

Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense
[*Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005)]

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*[E]xtradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty, and ought never to be allowed in this country.*¹

I. INTRODUCTION

Early in its history, the United States extradited an alleged mutineer into the hands of Great Britain.² The British executed the man, and he became a martyr in the United States, which did not participate in another international extradition for forty years.³ Today, extradition is a common weapon in the undeclared “wars” of our time.⁴ When a U.S. court recently refused to deny the extradition of a U.S. citizen facing the death penalty as punishment for a non-violent drug crime, hardly anyone noticed.⁵

The Kingdom of Thailand has decided that using the death penalty as punishment for non-violent drug offenses is a necessary weapon in its “war on drugs.”⁶ In *Prasoprat v. Benov*,⁷ the United States Court of Appeals for the Ninth Circuit ruled that, even when a U.S. citizen may be executed as punishment for a non-violent drug offense, “foreign policy considerations” precluded the court from denying extradition to Thailand.⁸ Declining an opportunity to be the first U.S. court to apply the much discussed but never employed hu-

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1. *In re Kaine*, 55 U.S. 103, 113 (1852) (quoting Justice John Catron).

2. CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 35-36 (2001).

3. *Id.* at 37.

4. *See id.* at 3.

5. *See Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005). A Google search for the name of “Suwit Prasoprat,” the extraditee in this case, turns up only sixteen results; most are either from the website of an international criminal defense firm or the reprint of a small Reuters news blurb. Google.com, <http://www.google.com> (search “Suwit Prasoprat”).

6. Richard Hermes, *Blood on the Hands*, BANGKOK POST, July 18, 2005, available at 2005 WLNR 11259124; U.S. DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS, CONSULAR INFORMATION SHEET ON THAILAND (2006), available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1040.html [hereinafter INFORMATION SHEET].

7. 421 F.3d 1009 (9th Cir. 2005).

8. *Id.* at 1016.

humanitarian exception to extradition, the Ninth Circuit decided that “[a]n extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country.”⁹ As a result, a U.S. citizen faces a possible death sentence in the Kingdom of Thailand for an offense requiring an imprisonment term as brief as eight years in the United States.¹⁰ Following the rule of non-inquiry, the Ninth Circuit created dangerous precedent that permits U.S. authorities to develop a case against a U.S. citizen for the purpose of extraditing the citizen to a nation that imposes the death penalty for the alleged offense when punishment in the United States for that offense would be much less severe.

Since 1960, courts have been discussing the possibility of a humanitarian basis for refusing extradition.¹¹ Thus far, however, no circuit has denied extradition on humanitarian grounds.¹² *Prasoprat* provided the Ninth Circuit with the opportunity to transform the humanitarian exception from often-discussed dicta into important precedent. Rather than seizing this opportunity, the Ninth Circuit closed its eyes to the Constitution and *Prasoprat*’s fate, possibly turning the humanitarian exception into dead law and a U.S. citizen into a dead man. Instead, the Ninth Circuit should have applied the humanitarian exception to deny *Prasoprat*’s extradition. The arguments against applying the humanitarian exception are no longer viable, particularly in cases in which the extraditee may be executed. More importantly, to make the protections of the U.S. Constitution truly effective, an independent judicial review of extradition is required when the extraditee could be subjected to punishment that would violate the Eighth Amendment if applied in the United States.

II. CASE DESCRIPTION

In 1998, a confidential informant alerted the Drug Enforcement Administration (DEA) that Suwit *Prasoprat*, a United States citizen, was involved in smuggling heroin from Thailand to the United

9. *Id.* (alteration in original) (quoting *Prasoprat v. Benov*, 294 F. Supp. 2d 1165, 1171 (C.D. Cal. 2003)).

10. Appellant’s Opening Brief at 8, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253); Appellee’s Brief at 31 n.14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). If prosecuted in the United States, *Prasoprat*’s offense would have been punishable under 21 U.S.C. § 841(b)(1)(A)(i). Appellee’s Brief at 31 n.14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). The statute provides for a maximum sentence of life imprisonment and a statutory minimum of ten years in prison; however, if *Prasoprat* pleaded guilty, then he would have received a sentence for as little as ninety-seven months. Appellant’s Opening Brief at 30, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253); Appellee’s Brief at 31 n.14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

11. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) (noting that an extradition court may deny extradition when a defendant faces procedures in the requesting state that are “antipathetic to a federal court’s sense of decency”).

12. *See infra* note 92.

States.¹³ Upon receiving this information, the DEA began an investigation of Prasoprat that lasted several years.¹⁴ While investigating Prasoprat in the United States, the DEA taped two phone conversations between Prasoprat and a confidential informant regarding the delivery and distribution of heroin in California.¹⁵ The most definitive evidence against Prasoprat involved his activities in the United States, where he allegedly intended to collect the proceeds of the drug deal.¹⁶ Although the evidence supported heroin charges in the United States, domestic charges were not filed against Prasoprat.¹⁷ On May 17, 2001, the United States Attorney for the Central District of California filed a complaint seeking an arrest warrant to extradite Prasoprat to Thailand on drug charges.¹⁸ United States Magistrate Judge George T. Swartz issued the arrest warrant the same day.¹⁹ On May 31, 2001, authorities arrested Prasoprat.²⁰ After Prasoprat's arrest, United States Magistrate Judge Brian Q. Robbins conducted a detention hearing and ordered Prasoprat detained.²¹

The United States filed a request for extradition on June 15, 2001.²² Before the extradition hearing, Prasoprat filed a discovery motion requesting information regarding Thailand's use of the death penalty in drug cases.²³ U.S. Magistrate Judge Jeffrey W. Johnson presided over a hearing on February 5, 2002, and denied Prasoprat's request.²⁴ Prasoprat urged Judge Johnson to take judicial notice of several newspaper articles discussing Thailand's use of the death penalty for drug offenses and argued that his extradition should be denied

13. Appellant's Opening Brief at 10-11, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). In February 1999, a confidential informant told Agent Piamboon Tepsuporn that Prasoprat planned to receive a portion of the proceeds from a heroin shipment to the United States, which he would then share with investors in Thailand. *Id.* The DEA ordered surveillance of Prasoprat's home in Thailand. *Id.* at 12. In August of 1999, Agent Tepsuporn observed Prasoprat, the confidential informant, and two other men meeting at a coffee shop in Bangkok. *Id.* The confidential informant told Agent Tepsuporn that the purpose of the meeting was to plan a shipment of heroin to the United States. *Id.* On arrival in the United States, the heroin was delivered to an undercover DEA agent acting as a courier. *Id.* at 13. On September 1, 2000, Prasoprat traveled to Los Angeles, California. *Id.*

14. *Prasoprat*, 421 F.3d at 1012.

15. Appellant's Opening Brief at 14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

16. *See id.* at 12, 14.

17. *See* Appellee's Brief at 3, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

18. *Id.*

19. *Prasoprat v. Benov*, 294 F. Supp. 2d 1165, 1167 (C.D. Cal. 2003).

20. Appellee's Brief at 3, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

21. *Prasoprat*, 294 F. Supp. 2d at 1167.

22. *Id.*

23. Appellant's Opening Brief at 16, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). Prasoprat believed that, if extradited, he would face the firing squad. *Id.* Through the Internet and various newspaper articles, Prasoprat became aware of Thailand's use of the death penalty as punishment for drug offenses. *Id.* Prasoprat provided the magistrate with several of these newspaper articles. *Id.* Prasoprat also obtained evidence that drug suspects in Thailand were sometimes killed before conviction. *Id.* Prasoprat's motion for discovery requested "all documentation or any other evidence that shows the current Thai law, drug policies, penalties for drug offenses, and political agenda relating to drugs." *Prasoprat*, 294 F. Supp. 2d at 1167.

24. *Prasoprat*, 294 F. Supp. 2d at 1167.

on humanitarian grounds.²⁵ Judge Johnson determined that Prasoprat was extraditable, certifying the matter to the secretary of state on April 30, 2002.²⁶

On October 31, 2002, Prasoprat successfully filed for a stay of extradition to petition for a writ of habeas corpus, arguing that the magistrate should have granted his discovery motion and denied the extradition request on humanitarian grounds.²⁷ Judge Johnson recommended that the United States District Court for the Central District of California, Western Division deny Prasoprat's petition, and on November 25, 2003, the district court followed Judge Johnson's recommendation.²⁸ The district court determined that Judge Johnson's denial of discovery was appropriate because the court lacked discretion to inquire into whether Thailand would sentence Prasoprat to death if extradited.²⁹

Prasoprat filed a notice of appeal, and the district court certified the appeal to consider whether Judge Johnson wrongly denied Prasoprat's motion for discovery or erred by failing to deny his extradition on humanitarian grounds.³⁰ The Ninth Circuit affirmed the district court's decision denying Prasoprat's writ of habeas corpus.³¹ As a result, the secretary of state will review Prasoprat's extradition and render the final decision on whether to extradite him to Thailand.³²

III. BACKGROUND

International extradition has traditionally been viewed as an executive prerogative in which courts play an extremely limited, non-discretionary role.³³ In the past fifty years, however, courts have increasingly pondered the possible ramifications of extradition on individual rights.³⁴ Although discussing a humanitarian exception to

25. See Appellant's Opening Brief at 16, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). At least two of the newspaper articles were from the *Bangkok Post*. *Id.* at 16-17. The articles noted Thailand's use of the death penalty, quoted government officials calling for immediate execution of drug offenders, and praised police for the extrajudicial killing of drug suspects. *Id.*

26. Appellee's Brief at 8, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253). Certifying Prasoprat for extradition, the magistrate determined that there was probable cause to believe that Prasoprat met and discussed with several individuals the sale of heroin in Thailand. Appellant's Opening Brief at 14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

27. *Prasoprat*, 294 F. Supp. 2d at 1168. On December 23, 2002, Prasoprat filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (2000). *Prasoprat*, 294 F. Supp. 2d at 1168.

