exist: (1) the court is better equipped to protect the relator than the Secretary of State; (2) the existence of extradition treaties do not guarantee fair criminal procedures and punishment in the requesting country; (3) constitutional authority exists for denying extradition on humanitarian grounds; (4) the courts frequently decide the very same issues which a *Gallina* style inquiry would involve; (5) the United States-United Kingdom extradition treaty exemplifies an arrangement which allows judicial review of extradition requests and determination of the fairness of the requesting country’s judicial system; and (6) there is international precedent for refusing extradition because of potential mistreatment of the relator in the requesting country.

A. Inability of Executive Branch to Protect Relator

The most compelling reason for allowing the court to inquire into potential mistreatment of the relator is that present extradition procedures offer little protection to the relator. Currently, the relator’s only protection against unjust treatment is an appeal to the Secretary of State. The court is better equipped to protect the relator than the Secretary of State. A judge is in a better position to evaluate evidence concerning potential treatment of the relator in order to decide the issue fairly because courts have experience and procedures for evaluating such evidence.\(^{122}\)

Moreover, an executive decision to block extradition might place the United States in a position of embarrassment vis-a-vis a foreign government and could burden United States foreign relations. Alternatively, in order to avoid such embarrassment, the Secretary of State might ignore the relator’s claim and force the individual to suffer at the hands of the requesting state. The political implications of denying an extradition request might easily overshadow the humanitarian concerns for the individual in question.

Limited court review would benefit the executive by providing the

---

122. The Federal Rules of Evidence were designed specifically to aid the courts in evaluating evidence.
Secretary of State with a judicial shield in controversial cases. Any embarrassment to United States foreign policy is likely to be more attenuated if it is a court that questions the other country's good faith or procedures rather than the Secretary of State. Thus, limited judicial review may be more effective in preventing international conflict than a strict rule of non-inquiry.

Moreover, appeal to the executive branch has proven fruitless for most relators. The Secretary of State consistently refuses to consider allegations that the accused might not receive a fair trial in the courts of the requesting nation. The usual basis for this refusal is that one nation should not impugn the integrity of the tribunals of another nation. From 1941 to 1962, only two extradition requests have been denied by the executive branch. Each request was refused under an express provision of the extradition treaty. K. Eugene Malmborg, an Assistant Legal Adviser for the State Department, stated that during his fourteen years of experience he had no knowledge of any instance when the Executive branch had barred extradition, other than for relators who fell within the political offense exception.

B. Extradition Treaties Do Not Guarantee Fair Treatment

The United States has signed extradition treaties with some countries whose notions of due process and fair punishment are questionable, including Yugoslavia, Albania, South Africa, Rumania, Bulgaria, Ghana, Iraq, Paraguay, Poland, Zambia, and Haiti. Many of these countries have changed governments since the United States signed the treaties.


125. JOHN BASSETT MOORE, *EXTRADITION AND INTERSTATE RENDITION* § 376 (1891).

126. Id.


The political offense exception allows the United States courts to inquire into potential mistreatment of relators who are charged with political offenses. *See infra* notes 151-54, and accompanying text.


131. Id.
The existence of these new governments refutes the argument that Congress ratified the treaties based on its determination that the requesting countries' criminal procedures could provide a fair trial to the defendant. Therefore, Professor Steven Lubet's argument before the House Committee on the Judiciary that an extradition treaty represents Congress' political decision concerning the appropriateness of extradition is not always valid. Because some of these countries cannot guarantee what a United States court might consider a fair trial, the relator needs the extra protection suggested by the *Gallina* dicta.

C. Constitutional Authority

Several cases suggest that it may be unconstitutional for the United States to allow extradition where the relator may be subjected to inhumane procedures or punishment. Constitutional authority exists which would enable the judiciary to deny extradition on humanitarian grounds. Courts are not prevented by treaty or statute from inquiring into the potential treatment a relator might receive.

