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United States Extradition Process: Changes in Law to Address Constitutional Infirmity

I. Introduction

On August 31, 1995, in *Lobue v. Christopher*, a federal district court held that the statutory process for international extraditions from the United States is unconstitutional because it violates the doctrine of separation of powers. Under the extradition process, a so-called extradition magistrate, a member of the judiciary, makes a determination of extraditability. However, if the magistrate determines that the person is extraditable, the Secretary of State, an executive branch official, has sole discretion whether to extradite. The court concluded that it was unconstitutional for the statute to "confer upon the Secretary the authority to review the legal determinations of federal extradition judges."

In *Lobue*, Canada sought extradition of a United States citizen, in order to try him for kidnapping. As *Lobue* illustrates, the extradition procedure represents the only opportunity for a United States national accused of a crime under the laws of another country to seek the protection of the United States. It is therefore crucial that the procedure strike a proper balance between the constitutional rights of the person whose extradition is sought and the interests of the United States government.

This Comment reviews the history of the international extradition process in the United States, in terms of the relation-

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3. *Id.*
4. The United States Constitution also provides for extradition between states. U.S. CONST. art. IV, § 2, cl. 2. Interstate extraditions are beyond the scope of this Comment.
ship between the roles of the executive branch and the judiciary, and describes the procedures prescribed by the current federal extradition statute. It explains the background of Lobue v. Christopher, and the separation of powers argument that led the district court to strike down in part the federal law governing extradition.

Further, this Comment suggests that it is possible to replace the current extradition procedure with one that not only is constitutionally acceptable, but also preserves the constitutional role of the executive branch in the conduct of foreign relations and protects the rights of persons subject to extradition by the United States. It concludes that this can be done by placing the extradition procedure entirely in the Department of State, and giving the current function of the federal judicial officers who now hear extradition complaints to administrative law judges, executive officials who are insulated from the foreign policy considerations that motivate the Secretary's decision. This would provide the requisite due process, including reviewability by an independent judiciary, to the same extent it is now available, while at the same time permitting the executive branch to take foreign policy considerations into account.

II. Extradition in the United States

The Supreme Court has defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." 5 6

The decision whether to extradite, for the executive branch, may be made as an exercise of the President's authority to conduct foreign relations. For the defendant who is the subject of an extradition request, the issue is one of individual rights. The attempt to strike a balance between these two sometimes competing interests has a long history in this country.

6. This Comment uses the term "defendant" hereafter to refer to persons in the United States whose extradition is sought by other countries.
A. History of Extradition

Extradition was first provided for in the United States by the Jay Treaty of 1794 with Great Britain. The Jay Treaty provided for either government to deliver persons charged with murder or forgery to the other government "on requisition," but only on evidence of criminality that would justify apprehending and trying the defendant in the country where he was located if the offense had been committed there. However, the Jay Treaty provided no specific procedure for extradition.

The first reported extradition case under the Jay Treaty occurred when the United States agreed to a request from Great Britain to surrender Jonathan Robbins, a man accused of murder during a mutiny on a British ship. By order of a federal district judge, Robbins was arrested and imprisoned without a hearing. The British Minister requested Robbins' extradition pursuant to the Jay Treaty. In response, the United States Secretary of State wrote to the judge that "the President 'advises and requests' you to deliver [Robbins] up." Despite arguing that he was a United States citizen who had been impressed into service in the British navy and had escaped during a mutiny by others, Robbins was turned over to the British, and was quickly tried and executed.

The Robbins case captured the public's attention and produced a great amount of controversy concerning the apparent failure of either the court or the President to provide procedural justice.

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8. Id.
9. Id.
10. The person who was the subject of this extradition proceeding is sometimes also referred to as Jonathan Robins, Nathan Robbins, or Thomas Nash. Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 YALE L.J. 229, 237 (1990); United States v. Robins, 27 F. Cas. 825 (D.C.S.C. 1799) (No. 16,175). This Comment uses the spelling "Robbins," except in citations to a source that uses an alternate spelling.
11. Robins, 27 F. Cas. at 826.
13. Jay Treaty, supra note 7, at art. XXVII.
15. Wedgwood, supra note 10, at 304.
16. Id.
17. Id. at 323-25.
and substantive rights for Robbins. Due in part to the controversy surrounding the case, the Jay Treaty was allowed to expire. Thereafter, until at least 1840, there were no extradition treaties in effect between the United States and any foreign country.