28. *Prasoprat*, 421 F.3d at 1013; *Prasoprat*, 294 F. Supp. 2d at 1165.

29. *Prasoprat*, 294 F. Supp. 2d at 1170.

30. *Prasoprat*, 421 F.3d at 1013.

31. *Id.* at 1017.

32. See *id.* at 1016; MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 292-93 (2001).

33. See Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 93 (1992).

34. See *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960); *United States v. Burns*, [2001] 1 S.C.R. 283, 360; *Netherlands v. Short*, 29 I.L.M. 1375, 1383 (Neth. 1990); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 478 (1989).

extradition since 1960, U.S. courts have fallen behind many of their international counterparts by failing to protect the rights of individuals wanted for extradition.³⁵

A. *The Evolution of American Extradition Law*

During the early history of the United States, international extradition was a rare phenomenon because America was traditionally viewed as a safe haven for individuals attempting to escape their pasts.³⁶ Thomas Jefferson noted that until most nations reform their criminal codes, “to deliver fugitives from them would be to become their accomplice.”³⁷ Jefferson recognized that “free governments, with laws equally mild and just, would find no difficulty in forming a convention for the interchange of fugitive criminals[,]” but he realized that most nations did not satisfy these requirements.³⁸ Therefore, Jefferson did not support extradition in most cases, and he reasoned that when extradition is permitted, it must be administered by an independent judiciary because the liberty of an individual is at stake.³⁹

Article 27 of the 1795 Jay Treaty with Great Britain represents our nation’s first international extradition agreement.⁴⁰ The treaty permitted extradition only for the crimes of murder and forgery.⁴¹ The only extradition under the treaty caused a political uproar.⁴² Thomas Nash allegedly participated in a mutiny after being impressed into service in the British Navy.⁴³ At that time, the procedure gov-

35. *Compare* *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999) (noting “scant authority for creating a humanitarian exception”), *and* *Hoxha v. Levi*, 371 F. Supp. 2d 651, 660 n.3 (E.D. Pa. 2005) (acknowledging allegations that U.S. authorities collaborated with foreign agents to send terrorist suspects to countries that use deplorable interrogation practices, but trusting the state department to refuse extradition if there are substantial grounds to believe the extraditee would be tortured), *with* *Soering*, 11 Eur. Ct. H.R. at 478 (refusing to allow extradition of an admitted murderer to the United States unless assurances were given that he would not be executed by U.S. authorities), *and* *Judge v. Canada*, U.N. Human Rights Comm., 78th Sess., para. 10.4, U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003), *available at* <http://www1.umn.edu/humanrts/undocs/829-1998.html> (last visited Apr. 9, 2006) [hereinafter UNHRC Communication] (ruling that nations abolishing the death penalty have a duty to refuse extradition when it is likely that the refugee will be executed).

36. *See* Abraham Abramovsky, *The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 HASTINGS INT’L & COMP. L. REV. 1, 8 (1989). The United States feared that extradition treaties may impede the influx of new immigrants. *Id.* Americans also mistrusted the monarchical regimes prevalent at that time and believed that the United States should be a place of refuge for those seeking asylum. *Id.*

37. *Id.* at 1 (quoting T. JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* (P. Ford ed. 1892-1899)).

38. PYLE, *supra* note 2, at 16.

39. *Id.*

40. ABBELL, *supra* note 32, at 1.

41. *Id.*

42. *Id.* at 2.

43. PYLE, *supra* note 2, at 26-27. The British used impressment as a method to staff their navy, abducting merchant sailors and forcing them to serve on military vessels for extremely low pay. *Id.* at 26. The English claimed that Thomas Nash was an Irishman who had volunteered for the British Navy; Nash claimed that his name was Jonathan Robbins and that he was an American who had been impressed into the British Navy. *Id.* at 30-36.

erning extradition was unclear, and in a decision that foreshadowed current extradition procedure, authorities brought Nash before a local judge who was directed to consider only whether there was sufficient evidence of criminality to prosecute Nash.⁴⁴ The United States extradited Nash into Great Britain's custody, and he was tried and convicted without counsel and executed.⁴⁵ The ensuing controversy resulted in demands for independent judicial review of extradition proceedings and ensured that Nash's extradition would be the last under the Jay Treaty.⁴⁶ After the treaty's lapse in 1807, the United States declined to enter into another extradition treaty until 1842.⁴⁷

In 1848, Congress enacted its first statute concerning international extradition.⁴⁸ The statute provided a structure similar to the current extradition process.⁴⁹ It granted U.S. Supreme Court Justices, U.S. district court judges, state court judges, and commissioners appointed by any U.S. court the power to issue arrest warrants for fugitives from foreign governments.⁵⁰ After a fugitive's arrest, these extradition magistrates would hold hearings to determine whether sufficient evidence of criminality existed.⁵¹ When such evidence did exist, the magistrate would certify the fugitive for extradition.⁵² This limited judicial role reflected the prevailing rule of non-inquiry in domestic extradition cases.⁵³

B. Current Extradition Procedure

Under U.S. law, a court may grant extradition to a foreign country only pursuant to the provisions of a treaty, unless the fugitive committed a crime of violence against a U.S. national abroad.⁵⁴ Any

44. *Id.* at 31-32.

45. *Id.* at 36.

46. Jacques Semmelman, *Federal Courts, The Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1207 (1991).

47. *Id.* Fears regarding fugitive slaves and slave revolts led to the United States's return to international extradition. PYLE, *supra* note 2, at 48. Because extradition agreements permitted the United States to retrieve fugitives who had fled the country, many southern citizens supported international extradition as a means to retrieve fugitive slaves who fled the United States to Canada, Mexico, or the Bahamas. *Id.* Additionally, many Americans who opposed slavery supported extradition because of fears that, without extradition, free areas in the hemisphere may become havens for fugitive slaves planning a large-scale uprising against whites. *Id.* Based on these fears, the United States entered into extradition treaties with the United Kingdom in 1842 and France in 1843. *See id.*; Semmelman, *supra* note 46, at 1207-08.

48. Semmelman, *supra* note 46, at 1208.

49. *Compare id.* at 1208-09 (noting past extradition procedure), with 18 U.S.C. § 3184 (2000) (providing current extradition procedure).

50. *See Semmelman, supra* note 46, at 1208-09.

51. *Id.* at 1209.

52. *Id.*

53. PYLE, *supra* note 2, at 57. In domestic extradition law, the rule of non-inquiry evolved as a method to ignore the impending treatment of extradited fugitive slaves. *Id.*

54. 18 U.S.C. § 3181 (2000). Under this statute, any person who is not a U.S. citizen, national, or permanent resident may be extradited, regardless of whether there is an extradition treaty with the requesting nation, when the person has committed a crime of violence against a U.S. national in a foreign country, and the crime charged is not of a political nature. *Id.*

federal judge, magistrate authorized for extradition proceedings by a federal court, or judge of a state court of general jurisdiction “may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, . . . issue his warrant for the apprehension of the person so charged.”⁵⁵ In *Grin v. Shine*,⁵⁶ the U.S. Supreme Court held that this language permitted anyone “acting by the permission or authority” of the requesting government to file the complaint.⁵⁷ Despite this broad latitude, almost all extradition requests are filed by the U.S. Department of Justice, acting on behalf of the requesting nation.⁵⁸ If a warrant is issued and the fugitive is arrested, then the magistrate will hold a hearing to determine whether sufficient evidence exists to sustain the charge under the treaty.⁵⁹

The extradition hearing is usually limited to determining two issues: whether probable cause exists to believe that the fugitive violated the crime charged by the requesting country, and whether the same conduct would be a violation of U.S. criminal law.⁶⁰ The defendant may raise affirmative defenses to extradition, such as the political offense or humanitarian exceptions.⁶¹ If the magistrate determines that the evidence is sufficient, then he will certify the fugitive to the secretary of state and order that he be detained until extradited.⁶²

The Federal Rules of Evidence do not apply in extradition proceedings; to prevent the burden of transporting witnesses from abroad, documentary evidence and hearsay is admissible against the defendant.⁶³ Although there are no statutory limitations on the types of evidence that the defendant may offer, U.S. courts routinely prevent the admission of exculpatory evidence and severely limit the extent of a defendant’s discovery.⁶⁴ A defendant is limited to presenting evidence that explains the circumstances surrounding the crime, that proves he is not the person requested by the foreign nation, or that

55. *Id.* § 3184.

56. 187 U.S. 181 (1902).

57. *Id.* at 194 (ruling that private persons must be permitted to file extradition complaints because foreign officials may not have sufficient knowledge of the crime).

58. ABBELL, *supra* note 32, at 25-26. Almost all extradition requests are filed by the U.S. government for several reasons. *Id.* First, under modern extradition treaties, the United States is required to represent the requesting nation in extradition proceedings. *Id.* at 25. Second, even under older treaties, the U.S. government pursues a policy of providing free legal representation for countries requesting extradition. *Id.* Third, because almost all extradition requests are filed by the United States, if a requesting nation filed the request directly, then it may raise the suspicions of the extradition magistrate. *Id.* at 26.

59. 18 U.S.C. § 3184.

60. Semmelman, *supra* note 46, at 1202.

61. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); Semmelman, *supra* note 46, at 1202.

62. 18 U.S.C. § 3184.