The Second Circuit has stated that the due process clause in the Constitution may bar extradition under some circumstances. In *Rosado v. Civiletti*, the defendants demonstrated that their convictions in Mexico "manifested a shocking insensitivity to their dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency." The defendants had been arrested, convicted, and sentenced to prison in Mexico for narcotics offenses. They were transferred to United States custody pursuant to a treaty under which each had voluntarily agreed to forego his right to challenge the validity of his Mexican conviction. The Second Circuit reversed the Connecticut District Court's grant of habeas corpus review and held that the defendants were estopped from arguing due process violations because of their voluntary waiver of the right to challenge their convictions. However, the Second Circuit stated that where evidence indicated officially sanctioned torture and abusive criminal proceedings, the presumption of fairness accorded to a requesting nation might be abandoned. The court also noted that constitutional due process guarantees might pose a barrier to extradition.

---

132. *See supra* note 86 and accompanying text.
134. Rosado v. Civiletti, 621 F.2d 1179, 1182 (2d Cir. 1980).
135. *Id.* at 1195.
136. *Id.* at 1195-96.
rule of non-inquiry as set forth in *Neely v. Henkel*, yet noted that the Constitution governs the manner in which United States officials may join in the efforts of the prosecuting country.\(^{137}\)

The Fourth Circuit in *Plaster v. United States* also discussed the constitutional limitations on the conduct of the United States government in the extradition process.\(^{138}\) In *Plaster*, United States law enforcement officials promised a United States serviceman immunity from criminal proceedings in exchange for his testimony in another case. Later, West Germany wanted to extradite him on murder charges. The court held that the breach of the immunity agreement constituted an impermissible violation of due process rights.\(^{139}\) The court, while acknowledging the wide scope of executive discretion in making the final extradition decision, reserved the power to review the constitutionality of the executive’s action.\(^{140}\) Regardless of obligations under the extradition treaty, the court held that the United States may not extradite an individual where such extradition would violate the individual’s constitutional rights.\(^{141}\) The Fourth Circuit stated that “the judiciary has jurisdiction to ensure that the executive’s power to extradite is not being exercised so as to violate individual constitutional rights.”\(^{142}\)

In *In re Burt*, the Seventh Circuit held that constitutional restraints are applicable to the government’s extradition decisions.\(^{143}\) This case involved a second defendant in the same incident as in *Plaster*. The court held that extradition decisions may not violate the basic notions of “fair play and decency” implicit in the due process clause of the 5th Amendment.\(^{144}\) The court also stated that such decisions must conform to “such other exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishment employed by the foreign jurisdiction.”\(^{145}\) Therefore, *In re Burt* appears to mandate constitutional restraints upon extradition where the relator may be subject to “atrocious procedures or punishment” after extradition.\(^{146}\)

---

137. *Id.*
139. *Id.* at 351.
140. *Id.* at 347-49.
141. *Id.*
142. *Id.* at 348.
143. *In re Burt*, 737 F.2d 1477, 1482 (7th Cir. 1984).
144. *Id.* at 1486-87.
145. *Id.* at 1487.
146. Hughes, *supra* note 133, at 309.
D. Public Policy

Although some foreign policy considerations necessarily arise in extradition cases, they should not necessarily preclude judicial inquiry. The Secretary of State contends that courts cannot or should not determine issues concerning the potential treatment of a relator and the nature of a foreign state’s criminal justice procedures. In fact, courts frequently decide the same issues which the Gallina dicta suggests the judiciary undertake.\(^\text{147}\)

Decisions with foreign policy implications are made when courts review the political asylum cases of the Immigration and Naturalization Service. In order to decide whether to grant political asylum to persons fearing persecution, courts take into account the treatment they might receive if returned to their home countries.\(^\text{148}\) The courts also review these considerations in hearing requests for political asylum and in cases brought under the Alien Tort Claims Statute.\(^\text{149}\)

Moreover, under the Protocol Relating to the Status of Refugees, courts may inquire into evidence of potential persecution awaiting refugees returned to their home countries.\(^\text{150}\) Refugee status must be granted prior to the inquiry into potential persecution.\(^\text{151}\) The Protocol defines a refugee as an individual who is unable or unwilling to return to the country of nationality or habitual residence due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . .”\(^\text{152}\)