In 1842 the United States and the United Kingdom signed the Webster-Ashburton Treaty. The Treaty was the origin of significant judicial involvement in the extradition process. Judges or magistrates had been involved before, but only, as was the case with Robbins, to arrest and detain the defendant while the executive branch decided his fate. With Webster-Ashburton, the judiciary took on a more significant role, and the executive branch role was weakened. The Webster-Ashburton Treaty, in part responding to the controversy over the Robbins case, provided for a determination by a judge or magistrate whether the evidence of the defendant’s criminality was sufficient to sustain the charge. Under the Treaty, a judicial official would certify this determination to an executive branch official; the executive official would issue a warrant of surrender. The executive official was not expected to

18. Concerning the public’s interest in this case, Justice Catron wrote that a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in cases of extradition, and which example might be made a precedent for similar invasions in other cases.

19. President Adams’ treatment of Robbins was an issue in the next presidential election, in which Thomas Jefferson defeated Adams. Jefferson stated that “I think no one circumstance since the establishment of our government has affected the popular mind more [than the Robbins case].” Letter from Thomas Jefferson to Charles Pinckney (Oct. 29, 1799), in 7 THE WRITINGS OF THOMAS JEFFERSON, 1795-1801, at 397 (Paul L. Ford ed., 1896).


21. Id.


25. The relevant portion of the Webster-Ashburton Treaty states that [T]he respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining
take foreign policy considerations into account, or otherwise to 
exercise significant discretion in determining whether to issue the 
warrant: "[I]f the President is satisfied of the regularity of the 
proceedings which have been certified, and of the authority of the 
[extradition magistrate] to entertain them, his duty . . . is to . . . 
issue a warrant for the surrender of the fugitive."26

In 1843, the year after signing Webster-Ashburton, the United 
States entered into an extradition treaty with France.27 Unlike 
Webster-Ashburton, this treaty did not contain a provision 
requiring a judicial determination of criminality.28 However, 
President Polk, upon receiving an extradition request from France 
for one Nicholas Metzger, referred the matter to a United States 
district judge.29 After the judge found that there was sufficient 
evidence to extradite, Metzger filed a habeas corpus petition with 
the Supreme Court.30 Although the treaty said nothing about 
judicial intervention, the Supreme Court found that the procedure 
followed by the President, referring the matter to a federal judge, 
was proper:

The mode adopted by the executive in the present case seems 
to be the proper one . . .

Whether the crime charged is sufficiently proved, and 
comes within the treaty, are matters for judicial decision; and 
the executive, when the late demand of the surrender of 
Metzger was made, very properly, as we suppose, referred it to 
the judgement of a judicial officer. The arrest which followed, 
and the committal of the accused, subject to the order of the 
executive, seems to be the most appropriate, if not the only, 
mode of giving effect to the treaty [of 1843 with France].31

In 1848, the extradition procedure provided for in the 
Webster-Ashburton Treaty,32 and used by President Polk to deal 
with the request by France for the extradition of Metzger,33 was

judge or magistrate to certify the same to the proper Executive authority, 
that a warrant may issue for the surrender of such fugitive.