63. FED. R. EVID. 1101(d)(3); ABBELL, *supra* note 32, at 38.

64. Abramovsky, *supra* note 36, at 12.

supports an affirmative defense.⁶⁵ No statute provides a right to appeal the magistrate's decision; however, the defendant may petition for a writ of habeas corpus in the district court.⁶⁶ The district court's decision is then subject to appeal.⁶⁷

C. *The Rule of Non-Inquiry*

The rule of non-inquiry permits courts to refrain from evaluating law enforcement and the legal and penal systems of the extradition destination.⁶⁸ The rule of non-inquiry developed primarily in domestic fugitive slave cases in which judges refused to inquire into whether slaves would be treated humanely upon return to their owners.⁶⁹ The rule outlasted slavery, however, and eventually became entrenched into U.S. law governing international extradition when the U.S. Supreme Court decided *Neely v. Henkel*⁷⁰ and *Glucksman v. Henkel*⁷¹ in the early 1900s. The Court explained in *Neely* that the U.S. Constitution does not apply in extradition proceedings because it has no relation to crimes committed abroad.⁷²

Today, U.S. courts usually apply the rule of non-inquiry under the presumption that if a valid extradition treaty exists and the secretary of state has presented an extradition request, then the extraditee will be treated fairly.⁷³ Even when there is a possibility that the extraditee will be subjected to unfair treatment or inhumane conditions, U.S. courts have continued to apply the rule of non-inquiry, trusting that

65. *Id.*

66. *Id.* at 13.

67. *Id.*

68. Semmelman, *supra* note 46, at 1203-04.

69. PYLE, *supra* note 2, at 119.

70. 180 U.S. 109 (1901).

71. 221 U.S. 508 (1911). In *Glucksman*, a Russian magistrate demanded the return of a prisoner from the United States to Russia to stand trial for forgery. *Id.* at 511. The court dismissed the prisoner's argument that there was insufficient evidence to establish probable cause. *Id.* at 513. The court also ruled that the existence of an extradition treaty with Russia required it to assume that the prisoner would receive a fair trial upon extradition. *Id.* at 512.

72. *See Neely*, 180 U.S. at 122. Neely was a U.S. citizen and public employee in Cuba during the United States occupation after the Spanish-American War. *See id.* at 114. After returning to the United States, U.S. authorities requested Neely's extradition to Cuba for a crime committed in Cuba. *See id.* at 112-13. Neely argued that, because Cuba remained in U.S. possession, extradition was not appropriate. *See id.* at 115. Neely also contended that extradition should be denied because he would not receive constitutional protections if extradited. *Id.* at 122. The U.S. Supreme Court held that, although the United States occupied and controlled Cuba, it was still a foreign nation making extradition appropriate. *See id.* at 120. Further, the Court determined that U.S. constitutional protections were inapplicable when addressing crimes committed by U.S. citizens abroad. *Id.* at 123. Consequently, Neely was extradited to Cuba where he could be tried by U.S. officials who were not bound by the Constitution. PYLE, *supra* note 2, at 123.

73. *See Shea*, *supra* note 33, at 96. The rule of non-inquiry may be circumvented when either the political offense or humanitarian exception applies. *See Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997); Shea, *supra* note 33, at 90-91. This reasoning can be traced to *Glucksman v. Henkel*, which held that the existence of an extradition treaty requires a court to assume that the extraditee will receive a fair trial upon extradition. 221 U.S. at 512.

the secretary of state will subsequently deny extradition.⁷⁴ For example, U.S. courts have followed the rule of non-inquiry despite allegations that extraditees would be subjected to double jeopardy,⁷⁵ a fundamentally unfair trial, abuse, torture, and even murder.⁷⁶

Traditionally, four additional justifications supported the rule of non-inquiry in extradition cases. First, domestic courts are arguably ill-equipped to examine the conditions awaiting a potential extraditee in a foreign country.⁷⁷ Second, because extradition is considered part of foreign policy, courts have been fearful that intervention would disadvantage the executive's pursuit of successful foreign relations.⁷⁸ Third, U.S. judges have argued that passing judgment on foreign legal systems would infringe on the sovereignty of foreign nations.⁷⁹ And fourth, inquiring into the legal systems of foreign states may hinder extradition and prevent proper punishment of notorious criminals.⁸⁰

D. *The Political Offense Exception*

Although the rule of non-inquiry has become firmly established in U.S. extradition proceedings, the political offense exception has provided a tool for circumventing the rule since 1843.⁸¹ The political offense exception renders an otherwise extraditable crime nonextraditable because of its political nature and motivation.⁸² The exception first appeared in U.S. law in an extradition treaty with France in 1843 and has been a fixture in the American legal system ever since.⁸³ The political offense exception is generally limited to crimes against a state, including treason, sedition, espionage, and relative political offenses in which an ordinary crime and a political act are so intertwined

74. *See, e.g.,* *Hoxha v. Levi*, 371 F. Supp. 2d 651, 660 n.3 (E.D. Pa. 2005) (noting that there are allegations that U.S. authorities have corroborated with foreign agents to send individuals to nations that use "deplorable and illegal interrogation practices[.]" but trusting the state department to seriously examine the situation).

75. *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y. 1973).

76. *In re Singh*, 123 F.R.D. 127, 127-29 (D.N.J. 1987) (applying the rule of non-inquiry even though there was evidence that extraditees may be deprived of a fair trial due to bias, torture, or even murder). This list is not exhaustive; in addition to the situations outlined in the text, the rule of non-inquiry has also been applied under other egregious circumstances. *E.g., In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989) (applying the rule of non-inquiry when an extraditee alleged that his safety would be threatened if extradited); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) (applying the rule of non-inquiry even though an extraditee would be prosecuted for crimes not covered in the extradition request); *Gallina v. Fraser*, 278 F.2d 77, 78-79 (2d Cir. 1960) (applying the rule of non-inquiry when an extraditee had been tried and convicted in absentia); *United States v. Clark*, 470 F. Supp. 976, 979 (D. Vt. 1979) (applying the rule of non-inquiry even though there was evidence that the requesting nation had breached its plea agreement with the extraditee).

77. *Shea*, *supra* note 33, at 91.

78. *Id.* at 93.

79. *Id.*

80. *Id.*

81. *Abramovsky*, *supra* note 36, at 9.

82. *In re Mackin*, 668 F.2d 122, 134 (2d Cir. 1981).

83. *Abramovsky*, *supra* note 36, at 9.

as to render the entire offense political.⁸⁴ Although the exception is created by treaty or statute, in many countries, including the United States, it is unilaterally defined through the judiciary.⁸⁵ Courts will ignore the rule of non-inquiry and examine circumstances in the requesting state to determine whether the offense may properly be defined as political.⁸⁶

E. *The Humanitarian Exception*

Until 1960, no U.S. court had ever considered whether it could deny extradition on humanitarian grounds.⁸⁷ In *Gallina v. Fraser*,⁸⁸ the defendant argued that the United States Court of Appeals for the Second Circuit should deny his extradition because Italy had convicted him in absentia, and he would not be retried if returned.⁸⁹ Applying the rule of non-inquiry to deny Gallina's request, the Second Circuit noted that inquiry might be appropriate when a defendant faced conditions sufficiently "antipathetic to a federal court's sense of decency."⁹⁰ Since *Gallina*, many courts, including the Ninth Circuit, have considered whether to deny extradition on humanitarian grounds.⁹¹ Almost all courts have stated that a case may arise in which the facts are sufficiently egregious to warrant such an exception; however, all courts concluded that the case presently before them was not that case.⁹²

84. *Id.* at 13.

85. *Id.* at 13-15. In the United States, the political offense exception is created by its inclusion in all U.S. extradition treaties. *Id.* at 13-14. The U.S. judiciary, however, defines the scope of the political offense exception through its application of the incidence test. *Id.* at 14. The incidence test requires that the charged offense be committed in furtherance of a "political disturbance related to the struggle of individuals to alter or abolish the existing government in their country." *Id.* at 15.

86. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE VIII § 2-25 (1983).

87. Semmelman, *supra* note 46, at 1214.

88. 278 F.2d 77 (2d Cir. 1960).

89. *Id.* at 78.

90. *Id.* at 79.

91. See, e.g., *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999); *Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2d Cir. 1990); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir. 1980); *Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928-29 (2d Cir. 1974).

92. See, e.g., *Mainero*, 164 F.3d at 1210 (assuming that the humanitarian exception exists in the abstract but refusing to apply it because the extraditees' allegations that they would be subjected to torture were speculative); *Arnbjornsdottir-Mendler*, 721 F.2d at 683 (refusing to apply the humanitarian exception because it had not been applied in more compelling situations); *Sindona*, 619 F.2d at 175 (conceding that situations were imaginable in which a court may "reexamine the principle of exclusive executive discretion" but holding that the exception did not apply in this case); *Gengler*, 507 F.2d at 928-29 (determining that an inability to present a defense may be a procedure sufficiently egregious to warrant application of the humanitarian exception but refusing to apply the exception because no evidence existed that the extraditees had a defense to present); cf. *Ahmad*, 910 F.2d at 1066-67 ("It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."); *Escobedo*, 623 F.2d at 1107 (holding that considerations relating to the degree of danger to an extraditee's life are exclusively within the discretion of the executive).

Some of the strongest support for the humanitarian exception originates from *Rosado v. Civiletti*,⁹³ in which the Second Circuit reasoned that the rule of non-inquiry may not apply when a defendant “persuasively demonstrates that extradition would expose him to procedures or punishment ‘antipathetic to a federal court’s sense of decency.’”⁹⁴ While noting that the Constitution does not apply to a foreign sovereign, the Second Circuit explained that the Constitution “does govern the manner in which the United States may join the effort.”⁹⁵

F. *The United States-Thailand Extradition Treaty*

U.S. law provides that the terms of an extradition treaty are controlling unless it conflicts with a statute or the Constitution.⁹⁶ The extradition treaty between the United States and Thailand affords both mandatory and discretionary grounds for refusing extradition.⁹⁷ The United States *must* deny extradition when the extradition request is based on a political or military offense or when it is established that the request is made for political purposes.⁹⁸ The United States *must* also deny extradition when it has already tried the individual for the same offense or when Thailand’s statute of limitations would bar prosecution for the offense.⁹⁹ Extradition *may* be denied if the United States is currently prosecuting or has already prosecuted the offender for the same offense.¹⁰⁰ Additionally, it *may* be denied when the offense was at least partially committed in this country, provided that

93. 621 F.2d 1179 (2d Cir. 1980). *Rosado* was not an extradition case but instead a habeas corpus challenge to the continued confinement of American citizens who had been tried and convicted of crimes in Mexico before being transferred to an American prison pursuant to a prisoner transfer treaty. *Id.* at 1182-83. The prisoners argued that they had been subjected to torture and an unfair trial while in Mexico and that their continued imprisonment in America violated due process. *Id.* To secure their transfer from Mexico, the prisoners agreed not to challenge their Mexican convictions in U.S. courts. *Id.* at 1182. While decrying the conditions and trial procedures faced by the prisoners in Mexico, the Second Circuit denied their challenge largely because the court feared that to hold otherwise would prevent further transfer of American citizens imprisoned in Mexico. *Id.* at 1200.