Finally, the political offense exception to extradition allows United States courts to inquire into the potential for mistreatment in a foreign country. Under the political offense exception,\(^\text{153}\) United States courts

---

147. The court noted this fallacy in the government’s position in Quinn v. Robinson, 783 F.2d 776, 790 n.8 (9th Cir. 1986).
148. Kester, supra note 124, at 1481.
149. Hughes, supra note 133, at 316.
151. Protocol, supra note 150.
152. Id. art. 1(2). However, refugee status is not available to most individuals sought for extradition. Under the Protocol, those individuals believed to have committed a serious non-political crime outside the country of refuge and prior to admission as a refugee are excepted from refugee status. This exception in effect prohibits most persons who are to be extradited from qualifying for refugee status. Id.
153. The U.S. judiciary first applied the political offense exception, under which a requested state refuses to extradite a fugitive who has committed an offense of a “political” character, in the case of In Re Ezeta, 62 F. 972 (N.D. Cal. 1894) (holding that the judiciary was authorized to determine that murders taking place during a revolutionary uprising were nonextraditable political offenses).
are able to protect relators charged with political crimes from potential mistreatment by a requesting state.\textsuperscript{154} The exception is only available to those individuals who can prove that their alleged crimes constitute a political offense.\textsuperscript{155} Because cases involving political crimes are particularly vulnerable to fair trial problems in the requesting state, the political offense exception has enabled United States courts to deny extradition in this entire class of cases.\textsuperscript{156}

In sum, there are many situations in which United States courts inquire into a foreign country’s criminal justice procedures. The policy rationale for these inquiries should allow similar inquiry in extradition cases. The judiciary has the experience and resources to make such inquiries in extradition cases.

E. United Kingdom Extradition Treaty

The Supplementary Extradition Treaty with the United Kingdom\textsuperscript{157} expands the judiciary’s role by legislatively negating the rule of non-inquiry with regard to extradition to and from the United Kingdom.\textsuperscript{158} This provision was adopted in response to the questionable practices of the "Diplock" court system set up to preside over cases involving the Irish Republican Army in Northern Ireland.\textsuperscript{159} Because the rule of non-inquiry has been partially abandoned, it would not be difficult to allow the court to extend this abandonment to all relators.

Under Article 3(a) of the Supplementary Treaty, Congress has explicitly given the United States judiciary the responsibility for determining the motive underlying the United Kingdom’s extradition request and the fairness of its judicial system.\textsuperscript{160} The court has the power to deny extradition if it finds by a preponderance of the evidence that the United Kingdom’s motives are improper, or that its judicial system is unfair.\textsuperscript{161} Article 3(a) gives the relator the right to introduce evidence and to prove in court that the judicial system is unfair.

The Supplementary Treaty focuses on whether the relator qualifies for the political offense exception to extradition. Prior to the Supplemen-
tary Treaty, the scope of inquiry in determining whether extradition to the United Kingdom fell under the political offense exception was limited to an examination of whether the crime was incidental to, or in furtherance of, a political uprising or disturbance.\footnote{162}

F. International Examples of Refusal to Extradite

The decision by the European Court of Human Rights in the \textit{Case of Soering} represents an important international precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration, or lack of due process at trial in the requesting country.\footnote{163}

The European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."\footnote{164} The European Court of Human Rights recently applied this provision in the \textit{Case of Soering}, to prevent the extradition of Jens Soering from the United Kingdom to the United States.\footnote{165} Soering was charged with stabbing his girlfriend's parents to death in Virginia. Soering, who potentially faced the death penalty in the United States, claimed that to subject him to the "death row phenomenon" would constitute a violation of the European Convention.\footnote{166} While in England, he filed a complaint with the European Commission of Human Rights, which ultimately referred the case to the European Court of Human Rights.\footnote{167}

After considering criteria for assessing "torture, inhuman or degrading treatment or punishment," the European Court of Human Rights unanimously held that extraditing Soering to the United States under those conditions would violate the European Convention.\footnote{168} The court set forth factors to be considered in assessing what amounts to a violation. These factors include "all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in