Webster-Ashburton Treaty, supra note 22, at art. X.
580.
28. Id.
30. Id. The court denied Metzger’s petition. Id. at 192.
31. Id. at 188-89.
32. Webster-Ashburton Treaty, supra note 22, at art. X.
33. Metzger, 46 U.S. at 176.
incorporated in the first federal statute to deal with extradition.\textsuperscript{34} The 1848 statute, which was substantially the same as the current law,\textsuperscript{35} provided for an extradition magistrate\textsuperscript{36} to examine the evidence against a person sought by a foreign government.\textsuperscript{37} The extradition magistrate, if he found the evidence to be sufficient, was required to certify that determination to the Secretary of State.\textsuperscript{38} Upon certification, the Secretary of State was given authority to make a final determination whether to extradite.\textsuperscript{39} The extradition law enacted in 1848 has been changed since then only in minor respects, for example, to substitute "magistrate" for the original "commissioner."\textsuperscript{40} None of the changes have altered the basic statutory scheme.\textsuperscript{41}

\textit{B. Extradition in Modern Times}

Today, the extradition procedure, as it has since the nineteenth century, combines review by a judicial officer, the extradition magistrate, and a final determination by an executive branch official. Under the law governing extraditions from the United States, an extradition is authorized only when there is a treaty, or convention for extradition, between the United States and the foreign government.\textsuperscript{42} These treaties generally prescribe which offenses are subject to extradition and what procedures each party to the treaty is to follow in asking for extradition by another party.\textsuperscript{43} The procedure for dealing with a request to the United States for extradition under one of these treaties is governed generally by 18 U.S.C. §§ 3181-96.

\textsuperscript{34} Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.
\textsuperscript{35} Compare 18 U.S.C. § 3184 (1994) with Act of Aug. 12, 1848, ch. 167, 9 Stat. 302 (some of the language has been modernized, but there is essentially no substantive change).
\textsuperscript{36} Unless otherwise indicated, this Comment uses the term "extradition magistrate" to designate all the federal judicial officers authorized by law to hear extradition complaints. Although this term is not found in the law, it is commonly used to designate those given jurisdiction over extradition complaints, including federal judges, magistrates authorized by the federal courts, and state court judges in courts of general jurisdiction. 18 U.S.C. § 3184.
\textsuperscript{37} Act of Aug. 12, 1848, ch. 167, 9 Stat. 302, § 1.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at § 3.
\textsuperscript{41} See supra note 35.
1. Procedural Requirements.—Although there may be minor variations, extradition requests addressed to the United States generally are subject to the same basic procedure. The foreign government seeking the defendant's extradition submits a formal request, accompanied by documentation such as copies of the pertinent foreign statutes, and either a certificate of conviction or evidence to support a finding that there is probable cause to believe that the defendant committed the crime for which he is sought.\(^{44}\) The formal proceeding before an extradition magistrate is initiated by filing a complaint under oath.\(^{45}\)

The magistrate then conducts a hearing.\(^{46}\) This has been described as a process for determining whether there is probable cause to believe that there has been a violation of one or more of the criminal laws of the [requesting] country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation . . . .\(^{47}\)

The extradition magistrate may also consider whether the offense charged is covered by the applicable extradition treaty, and whether it satisfies the "dual criminality" requirement.\(^{48}\)

The magistrate's jurisdiction is limited in significant respects. He is prohibited from inquiring into the motivation for the extradition request.\(^{49}\) Further, he may not consider such factors as the lack of procedural safeguards in the criminal justice system of the requesting country, the potential that the defendant might be punished more severely in the requesting country than in the


\(^{46}\) Id.

\(^{47}\) Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976).

\(^{48}\) Dual (or "double") criminality is the principle that extradition may not take place unless the offense charged is a crime not only under the laws of the country seeking extradition, but also under the laws of the country from which extradition is sought. In most cases, the treaty defines those offenses for which dual criminality is a requirement. Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313, 1316 (1962).

\(^{49}\) E.g., In re Mackin, 668 F.2d 122, 133 (2d Cir. 1981). But see John Kester, Some Myths of United States Extradition Law, 76 GEO. L.J. 1441, 1476 (1988) (suggesting that if an extradition magistrate can be convinced that the defendant's extradition is sought for punishment for a political offense or for an nonextraditable reason, extradition will probably be denied). Id.
United States for the same offense, or the possibility that the defendant might be subject to torture or other human rights violations. The limitation on the scope of inquiries by the magistrate is referred to as the “rule of non-inquiry.”