94. *Id.* at 1195 (quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960)).

95. *Id.* at 1195-96. In *Rosado*, the Second Circuit discussed extradition as a “point of reference.” *Id.* at 1195. The Second Circuit further explored the application of the U.S. Constitution abroad. *Id.* at 1189. The court noted that “[a]lthough the Bill of Rights does apply extraterritorially to protect American citizens against the illegal conduct of United States agents, it does not and cannot protect our citizens from the acts of a foreign sovereign committed within its territory.” *Id.* (internal citations omitted). The Second Circuit conceded, however, that the Constitution may be implicated by the acts of a foreign sovereign when the U.S. government directly or substantially contributed to the misconduct and when the foreign authorities acted essentially as U.S. agents. *Id.*

96. Semmelman, *supra* note 46, at 1223.

97. Extradition Treaty with Thailand, U.S.-Thail., arts. 3-7, Dec. 14, 1983, 1983 U.S.T. 418.

98. *Id.* art. 3.

99. *Id.* arts. 5, 7.

100. *Id.* art. 5.

the United States prosecutes the offender.¹⁰¹ Article 6 of the treaty provides another discretionary ground for refusing extradition:

When the offense for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless: (a) the offense is murder as defined under the laws of the Requested State; or (b) the competent authority of the Requesting State provides assurances that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed. In the case of the United States of America, the competent authority is the Executive Authority.¹⁰²

Drug trafficking is punishable by death in Thailand but not in the United States.¹⁰³ Therefore, under the United States-Thailand Extradition Treaty, the United States may refuse extradition of drug traffickers to Thailand unless it is provided assurances that Thailand will not impose the death penalty.¹⁰⁴ Not limiting the death penalty solely to its own citizens, Thailand has also imposed the death penalty for drug offenses against visiting Westerners.¹⁰⁵ In addition, drug offenders in Thailand have been subjected to extrajudicial killings and disappearances due to Thailand's "war on drugs."¹⁰⁶

G. Approaches to Extradition Abroad

Proponents of the rule of non-inquiry contend that allowing judicial refusals of extradition on grounds outside of the governing treaty will damage foreign relations.¹⁰⁷ Given this assertion, it is important to examine how other nations proceed in extradition cases.¹⁰⁸ In Japan, both the judicial and executive branches are authorized to inquire into whether the requesting nation will protect the defendant's

101. *Id.* art. 4.

102. *Id.* art. 6.

103. Appellant's Opening Brief at 16-17, *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005) (No. CA 03-57253); INFORMATION SHEET, *supra* note 6. *Contra* 18 U.S.C. § 3591(b)(1) (2000) (making the death penalty available as punishment for non-violent drug traffickers in extreme circumstances).

104. Extradition Treaty with Thailand, *supra* note 97, at art. 6. Under Article 6, this decision is made by the "competent authority," of each nation. *Id.* The treaty lists the executive as the competent authority for the United States, but it is unclear whether this language applies to only the competent authority that provides assurances that the death penalty will not be imposed, or whether it also applies to the competent authority that may deny extradition. *Id.* In *Prasoprat*, the Ninth Circuit assumed that in both situations the competent authority was the executive. *Prasoprat*, 421 F.3d at 1014.

105. John Scott, *Death Sentence Brit*, SUN (U.K.), Nov. 2, 2004, available at 2004 WLNR 6682016 (discussing the sentence of death by lethal injection imposed on a British man for heroin trafficking).

106. Hermes, *supra* note 6. Thailand's tactics in its "war on drugs" have allegedly resulted in approximately 2,500 extrajudicial killings and disappearances. *Id.*

107. See Semmelman, *supra* note 46, at 1229.

108. If other nations allow their judiciaries to refuse extradition on humanitarian grounds, then it would be difficult to argue that this concern is well founded.

human rights.¹⁰⁹ In Austria, the executive generally weighs humanitarian concerns, but unlike in the United States, extradition must be denied when the extraditee will face unfair proceedings.¹¹⁰ Dutch courts are permitted to consider the requesting nation's prior treatment of the extraditee and the type of conditions that the extraditee is likely to face upon extradition.¹¹¹ For example, in *Netherlands v. Short*,¹¹² the Supreme Court of the Netherlands refused to extradite a member of the U.S. military because he would face the death penalty in the United States.¹¹³

In contrast, Canada, Israel, Australia, and the United Kingdom have historically employed schemes similar to that of the United States in which courts are hesitant to inquire into humanitarian concerns in extradition proceedings and discretion is left to the executive.¹¹⁴ Some of these countries, however, have increasingly recognized exceptions to the rule of non-inquiry.¹¹⁵ In *Soering v. United Kingdom*,¹¹⁶ the European Court of Human Rights (European Court) forced the United Kingdom to deny extradition of an admitted murderer to the United States.¹¹⁷ Prior to the court's decision, the European Commission on Human Rights determined that the United Kingdom's extradition procedure violated the European Convention on Human Rights (Convention) because it did not provide for independent judicial review of an extraditee's concerns regarding unfair treatment in the requesting country.¹¹⁸

The European Court took the analysis a step further, concluding that the "death row phenomenon" in the United States constituted inhumane treatment under Article 3 of the Convention.¹¹⁹ It cautioned that if the United Kingdom extradited Soering without assurances from the United States that he would not receive the death penalty, then the United Kingdom would be liable for violating the

109. Michael S. Topiel, *The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?*, 9 CARDOZO J. INT'L & COMP. L. 389, 398 (2001).

110. *See id.*

111. *Id.*

112. 29 I.L.M. 1375 (Neth. 1990).

113. *Id.* at 1389.

114. Topiel, *supra* note 109, at 395, 400-03.

115. *See id.* at 396-97, 404. The United Kingdom and Canada recently recognized exceptions to the rule of non-inquiry. *Id.*

116. 11 Eur. Ct. H.R. 439, 478 (1989).

117. *See id.* at 439. European Court of Human Rights rulings are only binding on parties that submit to its jurisdiction. Shea, *supra* note 33, at 98. By signing the European Convention on Human Rights, the United Kingdom submitted to the jurisdiction and authority of the European Court. *See id.* Despite being bound by the Convention to submit to the European Court's decision, it was questionable whether the United Kingdom would accept the ruling in *Soering*. *Id.* at 112. The United Kingdom, however, decided to honor its obligations to the European Convention. *Id.*

118. *Soering*, 11 Eur. Ct. H.R. at 480.

119. *Id.* at 477.

Convention.¹²⁰ The court stressed that maintaining the practical effectiveness of the Convention's safeguards required holding signatories responsible when they extradite fugitives to nations where the fugitives would probably be treated inhumanely.¹²¹ The United Kingdom extradited Soering to the United States only after receiving assurances that the United States would not impose the death penalty.¹²²

Canada, similar to the United States, has traditionally applied the rule of non-inquiry.¹²³ Discretion to deny extradition was beyond the power of Canadian courts and instead resided with the minister of justice.¹²⁴ In 2001, the Canadian Supreme Court amended this procedure with regard to death penalty cases in *United States v. Burns*.¹²⁵ The Canadian Supreme Court ruled in *Burns* that, absent extraordinary circumstances, the minister of justice could not extradite people facing the death penalty to the United States without assurances that the death penalty would not be imposed.¹²⁶ In 2003, the United Nations Human Rights Commission further buttressed this result by ruling that nations without the death penalty have an obligation to obtain assurances that the death penalty will not be imposed before deporting or extraditing an individual when there is a real possibility that the individual will otherwise be put to death.¹²⁷

IV. COURT'S DECISION

Although American courts began discussing the possibility of a humanitarian exception to extradition in 1960, the United States has not followed the international trend toward abrogating the rule of non-inquiry in favor of protecting the individual rights of an extraditee.¹²⁸ In *Prasoprat*, the Ninth Circuit had the opportunity to be the first court in the United States to deny extradition under the humanitarian exception.¹²⁹ Specifically, the court considered whether the magistrate erred by not applying the humanitarian exception to deny *Prasoprat's* extradition and whether the magistrate wrongly de-

120. *Id.* at 478.

121. *See id.* at 484 (de Meyer, J., concurring); *cf.* *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1980) (holding that, while the U.S. Constitution does not bind foreign nations, it "does govern the manner in which the United States may join the effort"). *Contra* *Neely v. Henkel*, 180 U.S. 109, 122 (1901) (rejecting the premise that the U.S. Constitution applies in extradition proceedings).

122. *Shea, supra* note 33, at 112.

123. *See* *Topiel, supra* note 109, at 403.

124. Alan W. Clarke et al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty*, 30 *QUEEN'S L.J.* 260, 273-74 (2004).

125. [2001] 1 S.C.R. 283, 360.

126. *Id.*

127. *See* UNHRC Communication, *supra* note 35.

128. *See supra* notes 34-35.