\footnote{162. Scharf, \textit{supra} note 93, at 258.}
\footnote{165. 195 Eur. Ct. H.R. (Ser. A), \textit{reprinted in} 28 I.L.M. at 1069.}
\footnote{166. \textit{Id.}, \textit{reprinted in} 28 I.L.M. at 1088.}
\footnote{167. The European Commission of Human Rights and the European Court of Human Rights were both established in Article 19 of the \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms}, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). The Commission receives complaints of human rights violations and may direct the case to the Court of Human Rights if the legal issues require the Court's attention. The Commission and the Court convene in Strasbourg, France.}
some instances, the sex, age, and state of health of the victim."169 The European Court adopted the principle that an extraditing country is responsible for measuring the conditions in the requesting country to ensure that the relator will not be subjected to torture or inhuman or degrading treatment.

The U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment is another instrument which protects potential torture victims from extradition.170 In addition to protecting from extradition those who would be in danger of being tortured, the Convention directs the extradition or prosecution of suspected torturers.171 It defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."172 Although the United States signed the Convention on April 18, 1988, the Senate has yet to ratify the Convention. Moreover, the State Department has attached various proposed reservations, understandings, and declarations.173 Therefore, the Convention is not yet binding upon the United States.

United States courts may also be able to rely on the Universal Declaration of Human Rights,174 the International Covenant on Civil and Political Rights,175 and the Inter-American Convention on Human Rights to deny extradition requests.176 These instruments explicitly pro-

170. Convention against Torture and Other Cruel, Inhuman or other Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/RES/39/46 (1984) (entered into force June 26, 1987) [hereinafter Convention]. The Convention obligates parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" within their jurisdictions. Id. art. 2, ¶ 1. However, the countries most responsible for torture are the least likely to adopt the Convention.
171. Id.
172. Id. art. 1, ¶ 1.
173. Moor & Nichols, supra note 4, at 29.
174. Art. 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217 A, at 71 U.N. Doc. A/810 (1948).
176. Art. 5(2): "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." OAS Official Records Ser. K/XVI/1.1, Doc. 655, Rev. 1, Corr. 1, Jan. 7, 1970.
hibit the use of torture or cruel, inhuman, or degrading treatment or punishment.

These international examples demonstrate that the United States needs to do more to protect relators from potential mistreatment. European courts and the United Nations have adopted measures that can protect individuals from torture or inhuman or degrading treatment in requesting countries. By establishing a limited exception to the rule of non-inquiry, United States courts could also recognize the humanitarian concerns of relators.

V. CONCLUSION

In order to protect a relator from inhuman treatment following extradition, the United States judiciary should have the option of conducting an inquiry when the relator presents evidence of treatment which is antipathetic to a federal court's sense of decency. This standard would allow the courts to recognize humanitarian concerns at the extradition certification hearing. This standard would not overrule *Neely v. Henkel* because it would not require that the requesting state follow procedures identical to those of the United States courts. The standard would guard against torture and cruel and inhumane treatment.

The judiciary is in a better position than the executive branch to protect the relator from torture or inhumane treatment or punishment. The federal courts have established procedures for hearing evidence and could process allegations more efficiently and fairly than the executive branch. The inquiry could be incorporated into the extradition certification hearing and would have the added benefit of shielding the executive branch from any embarrassing political repercussions. The judiciary is empowered by the Constitution to make this type of inquiry.\(^{177}\) The courts presently decide the very same issues in different instances and are authorized by Congress to make this inquiry under the Supplementary Extradition Treaty with the United Kingdom. International courts and the United Nations have recognized that countries have an obligation to protect people from torture or inhumane treatment and punishment.

So that the United States will be able to protect the relator, federal courts must be allowed to inquire into the potential treatment of the relator in the requesting country. We must abandon the rule of non-inquiry in international extradition.

---

\(^{177}\) In re Burt, 737 F.2d 1477, 1487 (7th Cir.1984).