If the extradition magistrate finds that the evidence is sufficient to sustain the charge under the treaty, he must certify that finding to the United States Secretary of State. The extradition magistrate also is to send the evidence and “a copy of all the testimony taken before him” to the Secretary.

The Secretary has broad discretion in making a final decision whether to extradite the defendant. After receiving the information provided by the extradition magistrate, the Secretary can review the requesting country’s expected treatment of the defendant, the motivation of the requesting country, and whether the offense alleged is “political” in nature.

The Secretary may also review the extradition magistrate’s determination of extraditability. While the Secretary is not required to hear oral argument or to receive new evidence, he may look outside the record of the extradition hearing and conduct a de novo examination of the case. The final decision whether to extradite lies “within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs” and is not reviewable by the courts.

2. The Rights of the Defendant in an Extradition Proceeding.—In the Robbins case, discussed above, the defendant was extradited from the United States after the President, uncertain

50. See Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976); Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960).
51. United States v. Smyth, 61 F.3d 711, 714 (9th Cir. 1995).
53. Id.
54. See Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980).
55. In re Mackin, 668 F.2d 122, 133 (2d Cir. 1981).
56. Nicosia v. Wall, 442 F.2d 1005, 1006 (5th Cir. 1971). The United States will refuse extradition for what it considers to be political offenses. Id. A discussion of what constitutes a political offense is beyond the scope of this Comment. However, they are generally those that are committed in defiance of or in an attempted overthrow of an existing regime. Id.
59. Id.
60. Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980).
whether he could direct the judge with jurisdiction of the defendant to act, "advised and requested" that the judge deliver the defendant to British authorities.\footnote{Wedgwood, supra note 10, at 289-90.} In part because of the adverse public reaction to Robbins' extradition, the procedure for successive reviews, first by an extradition magistrate and then by an executive branch official, was instituted in the Webster-Ashburton Treaty.\footnote{In re Kaine, 55 U.S. (14 How.) 103, 112-13 (1852).}

Under the current procedure, the defendant's appearance before the extradition magistrate affords him the opportunity to assert certain basic rights.\footnote{The Rights of the defendant in an extradition are more limited than those of the defendant in a criminal prosecution. See infra text accompanying notes 73-82.} The role of the judiciary in the extradition process has been described as ensuring "that the Executive's power to extradite is not being exercised so as to violate individual constitutional rights."\footnote{Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).} Among these are the rights to due process\footnote{18 U.S.C. § 3184 (1994).} and equal protection.\footnote{See FED. R. CRIM. P. 4, 5.1.}

The extradition hearing has been analogized to a preliminary hearing in the criminal process.\footnote{Cf. In re Burt, 737 F.2d at 1487 (holding extradition decisions may not be based on constitutionally impermissible factors).} For example, the extradition magistrate's determination whether the evidence is sufficient to sustain the charge against the defendant is similar to a magistrate's determination whether to issue a search warrant or an arrest warrant, based on a finding that probable cause exists.\footnote{Benson v. McMahon, 127 U.S. 457, 463 (1888).} In fact, the extradition magistrate's determination has been described as a determination of probable cause.\footnote{See Jimenez v. Aristeguieta, 311 F.2d 547, 551-52 (5th Cir. 1962).} Similarly, just as in a preliminary hearing, the guilt or innocence of the accused is not determined during the judicial extradition proceeding.\footnote{Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976).}

However, the defendant in an extradition proceeding is not a criminal defendant under United States law, and does not enjoy many of the rights that would be available in a United States court in a criminal trial.\footnote{Martin v. Warden, Atlanta Penitentiary, 993 F.2d 824, 829 (11th Cir. 1993).} For example, the Sixth Amendment right to a speedy trial does not apply in extradition proceedings.\footnote{Jhirad, 536 F.2d at 485 n.9.} Neither the Federal Rules of Evidence nor the Federal Rules of Criminal
Procedure apply; therefore, the government is free to introduce hearsay evidence. In addition, the Fourth Amendment exclusionary rule does not apply, and the defendant may not introduce evidence to contradict the allegations of the requesting nation.