129. *See Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005).

nied Prasoprat's discovery motion seeking information concerning Thailand's use of the death penalty in drug cases.¹³⁰

The court first considered whether the magistrate wrongly denied Prasoprat's discovery motion. Noting that discovery in extradition hearings is discretionary and usually limited, the Government argued that Prasoprat was not entitled to discovery regarding Thailand's use of the death penalty in drug cases.¹³¹ The Government asserted that, regardless of the scope of discovery in an extradition case, Prasoprat's requested discovery was irrelevant to the matters properly before the magistrate who lacked the discretion to deny extradition on humanitarian grounds.¹³²

Prasoprat argued that the magistrate violated due process by denying his discovery motion.¹³³ He asserted that information regarding Thailand's use of the death penalty for drug offenses was vital to his argument that the court should deny his extradition under the humanitarian exception.¹³⁴ According to Prasoprat, an extradition magistrate has inherent power to order discovery in accordance with the requirements of law and justice.¹³⁵ Prasoprat recognized that the discovery motion was denied because the magistrate believed he lacked authority to inquire into humanitarian concerns; therefore, Prasoprat contended that the discovery motion should be granted if the court determined that the humanitarian exception was viable.¹³⁶

The Ninth Circuit ruled that the magistrate did not abuse his discretion when he denied Prasoprat's discovery motion.¹³⁷ Recognizing that discovery in extradition cases is discretionary and generally narrow in scope, the court explained that the United States-Thailand extradition treaty provided the executive "authority for determining extradition when the death penalty is involved."¹³⁸ Based on this language, the court concluded that "[w]hen the offense for which extradition is sought is punishable by death, the question of whether to refuse extradition on that basis is within the authority of the executive branch, not the judicial branch."¹³⁹ Therefore, the Ninth Circuit reasoned, discovery pertaining to Thailand's use of the death penalty was not pertinent to the magistrate's decision and was properly denied.¹⁴⁰

130. *Id.* at 1013.

131. Appellee's Brief at 35, 37-38, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

132. *Id.* at 37-38.

133. Appellant's Opening Brief at 15, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

134. *Id.* at 17.

135. *Id.* at 18.

136. *Id.* at 22-23.

137. *Prasoprat*, 421 F.3d 1015-16.

138. *Id.* at 1014.

139. *Id.* at 1015.

140. *Id.* at 1014-15.

Second, the court considered whether the magistrate erred in not applying the humanitarian exception to deny Prasoprat's extradition. The Government argued that the magistrate in an extradition proceeding is restricted to performing a limited non-discretionary analysis of the evidence presented.¹⁴¹ The magistrate did not have authority to deny extradition so long as certain elements were satisfied.¹⁴² According to the Government, the magistrate must first determine whether the court possessed jurisdiction to conduct the proceeding, whether the court had jurisdiction over the fugitive, whether an extradition treaty was in force, whether the fugitive was requested for offenses extraditable under the treaty, and whether there was sufficient evidence to support the fugitive's extradition.¹⁴³ After these elements are satisfied, the magistrate must certify the fugitive for extradition.¹⁴⁴ Portraying the humanitarian exception as theoretical, the Government denied its validity.¹⁴⁵ Instead, it asserted that the secretary of state, not the judicial system, possessed the discretion to consider the conditions facing the fugitive upon extradition, along with political or foreign policy concerns related to the case.¹⁴⁶

Prasoprat argued that the magistrate should have denied his extradition under the humanitarian exception.¹⁴⁷ He emphasized the extensive dicta referring to the existence of the humanitarian exception and provided the court with newspaper articles discussing Thailand's use of the death penalty and extra-judicial killings as punishment for drug offenders.¹⁴⁸ Contending that such concerns should motivate the court to invoke the humanitarian exception, Prasoprat asserted that the death penalty would be considered cruel and unusual punishment if applied to drug offenses in the United States.¹⁴⁹

The Ninth Circuit adopted the arguments advanced by the Government.¹⁵⁰ The court emphasized that it was the role of the secretary of state to consider denying extradition on humanitarian grounds.¹⁵¹ Because the secretary of state's decision "regarding whether to extradite an individual may be based not only on 'considerations individual to the person facing extradition' but 'may be based on foreign policy considerations instead[.]'" the court determined that application of

141. See Appellee's Brief at 11-12, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

142. *Id.* at 12.

143. *Id.* at 11-12.

144. *Id.* at 12.

145. *Id.* at 10.

146. *Id.* at 22.

147. Appellant's Opening Brief at 27, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

148. *Id.* at 16-17, 28-29.

149. See *id.* at 30.

150. *Prasoprat*, 421 F.3d at 1016.

151. *Id.*

the rule of non-inquiry was justified.¹⁵² While recognizing that courts had discussed the existence of the humanitarian exception, the Ninth Circuit noted that the exception had never been applied.¹⁵³ Based on this absence of precedent, the court ruled that “[a]n extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country.”¹⁵⁴

V. COMMENTARY

The Ninth Circuit erred when it failed to use the humanitarian exception to deny the extradition of a U.S. citizen who may be sentenced to death as punishment for a non-violent drug offense when extradited. Since 1960, many courts, including the Ninth Circuit, have considered whether extradition may be denied on humanitarian grounds.¹⁵⁵ Repeatedly, these courts have explained that a case may arise with facts sufficiently egregious to warrant the exception, but all concluded that the exception was inapplicable to the cases then presently before them.¹⁵⁶ When a U.S. citizen is in danger of being executed for a non-violent drug offense, it is time to turn the dicta surrounding the humanitarian exception into precedent. Instead, the Ninth Circuit ruled in *Prasoprat* that an extradition magistrate cannot inquire into whether a fugitive may be executed upon extradition.¹⁵⁷ The court not only declined to apply the humanitarian exception in this case, but it also appeared to deny that the exception would ever apply in an extradition proceeding.¹⁵⁸ Refusing to examine whether the rule of non-inquiry was justifiable in this case, the Ninth Circuit failed to recognize the constitutional implications of applying the rule of non-inquiry to the facts in *Prasoprat*. Instead, the Ninth Circuit deferred to the executive, allowing the secretary of state to decide whether to sacrifice the life of an American citizen in the name of “foreign policy considerations.”¹⁵⁹

A. *The Rule of Non-Inquiry Is No Longer Justifiable*

Proponents offer five justifications for the rule of non-inquiry. First, courts usually apply a presumption that if a valid extradition treaty exists and the secretary of state has presented an extradition

152. *Id.* (quoting *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997)).

153. *Id.*

154. *Id.* (alteration in original) (quoting *Prasoprat v. Benov*, 294 F. Supp. 2d 1164, 1171 (C.D. Cal. 2003)).

155. *Gallina v. Fraser*, 278 F.2d 77, 78-79 (2d Cir. 1960).

156. *See supra* note 92.

157. *Prasoprat*, 421 F.3d at 1016.

158. *See id.*

159. *See id.*

request, then the extraditee will be treated fairly.¹⁶⁰ Second, domestic courts are arguably ill-equipped to examine the conditions awaiting a potential extraditee in a foreign country.¹⁶¹ Third, because extradition is considered part of foreign policy, courts have been fearful that intervention would disadvantage the executive's pursuit of successful foreign relations.¹⁶² Fourth, U.S. judges have argued that passing judgment on foreign legal systems would infringe on the sovereignty of foreign nations.¹⁶³ Fifth, inquiring into the legal systems of foreign states may hinder extradition and prevent proper punishment of notorious criminals.¹⁶⁴ Upon a closer examination of these five arguments, it becomes apparent that each no longer provides justification for the rule of non-inquiry, especially under the facts of *Prasoprat*.

First, U.S. courts justify the rule of non-inquiry with the assumption that a foreign nation's procedures and punishments must be fair when the United States has entered into an extradition treaty with that nation.¹⁶⁵ This assumption is often incorrect. As observed in *Prasoprat*, the United States has entered into an extradition agreement with Thailand, a nation that employs the death penalty as punishment for drug offenses.¹⁶⁶ Additionally, the United States currently maintains extradition treaties with four of the eighteen nations listed as the world's most repressive societies in 2005.¹⁶⁷

Second, U.S. courts have applied the rule of non-inquiry, claiming that they are incapable of effectively evaluating conditions that await extraditees abroad.¹⁶⁸ The present status of technology and the worldwide prevalence of the media undermine the viability of this assertion, especially because U.S. courts currently evaluate conditions and events in foreign nations in other contexts.¹⁶⁹ In particular, extradition courts must evaluate circumstances abroad when contemplating the political offense exception.¹⁷⁰ Thus, application of the political

160. *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911).

161. *See* Shea, *supra* note 33, at 91.

162. *Id.* at 93.

163. *Id.*

164. *Id.*

165. *Id.* at 96.

166. Appellant's Opening Brief at 16-17, *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005) (No. CA 03-57253); INFORMATION SHEET, *supra* note 6.

167. *See* McNabb Associates, P.C., *Bilateral Treaties Involving International Extradition*, http://www.usextradition.com/extradition_main.htm (last visited Apr. 9, 2006); Press Release, Freedom House, *World's Worst Regimes Unveiled: Several of the World's Greatest Human Rights Violators Sit on U.N. Human Rights Panel* (Mar. 31, 2005), available at <http://www.freerpublic.com/focus/f-news/1376540/posts> [hereinafter Freedom House]. Freedom House, an independent non-governmental organization in consultative status with the United Nations, publishes a list of the world's most repressive societies as part of its annual "Freedom in the World" publication. Freedom House, *supra*.

168. Shea, *supra* note 33.

169. STANLEY MAILMAN, *IMMIGRATION LAW AND PROCEDURE: DESK EDITION* § 29.02[1] (2005) (outlining the judicial review of conditions abroad in asylum proceedings).