The defendant may not appeal directly from an extradition magistrate's finding of extraditability; the defendant's only recourse is to file a petition for a writ of habeas corpus to test the legality of his detention. If the extradition magistrate finds that the defendant is not extraditable, the constitutional double jeopardy prohibition does not protect the defendant; the requesting government may file a second complaint and begin a new extradition proceeding.

Once the extradition magistrate certifies extraditability, the Secretary of State makes a final decision whether to extradite. Review by the Secretary provides an opportunity for The Executive Branch to assert its constitutional prerogatives in the foreign policy arena.

At this stage of the extradition process, the defendant lacks the protections that were available to him before the extradition magistrate. Nothing in the extradition statute prevents the Secretary of State from acting for policy reasons in a manner that does not protect the defendant's rights. The executive power to conduct foreign affairs and make treaties extends to extradition;

75. Fed. R. Crim. P. 54(b)(5); Fed. R. Evid. 1101(d)(3).
77. Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981).
78. Hill v. United States, 737 F.2d 950, 951 (11th Cir. 1984).
80. U.S. Const. amend. V.
81. Mirchandani v. United States, 836 F.2d 1223, 1226 (9th Cir. 1988).
82. See United States v. Doherty, 786 F.2d 491, 501 (2d Cir. 1986).
84. The Department of State has access to information and resources concerning conditions in other countries. The Department, for example, undertakes annual reviews of global human rights throughout the world under the Foreign Assistance Act of 1961. Ahmad v. Wigen, 726 F. Supp. 389, 415 (E.D.N.Y. 1989).
85. 18 U.S.C. § 3186 (1994): “The Secretary of State may order the person committed under [18 U.S.C. § 3184 (1994), providing for certification to the Secretary by the extradition magistrate] to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.” By the same token, there is nothing in the law to prevent the Secretary from acting in the interest of the defendant even though the defendant was properly found to be extraditable.
86. U.S. Const. art. II, § 2, cl. 2; see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (the President alone has the power to
thus, in a case where the defendant’s interests are in conflict with
the international interests of the United States, the Secretary may
decide whether to extradite based on foreign policy or domestic
political considerations, even though consideration of the individual
rights of the defendant might call for a different result.

III. Lobue v. Christopher

As discussed above, the longstanding statutory scheme for
dealing with extradition recognizes two competing interests, that of
the executive Branch in using extradition as an instrument of
foreign policy and that of the individual defendant in protecting his
constitutional rights. It does this by establishing an extradition
process under which the judiciary makes a determination of
extraditability, and the executive branch decides independently
whether to extradite. However, that attempt to accommodate
competing interests set the stage for the challenge to the constitu-
tionality of the process in Lobue v. Christopher.87

Mr. Lobue, the defendant, is an American citizen.88 An
American lawyer asked Lobue to go to Canada to bring back Mrs.
DeSilva, the wife of a client. Mrs. DeSilva was quadriplegic and
mentally disabled as the result of a car accident, and was staying in
Canada with her mother. Mr. DeSilva, who was also his wife’s
legal guardian, sought her return for a medical examination, in
connection with a suit he was bringing, on her behalf, for the
injuries she sustained in the accident.89

Lobue and Mr. DeSilva went to Winnipeg and left with Mrs.
DeSilva. Mrs. DeSilva’s mother called Canadian police to allege
that her daughter had been abducted. Lobue was stopped at the
American side of the border, Mrs. DeSilva was returned to Canada,
and Lobue was permitted to enter the United States.90

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87. It should be noted that the district court’s decision in Lobue has been met
with skepticism from other federal courts. See, e.g., In re Lin, 915 F. Supp. 206,
88. Memorandum in Support of Application for Temporary Restraining Order
and Preliminary Injunction at 1, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C.
89. Id. at 2-3.
90. Id. at 4.
Pursuant to the United States-Canada extradition treaty, Canadian authorities asked the State Department for extradition of Lobue and several co-defendants on kidnapping charges. The Secretary of State forwarded the request to the appropriate U.S. Attorney, a complaint was filed, and an extradition magistrate, after a hearing, issued an order certifying the extraditability of Lobue.

Lobue challenged the magistrate's ruling in a habeas corpus proceeding in the Northern District of Illinois, while at the same time challenging the constitutionality of the extradition statute in the District Court for the District of Columbia. In the latter proceeding, the district court decided that the extradition statute is unconstitutional to the extent that it purports to authorize executive branch officials to review decisions of members of the federal judiciary and federal magistrates. The district court enjoined the government from executing the surrender warrants signed by the Secretary of State for Lobue. Subsequently, the district court issued an injunction that prevented all extraditions.

In arguing successfully against the latter injunction, the State Department pointed out that "an additional injunction barring the United States from effecting the extradition of all other fugitives while this case is pending would seriously damage the U.S. foreign policy generally and would have a particularly harmful effect on the U.S. Government's efforts to combat international criminal activity." It also argued that if the United States refused to honor extradition requests of other countries, it would be in violation of the terms of treaties, and our treaty partners would be in a position to seek suspension or termination of those treaties, as well as to refuse to comply with requests that they extradite their citizens to the United States.

93. Id.
94. Id. at 78.
95. Id. The district court ordered that Lobue not be extradited and the Department of State complied, but an effort by the plaintiffs to extend that order to prevent surrender of anyone in the United States who is the subject of a pending extradition proceeding was unsuccessful. Toni Locy, Court Lifts Ruling Barring U.S. Extradition; Statute to Remain in Force During Appeal, WASH. POST, Sept. 30, 1995, at A3.
98. Id. at 3.
On appeal, the Court of Appeals for the District of Columbia Circuit vacated the district court's judgment that the extradition statute was unconstitutional on the basis that the district court lacked subject matter jurisdiction of the case. However, the Court of Appeals indicated that the plaintiffs could pursue the matter through a habeas corpus petition in the Northern District of Illinois. That petition was granted. The extradition treaty between the United States and Canada requires "dual criminality" as a condition of extradition. The Illinois district court held that this requirement was not met because the conduct for which extradition was sought would not have been a crime under Illinois or federal law.

The *Lobue* litigation thus does not resolve the issue of the constitutionality of the extradition procedure. Until that issue is finally resolved, the reasoning of the District Court for the District of Columbia in support of the view that the extradition procedure is unconstitutional may be relied on by anyone seeking to challenge an extradition.

The basis for the district court's decision was the separation of powers doctrine. Separation of powers refers generally to the idea that the functions of the three branches of government must not infringe on one another's domains. In the context of the relation of the judiciary to the executive branch, this doctrine forbids executive review of a final determination by the judiciary. This is "exemplified by Hayburn's Case, ... which stands for the principle that Congress cannot vest review of the decisions of [federal courts established under constitutional authority] in officials of the Executive Branch." The district court in *Lobue* found that the law purported to give the Secretary of State, an executive branch official, the power to review legal decisions of federal judges and extradition magistrates, members of the judiciary. The court then went on to consider whether that power to review, by permitting a decision by

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100. *Id.* at 1082.
the judiciary to be reviewed by executive branch officials, was an unconstitutional violation of separation of powers.106

The Department of State contended that its role was not to review the extradition magistrate’s decision. According to the Department, the magistrate’s decision is limited to the question whether it is lawful to hold the defendant for extradition; the decision is final and binding on that question. The Secretary, on the other hand, “may decide for any reason to deny the extradition request,” regardless of the magistrate’s decision that the extradition is legally permissible.107

The district court disagreed, holding that under the extradition law the magistrate’s decisions are neither binding nor final.108 It found that the only plausible explanation for the requirement in the law that the magistrate send to the Secretary a copy of all the testimony taken before him is that the Secretary has authority to perform his own independent review of the legality of the extradition. The court cited instances in which the Secretary appears to have done just that.109