170. *Abramovsky*, *supra* note 36, at 15.

offense exception undermines the contention that courts are ill-equipped to inquire into circumstances abroad. Also, international courts evaluate conditions in the United States and other nations when deciding extradition cases.¹⁷¹ Indeed, the United Nations Commission on Human Rights has ruled that it is sometimes a nation's duty to examine the requesting nation's use of the death penalty.¹⁷²

Third, supporters of the rule of non-inquiry posit that extradition is part of foreign policy and that discretion in this area must be retained in the executive branch.¹⁷³ In *Prasoprat*, the Ninth Circuit justified its application of the rule of non-inquiry by noting that the secretary of state's decision on whether to extradite an individual may not be limited to considerations individual to the extraditee but may also include "foreign policy considerations."¹⁷⁴ The Ninth Circuit reasoned that this international element increased the need for flexibility in the exercise of executive discretion in extradition cases.¹⁷⁵ This rationale ignores the possibility that increased flexibility may destroy an individual's rights in favor of alleged foreign policy considerations.¹⁷⁶

Extradition proceedings determine the fate and freedom of an individual.¹⁷⁷ When the rights, and indeed the life, of an individual are jeopardized, ultimate discretion should not be relinquished to the executive.¹⁷⁸ The Ninth Circuit admits that the secretary of state's decision may not be limited to evaluating the fate of the extraditee.¹⁷⁹ Instead, "foreign policy considerations" may outweigh concerns regarding the possible execution of a U.S. citizen.¹⁸⁰ This potential renders a full independent judicial review of extradition imperative.

Viewing extradition as part of foreign policy, courts and commentators have argued that allowing increased judicial scrutiny of extradition would threaten American foreign policy; therefore, the rule of non-inquiry must be retained.¹⁸¹ The Ninth Circuit may have shared this fear, perhaps believing that if it denied *Prasoprat*'s extradition, unless assurances were given that *Prasoprat* would not be put to death, then foreign courts may place the same requirement on the United States. This fear, however, is misplaced because many nations currently permit their judiciary to inquire into humanitarian concerns

171. See, e.g., *Mamatkulov & Askarov v. Turkey*, 41 Eur. Ct. H.R. 25, 516-17 (2005); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 474-79 (1989).

172. UNHRC Communication, *supra* note 35.

173. Shea, *supra* note 33.

174. *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005).

175. *Id.*

176. *Ahmad v. Wigen*, 726 F. Supp. 389, 415 (E.D.N.Y. 1989).

177. PYLE, *supra* note 2.

178. *Abramovsky*, *supra* note 36, at 24.

179. *Prasoprat*, 421 F.3d at 1016.

180. See *id.*

181. See, e.g., *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir. 1980); *Semmelman*, *supra* note 46, at 1229-30.

regarding conditions awaiting a possible extraditee; foreign judiciaries often refuse extradition when the extraditee will be subjected to the death penalty.¹⁸²

Even the United Kingdom, whose judiciary steadfastly upheld the doctrine of non-inquiry, was forced to circumvent the doctrine in *Soering v. United Kingdom*.¹⁸³ In *Soering*, the European Court of Human Rights forced the United Kingdom to deny extradition of an admitted murderer to the United States.¹⁸⁴ The European Court determined that the “death row phenomenon” constituted inhuman treatment under Article 3 of the European Convention on Human Rights.¹⁸⁵ The European Court further explained that if the United Kingdom extradited Soering without assurances that he would not receive the death penalty, then the United Kingdom would be liable for violating the Convention.¹⁸⁶ Since *Soering*, the judiciaries of South Africa and Canada have also ruled that extraditing an individual facing the death penalty violates that individual’s rights.¹⁸⁷

Because many other nations allow judicial review of conditions awaiting an extraditee in the requesting nation, a similar course by U.S. courts would not severely hinder U.S. relations abroad. Internationally, courts are increasingly eroding the rule of non-inquiry in favor of protecting individual rights.¹⁸⁸ This trend is particularly prevalent in potential capital cases because of the increasing international condemnation of the death penalty.¹⁸⁹ Indeed, the United Nations Commission on Human Rights ruled that nations who have abolished the death penalty have a duty to ignore the rule of non-inquiry and deny extradition when there exists a real possibility that the extraditee will be put to death.¹⁹⁰

Fourth, supporters of the rule of non-inquiry maintain that if U.S. courts pass judgment on a foreign counterpart, then they impinge on that nation’s sovereignty.¹⁹¹ This argument increasingly weakens as more nations disregard the rule of non-inquiry in favor of protecting individual rights or promoting international standards.¹⁹² As one scholar recently noted, “[s]tate sovereignty no longer implies the kind of opacity to outside scrutiny embedded in the rule of non-inquiry; it

182. *E.g.*, *United States v. Burns*, [2001] 1 S.C.R. 283, 360; *Netherlands v. Short*, 29 I.L.M. 1375, 1387 (Neth. 1990); *Mohamed v. President of the RSA*, 127 I.L.R. 468, 493, 497, 500 (S. Afr. CC 2001); *see also* discussion *supra* Part III.G.

183. 11 Eur. Ct. H.R. 439, 478 (1989).

184. *See id.*

185. *Id.* at 477.

186. *Id.* at 478.

187. *Burns*, [2001] 1 S.C.R. at 360; *Mohamed*, 127 I.L.R. at 493, 497, 500.

188. Clarke, *supra* note 124, at 275-76.

189. *See, e.g.*, UNHRC Communication, *supra* note 35.

190. *Id.*

191. Shea, *supra* note 33.

192. *See* Clarke, *supra* note 124, at 275-76.

is increasingly seen as consistent with accountability to the international community.”¹⁹³

Fifth, U.S. courts apply the rule of non-inquiry because of the fear that inquiring into the legal systems of foreign states may hinder extradition and prevent proper punishment of notorious criminals.¹⁹⁴ This concern may be alleviated by obtaining assurances from the requesting nation.¹⁹⁵ Rather than refusing extradition when a requested nation objects to the requesting nation’s punishment or procedure, the requested nation may ask for assurances that the unacceptable punishment or procedure will not be employed.¹⁹⁶ This practice permits the punishment of criminals, yet promotes international standards of decency and allows the requested nation to avoid participating in punishments or procedures that violate its conscience or constitution.

In *Prasoprat*, the Ninth Circuit could have conditioned extradition on receiving assurances from Thailand that the death penalty would not be imposed. The Ninth Circuit had no reason to fear that Prasoprat may escape punishment because the United States could have prosecuted him.¹⁹⁷ The DEA carried out the primary investigation of Prasoprat, and the best evidence against him related to his activities in the United States.¹⁹⁸

The justifications for the rule of non-inquiry have lost most of their persuasiveness, especially considering the significant individual rights often affected by extradition. International courts are increasingly ignoring the rule of non-inquiry and are instead using extradition cases as an opportunity to express international standards of decency.¹⁹⁹ The rule of non-inquiry is particularly suspect in capital cases.²⁰⁰ Considering the facts in *Prasoprat*, the Ninth Circuit certainly had no justification for applying the rule of non-inquiry to leave Prasoprat’s fate at the mercy of the secretary of state.

B. *The U.S. Constitution Requires a Full Independent Judicial Review of Extradition when the Life of a U.S. Citizen Is in Jeopardy*

Traditionally, discretion to deny extradition on humanitarian grounds has been exercised by the secretary of state.²⁰¹ In *Prasoprat*, the Ninth Circuit emphasized the importance of executive control in

193. *Id.* at 276.

194. Shea, *supra* note 33.

195. *See id.* at 136-37.

196. *See id.* at 112.

197. *See* Appellant’s Opening Brief at 13-14, *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005) (No. CA 03-57253). In fact, one of Prasoprat’s accomplices was prosecuted in the United States for heroin trafficking and sentenced to forty-eight months in prison. *Id.* at 13.

198. *See id.* at 12, 14.

199. *See* Clarke, *supra* note 124, at 275-76.

200. *See* UNHRC Communication, *supra* note 35.

201. Semmelman, *supra* note 46, at 1198-99.

this area because of the political and foreign policy concerns implicated by extradition.²⁰² This reasoning, however, ignores the importance of protecting individual rights.²⁰³ In *Prasoprat*, the most basic of all individual rights was in danger: the right to life.²⁰⁴

To properly safeguard the constitutional and natural rights of American citizens, the judiciary should undertake a more searching review of the circumstances surrounding an extradition request. The possibility of abuse or oversight in determining whether to extradite an individual cautions against entrusting the final decision to an executive who may be more focused on political or foreign policy concerns.²⁰⁵ Because individual rights are implicated and because the political process is unlikely to protect the rights of a fugitive, extradition falls within the category of cases in which the U.S. Supreme Court has declared judicial review most imperative.²⁰⁶ Despite this mandate, U.S. courts have avoided their duty to interpret and enforce the Constitution in extradition proceedings, reasoning that the Constitution does not apply to crimes committed abroad.²⁰⁷

In *Rosado v. Civiletti*, the Second Circuit upheld the interpretation that the U.S. Constitution is inapplicable to a foreign sovereign in an extradition proceeding but declared that the Constitution “does govern the manner in which the United States may join the effort.”²⁰⁸ The Ninth Circuit should have followed this reasoning in *Prasoprat*. Although *Prasoprat* is an American citizen, U.S. Supreme Court precedent suggests that the Constitution may not provide him any protection.²⁰⁹ The extensive involvement of U.S. authorities in the investigation and decision to extradite *Prasoprat* should have implicated the protections of the Constitution.²¹⁰ Absent investigation by the DEA, there is no reason to believe that the Thai government would be aware of *Prasoprat*’s alleged criminal behavior,²¹¹ and without the decision by U.S. authorities to forgo *Prasoprat*’s prosecution in the United States in favor of extradition proceedings, *Prasoprat* would not be facing the prospect of execution.²¹²

The DEA began and conducted most of the investigation of *Prasoprat*.²¹³ The United States could have prosecuted *Prasoprat*

202. *Prasoprat*, 421 F.3d at 1017.

203. See PYLE, *supra* note 2; Abramovsky, *supra* note 36, at 24.

204. See *Prasoprat*, 421 F.3d at 1013.

205. See *id.* at 1017; Abramovsky, *supra* note 36, at 24.

206. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

207. *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

208. *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1990).