Further, the district court pointed out, despite a determination by the magistrate of non-extraditability, there is nothing to prevent the government from bringing additional extradition proceedings against the same individual.110 Conversely, the court said, if the magistrate finds that the defendant is extraditable, that finding also lacks finality because the Secretary can review the magistrate’s legal conclusions.111

The district court conceded that the executive branch can choose not to honor a particular extradition request in the exercise of its foreign relations power, and can do so without offering any explanation.112 However, the court said that the executive branch

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106. *Lobue*, 893 F. Supp. at 70-74. In addition to federal judges and magistrates, state judges can also serve as extradition magistrates. 18 U.S.C. § 3184 (1994). The court in *Lobue* points out that there is no constitutional separation of powers issue if the Secretary of State reviews determinations made by state judges. *Lobue*, 893 F. Supp. at 67 n.2.
109. *Id.* at 68-70.
110. *Id.* at 71.
111. *Id.*
112. *Id.* at 73-74.
may not review and set aside a determination constitutionally
committed to the judicial branch.\footnote{113}{Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), vacated, 82 F.3d 1081 (D.C. Cir. 1996).}

Finally, the district court rejected the State Department’s
argument that the combination of judicial and executive functions
in the statutory extradition procedure is essentially no different
from that employed in preliminary judicial rulings in criminal
cases.\footnote{114}{Id. at 74-75.} The Department of State had argued, for example, that
when a magistrate determines that probable cause exists and issues
a search warrant, the prosecutor, an executive branch official,
retains discretion not to execute the warrant.\footnote{115}{Id. at 74.}
The court found
that the procedures are significantly different, primarily in that the
law governing search warrants is silent about the prosecutor’s role,
while the extradition law “specifically confers on The Executive
Branch an impermissible power.”\footnote{116}{Id. at 75 n.15.}

IV. Responses to the Unconstitutionality of the Extradition
Process

Should the extradition procedures of 18 U.S.C. § 3184 be
found unconstitutional, the adverse effects on United States foreign
policy predicted by the Department of State could come to pass,
unless the Congress were to enact legislation replacing the current
extradition laws. The new legislation would have to avoid the
separation of powers problem, while at the same time balancing the
interests of the individual defendants against the foreign policy
interests of the executive branch. It is therefore prudent to begin
thinking about possible solutions.

One option is to do nothing. In \textit{Lobue}, the district court did
not strike down section 3184 in its entirety. The court ordered that
“insofar as it purports to confer on members of the Executive
branch the power to review decisions of Article III federal judges
and United States magistrates, Title 18, § 3184 of the United States
Code is hereby declared to violate the United States Constitution

The Department of State suggested in \textit{Lobue} that the
consequence of the district court’s decision would be to invalidate
that part of 18 U.S.C. § 3184 that requires the extradition magistrate to certify the decision for review by the Secretary of State.\textsuperscript{118} The result, in this view, would be that the Secretary would exercise his discretion, but without reviewing the findings of the extradition magistrate.\textsuperscript{119} This seems consistent with the suggestion by the district judge that the section 3184 procedure would be constitutional if the extradition magistrate were not required to send a copy of all testimony to the Secretary.\textsuperscript{120}

If the extradition procedure was found unconstitutional on this basis, and the law was not amended, the constitutional issue could remain unsettled. A subsequent defendant might still attack the extradition procedure, arguing that the Secretary's action, after a decision by an extradition magistrate, remains in effect an executive review of a final judicial determination.

It is therefore preferable to think in terms of an amendment to the extradition statutes.\textsuperscript{121} One option would be to reverse the order in which the executive branch and the judiciary review extraditions. The Secretary of State could make the threshold decision whether extradition is consistent with treaty obligations and foreign policy considerations. The matter could then be appealed to a judge or magistrate, just as other executive branch determinations are subject to judicial review.\textsuperscript{122}

The statute could limit the scope of review, so that the judge or magistrate would not be questioning the Secretary's determination on foreign policy grounds. Instead, he would be determining, as the extradition magistrate does under current law, whether there is probable cause to believe that the person whose extradition is sought has violated a law of the country seeking extradition, that the offense charged is unlawful both in the other country and in the


\textsuperscript{119} \textit{Id.} at 20.