209. *Neely*, 180 U.S. at 122.

210. See *Rosado*, 621 F.2d at 1195-96.

211. See Appellant’s Opening Brief at 10-14, *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005) (No. CA 03-57253).

212. See Appellee’s Brief at 3, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

213. See Appellant’s Opening Brief at 10-14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

under federal heroin charges; in fact, one of Prasoprat's alleged accomplices was prosecuted in the United States.²¹⁴ Instead of charging Prasoprat domestically, however, the U.S. Attorney's Office requested his extradition to Thailand.²¹⁵ Because U.S. attorneys normally file for extradition on behalf of foreign nations, it is probable that the U.S. Attorney's Office filed for extradition at the behest of the Thai government.²¹⁶ Under the Supreme Court's interpretation of the federal extradition statute, however, the U.S. government may initiate the request, so it is unclear on whose behalf the proceeding was commenced.²¹⁷

Even if the extradition request began with the Thai government, U.S. authorities could have avoided Prasoprat's extradition without violating any treaty obligations. Under the United States-Thailand extradition treaty, the United States must deny extradition when it has previously tried the individual for the same offense.²¹⁸ The United States may also deny extradition when the offense was committed in this country, provided that the United States prosecutes the offender.²¹⁹ Prasoprat's offense was primarily, if not entirely, committed in the United States; therefore, under the treaty, the United States could have prosecuted Prasoprat domestically and denied his extradition.²²⁰

Pursuant to the United States-Thailand extradition treaty, when the offense is punishable by death in the requesting nation, but not in the requested nation, the requested nation may deny extradition unless it is provided assurances that the death penalty will not be imposed.²²¹ The Ninth Circuit interpreted the treaty as denying the judiciary the authority to demand assurances from a foreign nation.²²² No justification exists for this limitation.²²³ Indeed, many international courts already make such demands.²²⁴ Vesting the sole power to make demands for assurances in the executive branch does not ef-

214. *See id.* at 13.

215. *Prasoprat*, 421 F.3d at 1012.

216. Appellee's Brief at 5, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253); *see supra* note 58.

217. *See supra* notes 55-57 and accompanying text. Anyone, including the U.S. government, who is "acting under the authority" of the requesting nation may file an extradition complaint. *Grin v. Shine*, 187 U.S. 181, 193 (1902).

218. Extradition Treaty with Thailand, *supra* note 97, art. 5.

219. *Id.*

220. *See id.*; Appellant's Opening Brief at 12, 14, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

221. Extradition Treaty with Thailand, *supra* note 97, art. 6.

222. *Prasoprat*, 421 F.3d at 1014.

223. *See Shea, supra* note 33, at 127, 136-37.

224. *Clarke, supra* note 124, 274-76.

fectively protect an individual's rights because the executive may be preoccupied with political, military, or foreign policy concerns.²²⁵

The Ninth Circuit determined that the humanitarian exception is unnecessary because the secretary of state has the discretion to deny extradition on humanitarian grounds.²²⁶ This protection, however, is not constitutionally sufficient. The secretary of state is not obligated to conduct a hearing concerning the extraditee's fate or to deny extradition, regardless of the conditions or punishments that await the extraditee.²²⁷ Furthermore, there is no right to appeal the decision of the secretary of state.²²⁸ These procedures do not satisfy the Fifth Amendment's Due Process Clause, particularly in *Prasoprat's* case, because he was facing a punishment in Thailand that would likely violate the Eighth Amendment if applied in the United States.²²⁹

Because the secretary of state is not a neutral party, vesting exclusive discretion to deny extradition for humanitarian reasons in this office is problematic. The secretary of state is charged with furthering the government's interest in the outcome of the extradition proceedings and is permitted to factor in political and foreign policy concerns when deciding whether to deny extradition.²³⁰ Allowing the secretary of state to make the final determination concerning whether to deny extradition for humanitarian reasons is akin to permitting a prosecutor to make the final determination about whether a defendant's constitutional rights have been violated. To properly protect the rights of individuals, extradition courts must possess the power to undertake a neutral review of the conditions awaiting an extraditee and, when necessary, deny extradition under the humanitarian exception.

Drug trafficking is punishable by death in Thailand but not in the United States.²³¹ Employing the death penalty for drug crimes in the

225. *Ahmad v. Wigen*, 910 F.2d 389, 415 (E.D.N.Y. 1989) ("There may, however, be instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused.").

226. *See Prasoprat*, 421 F.3d at 1017.

227. *See* 18 U.S.C. § 3184 (2000).

228. *See Escobedo v. Castillo*, 623 F.2d 1098, 1105 (5th Cir. 1980).

229. U.S. CONST. amend. V. No person may "be deprived of *life*, liberty, or property, without due process of law." *Id.* (emphasis added). If the courts cannot evaluate the possibility that *Prasoprat* will be executed upon extradition, and the secretary of state is not required to hold a hearing to address these concerns, then *Prasoprat* is denied due process because he is not given an "opportunity for hearing." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing . . .'" (quoting *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313 (1950))). Even if the secretary of state held a hearing to address these concerns, due process may not be satisfied because "due process requires a 'neutral and detached judge'" who can evaluate the consequences of extradition independent of concerns regarding politics and foreign policy. *See id.* (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)). The fact that *Prasoprat* involved extradition procedure is insignificant because "[t]hese essential constitutional promises may not be eroded." *Id.*

230. *See Prasoprat*, 421 F.3d at 1017.

231. *See supra* note 103.

United States would likely violate the Eighth Amendment's prohibition of cruel and unusual punishment.²³² The judiciary should have the authority to inquire into whether an American citizen will be subjected to punishment that would violate the Eighth Amendment if applied in the United States. By failing to deny Prasoprat's extradition, the Ninth Circuit has permitted U.S. authorities to improperly "join the effort" of trampling on an American citizen's constitutional rights.²³³

The court should have applied the humanitarian exception to prevent Prasoprat's extradition because he faced punishment abroad that would violate the Eighth Amendment if imposed domestically. Case law suggests that the humanitarian exception is applicable in situations that are "antipathetic to a federal court's sense of decency."²³⁴ Courts likely rooted the exception in this vague language because the Constitution is not traditionally considered applicable in extradition cases.²³⁵ In cases such as *Prasoprat*, however, in which U.S. authorities were extensively involved in the investigation and when domestic prosecution would have rendered extradition unnecessary, the Constitution prevents U.S. authorities from extraditing an individual who faces punishments or procedures in the requesting nation that would violate the U.S. Constitution if imposed domestically.²³⁶

The Ninth Circuit's decision in *Prasoprat* renders the Constitution ineffective when a crime has a transnational element. Under *Prasoprat*, when an alleged crime is at least partially committed in a foreign nation, U.S. authorities may avoid the restrictions of the U.S. Constitution by extraditing the suspect abroad. The humanitarian exception provides U.S. courts a solution to this problem by permitting examination of the punishments, procedures, and conditions in the extradition destination. If the extraditee would be subjected to a speci-

232. Because the Supreme Court has ruled the death penalty an unconstitutional punishment for robbery, rape, and aggravated kidnapping, it follows that the use of the death penalty to punish non-violent drug offenders would violate the Eighth Amendment. See *Edmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the use of the death penalty in a robbery case violated the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (ruling that the death penalty was an unconstitutionally disproportionate penalty for the rape of an adult woman). *Contra* 18 U.S.C. § 3591(b)(1) (2000) (making the death penalty available as punishment for non-violent drug traffickers under extreme circumstances). Although § 3591(b)(1) provides the death penalty as an available punishment for drug traffickers in extreme but non-violent situations, the provision has never been applied, and the death penalty has never been used as punishment for a drug offense in the United States. If § 3591(b)(1) was ever applied to a non-violent drug trafficker, then it is probable that the provision would be struck down as violating the Eighth Amendment. See *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) (declaring that the death penalty is cruel and unusual punishment for a crime when there is a societal consensus that the death penalty is a disproportionate punishment for that particular offense).

233. See *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1980).

234. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

235. See *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

236. Cf. *Rosado*, 621 F.2d at 1189 (explaining that the Constitution does not apply when the U.S. "[g]overnment plays no direct or substantial role in the misconduct").

fied level of objectionable treatment, then extradition should be denied absent assurances that the extraditee will not be exposed to the objectionable treatment. Traditionally, courts considered whether the situation abroad was sufficiently “antipathetic to a federal court’s sense of decency.”²³⁷ Under this standard, Prasoprat’s extradition should have been denied. Because the Constitution sometimes requires application of the humanitarian exception, other standards may be applied to determine the level of objectionable treatment required for application of the humanitarian exception.²³⁸

C. Possible Frameworks for Judicial Application of the Humanitarian Exception

The humanitarian exception should be guided by a standard more powerful and concrete than “a federal court’s sense of decency.”²³⁹ In cases such as *Prasoprat*, the humanitarian exception should be guided by the U.S. Constitution. When the Constitution is implicated, U.S. courts must abrogate the rule of non-inquiry and examine the conditions awaiting an extraditee abroad. There are several different approaches for denying extradition based on constitutional concerns.²⁴⁰ Under any of these methods, Prasoprat’s extradition should have been denied.

1. The Basic Humanitarian Exception

Under the basic humanitarian exception, U.S. courts would deny extradition only when the extraditee’s awaiting punishment or procedure could be characterized as “antipathetic to a federal court’s sense of decency.”²⁴¹ This approach incorporates the traditional language of the humanitarian exception expressed in *Gallina* and would protect extraditees from inhumane or unconstitutional punishments.²⁴² The standard is flexible and would allow extradition to nations that employ a variety of trial procedures, while promoting basic human rights and fairness on an international level. Under this approach, foreign nations would likely provide assurances that they would not execute a

237. *Gallina*, 278 F.2d at 79.

238. See discussion *infra* Parts V.C.1-3.

239. *Gallina*, 278 F.2d at 79.

240. See discussion *infra* Parts V.C.1-3. Under each approach, the use of assurances should be employed. If the court determines that a punishment or procedure is sufficiently objectionable to deny extradition, then before denying extradition, the court should offer the requesting nation the opportunity to provide assurances that the objectionable punishment or procedure will not be employed. If these assurances are provided, then the extradition may continue, if not, then the court will be forced to deny extradition. Shea, *supra* note 33, at 137. The use of assurances will permit extradition to continue relatively unimpeded while preventing U.S. courts from facilitating human rights violations abroad. See *id.* at 126-29.

241. *Gallina*, 278 F.2d at 79.

242. This proposition assumes that punishments would offend a federal court’s sense of decency if those punishments also offended the Constitution.

particular extraditee and would provide the extraditee with a fair trial. Foreign nations would not be overly burdened, and extradition would continue relatively unimpeded, preserving international cooperation in bringing criminals to justice.²⁴³

2. The Constitutional Exception

Pursuant to the constitutional exception, U.S. courts could deny extradition when the extraditee would be subjected to unconstitutional procedures or punishments abroad. Although this approach would be the most comprehensive in protecting the constitutional rights of an extraditee, there are several inherent disadvantages. First, U.S. courts would essentially apply the U.S. Constitution to foreign authorities; this application could be viewed as infringing on the sovereignty of foreign nations and would undermine well-established precedent.²⁴⁴ Second, this method would involve an extremely detailed review of foreign procedures, which could significantly increase the length and expense of the extradition process. Third, extradition may become too difficult to achieve. Foreign courts are likely to provide assurances that they will forgo a certain punishment or will give the extraditee an attorney or fair trial. To expect foreign judicial systems to comply with every requirement of our Constitution, however, is overly burdensome. Instead of complying with these requests, foreign nations may renounce extradition. If foreign nations are unable to receive extradition of fugitives from the United States, then they will likely also refuse to extradite fugitives to the United States, seriously impeding the proper punishment of criminals.

3. The U.S. Involvement Humanitarian Exception

A U.S. involvement humanitarian exception would require U.S. courts to focus on the involvement of U.S. authorities in the extradition process. This approach would incorporate the language in *Rosado* limiting the manner in which U.S. authorities may “join the effort” of violating an extraditee’s constitutional rights.²⁴⁵ To ensure effective constitutional protections, U.S. authorities may not be permitted to knowingly subject individuals to procedures or punishments through extradition that would violate the Constitution if used in the United States.²⁴⁶

243. Compared to the imposition on foreign nations under the constitutional exception, the basic humanitarian exception would be less burdensome. See discussion *infra* Part V.C.2.

244. See, e.g., *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

245. *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1980).

246. See, e.g., *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 484 (1989) (de Meyer, J., concurring).

This method would permit U.S. courts to deny extradition in three situations. First, extradition would be denied when U.S. authorities were substantially involved in the investigation of the extraditee, unless the foreign nation provided assurances that the extraditee would not be subjected to unconstitutional procedures or punishments. It is important to deny extradition in this situation because allowing extradition would permit U.S. authorities to facilitate constitutional violations.²⁴⁷

Second, extradition would be denied when the extraditee could be prosecuted for the same offense in the United States, unless the foreign nation provided assurances that the extraditee would not be subjected to unconstitutional procedures or punishments. Allowing extradition in this situation would permit U.S. authorities to subject individuals to unconstitutional procedures or punishments when justice could be served in a constitutional manner. When a choice exists between granting an extradition that threatens the constitutional rights of the extraditee and prosecuting that same person under the constitutional protections of the United States, authorities must choose the alternative that most appropriately reflects the spirit of the Constitution.

Third, extradition would be denied when the foreign government's punishment or procedure is "antipathetic to a federal court's sense of decency."²⁴⁸ Denying extradition under this prong would prevent U.S. courts from contributing to practices that clearly undermine international standards of decency.²⁴⁹ Like the basic humanitarian exception, this approach would be relatively unobtrusive. Also, this method would prevent U.S. authorities from manipulating extradition to subject defendants to unconstitutional punishments or procedures.

To give the Constitution practical effect in cases like *Prasoprat*, courts must use the humanitarian exception to deny extradition.²⁵⁰ In these cases, the humanitarian exception should become a rule based on a standard more concrete than "a federal court's sense of decency."²⁵¹ At least three possible frameworks exist for using the humanitarian exception to protect the extraditee's constitutional rights. While each of these frameworks have advantages and disadvantages,

247. See Shea, *supra* note 33, at 129.

248. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

249. See Shea, *supra* note 33, at 129.

250. This reasoning is borrowed from the European Court of Human Rights, which has denied extradition in cases when the extraditees would have been subjected to punishments that would have violated Article 3 of the European Convention on Human Rights. *Soering*, 11 Eur. Ct. H.R. at 484 (de Meyer, J., concurring).

251. *Gallina*, 278 F.2d at 79.

each would result in the Ninth Circuit's denial of Prasoprat's extradition.

D. *Discovery Pertaining to Conditions in the Requesting Nation Should Be Permitted in Extradition Cases*

A magistrate's denial of discovery in an extradition proceeding is normally reviewed for abuse of discretion.²⁵² In *Prasoprat*, the magistrate denied Prasoprat's discovery motion regarding Thailand's use of the death penalty as punishment for drug offenses, believing that he lacked the discretion to deny extradition based on the requested information.²⁵³ The information was relevant, however, because the magistrate could have denied extradition based on the humanitarian exception.²⁵⁴ Because the magistrate possessed the authority to deny extradition based on Thailand's use of the death penalty, his decision to deny discovery was erroneous.²⁵⁵ Therefore, if the Ninth Circuit correctly held that the humanitarian exception was available in Prasoprat's case, then it should have allowed for discovery to determine whether there was a credible concern that Prasoprat would be executed upon extradition. Because Thailand routinely executes drug offenders, discovery would have surely proven Prasoprat's fear of execution credible.²⁵⁶ Upon this finding, the court should have denied Prasoprat's extradition under the humanitarian exception unless Thailand provided assurances that it would not execute Prasoprat.

In a case such as *Prasoprat* in which a failure to apply the humanitarian exception may violate the extraditee's constitutional rights, a decision to deny discovery into the conditions threatening a constitutional violation is surely an abuse of discretion. Even if the magistrate did not abuse his discretion, Prasoprat deserves a ruling on his discovery motion under a correct understanding of the applicable law. Once the validity of the humanitarian exception is established, the right to discovery pertaining to humanitarian concerns must follow. Discovery in extradition proceedings has traditionally been discretionary and limited.²⁵⁷ As the areas of permissible inquiry expand, the discovery permitted will also expand to the extent necessary to determine whether the humanitarian exception should apply.²⁵⁸ In accordance with Prasoprat's argument, if the magistrate in his case had realized that he possessed the discretion to deny extradition on humanitarian

252. *Emami v. U.S. Dist. Ct. for N. Dist. of Cal.*, 834 F.2d 1444, 1452 (9th Cir. 1987).

253. *See Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005).

254. *See Gallina*, 278 F.2d at 79.

255. Appellant's Opening Brief at 23, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

256. *See supra* text accompanying notes 103, 105-06.

257. *See Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988); *In re Kraiselburd*, 786 F.2d 1395, 1399 (9th Cir. 1986).

258. *See Shea, supra* note 33, at 134-35.

grounds, then he likely would have allowed discovery relating to the use of the death penalty as a punishment for drug offenses in Thailand.²⁵⁹

VI. CONCLUSION

In *Prasoprat*, the Ninth Circuit erroneously upheld the extradition of a U.S. citizen to Thailand where he faces the death penalty for a non-violent drug offense.²⁶⁰ The court failed to apply the humanitarian exception and effectively eliminated the exception as a viable doctrine in the Ninth Circuit.²⁶¹ Denying the humanitarian exception's existence, the Ninth Circuit also erroneously denied Prasoprat the opportunity to obtain discovery regarding Thailand's use of the death penalty as punishment for drug offenses.²⁶²

Prasoprat did not argue that his extradition would amount to a constitutional violation.²⁶³ He was likely discouraged by case precedent suggesting that the Constitution does not apply in extradition proceedings.²⁶⁴ To ensure the effectiveness of constitutional protections, however, nations should not be permitted to circumvent an individual's rights by permitting extradition to nations without the same constitutional protections.²⁶⁵ In *Prasoprat*, the Ninth Circuit wrongly allowed U.S. authorities to subject a U.S. citizen to unconstitutional punishment through extradition.

When the United States endangers the life of a U.S. citizen, that citizen is entitled to review by an independent judiciary.²⁶⁶ The Ninth Circuit also should have obtained assurances from Thailand that Prasoprat would not be executed or inadequately protected from extrajudicial action. Absent these assurances, the Ninth Circuit should have denied Prasoprat's extradition on constitutional and humanitarian grounds. Instead, the Ninth Circuit ignored international trends toward evaluating humanitarian concerns in extradition proceedings and permitted the United States to extradite one of its own citizens to a nation that may subject him to cruel and unusual punishment.²⁶⁷

259. Appellant's Opening Brief at 22-23, *Prasoprat*, 421 F.3d 1009 (9th Cir. 2005) (No. CA 03-57253).

260. *Prasoprat*, 421 F.3d at 1015.

261. *See id.* at 1016.

262. *Id.* at 1015-16.

263. Appellant's Opening Brief at 27-34, *Prasoprat*, 421 F.3d 1009 (No. CA 03-57253).

264. *E.g.*, *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

265. *See Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 484 (1989) (de Meyer, J., concurring).

266. *See Abramovsky, supra* note 36, at 24.

267. *See Prasoprat*, 421 F.3d at 1017; *Clarke, supra* note 124, at 275-76; *supra* note 232 and accompanying text.