\textsuperscript{120} See Lobue, 893 F. Supp. at 72-74.

\textsuperscript{121} In the early 1980s, amendments to the extradition laws were considered. \textit{Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981); H.R. REP. NO. 97-627, pt. I (1982).}

Although the bills then under consideration would have changed the extradition process in some respects, neither addressed the constitutional separation of powers problem that is the subject of this Comment.

\textsuperscript{122} For example, a claimant for Social Security disability benefits whose claim is denied by the Social Security Administration, can appeal that denial to the courts. 42 U.S.C. § 405(g) (1988).
United States, and that the offense is extraditable under the applicable treaty.

This approach is likely to be found constitutional because the law would in effect provide for judicial review of an executive branch decision, and the judicial determination would have the requisite finality. However, it has serious disadvantages for the defendant. In order to prevent his extradition, he would be forced to appeal, with the expense and delay that process entails. Even if judicial review were automatic, the defendant could be confined for a lengthy period, without the possibility of bail, while waiting for a decision on the legal issues.

This option might also be objectionable to the executive branch. After the Secretary of State makes a policy decision to extradite an individual, that decision could be reversed by an officer in the judicial branch. That could have an adverse effect on relations with the requesting country.

The constitutional issue could be avoided by confining the extradition procedure solely to one or the other branch of government. However, making it entirely a judicial function would prevent the executive branch from considering any of the foreign policy and international relations issues that are important factors in the decision whether to extradite.

That objection would not apply if the extradition procedure was entirely an executive function; the Secretary of State would then be able to consider the foreign policy implications of each extradition. However, as discussed above, extradition involves a balance between the interests of United States foreign policy and the interests of the defendant.

Vesting the entire function in the executive branch takes care of the former consideration, but giving the Secretary sole authority to decide all aspects of extradition could be unfair to defendants. The Department of State "is first of all a prosecutor in extradition cases." The Department helps the requesting country prepare the request, and works with the Department of Justice when the latter presents the case to the extradition magistrate. The Department therefore cannot be expected to be completely objective in deciding the legal claims of the defendant.

It is possible to amend the law to protect the rights of the defendant, while vesting the extradition procedure entirely within

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125. Id. at 1488-89.
the executive branch. Administrative law judges (ALJs) in the Department of State could perform the function in extradition proceedings now performed by the extradition magistrates, without detracting from the rights of the defendants. The ALJs' decisions could then be reviewed by the Secretary of State, just as the magistrates' decisions have been reviewed.

Federal law already provides for the appointment of ALJs in executive agencies. ALJs may conduct hearings in much the same way that a judge or magistrate does, and adjudicate the rights of parties.

ALJs are like judges in that they have considerable independence. The law requires that cases be assigned to them in rotation, so far as practicable. They can be disciplined or removed only for "good cause," and any effort to discipline them must be ruled on by an independent agency, the Merit Systems Protection Board, after an opportunity for a hearing. Disciplinary actions against ALJs are reviewable in federal district court.

One objection that might be raised to the use of ALJs concerns whether the rights of defendants would be adequately protected. However, when a proceeding conducted by an ALJ may deprive an individual of life, liberty, or property, the Due Process Clause of the Constitution requires that basic elements of due process of law be provided.

As discussed above, defendants in extradition proceedings under the present law lack many procedural rights available to defendants in criminal prosecutions. Therefore, it is not

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131. U.S. CONST. amend. V.
133. See supra text accompanying notes 73-82.
necessary to provide a full spectrum of rights in a proceeding before an ALJ in order to preserve the rights now given to defendants in extradition proceedings. An amendment providing for ALJ adjudication of extradition requests could easily assure that defendants receive no less due process protection than is now available to them.

It would not necessarily be advisable to apply to extradition the entire structure of federal law governing proceedings before ALJs. For example, the Act provides for judicial review of ALJ decisions. However, in extradition, judicial review has been limited to habeas corpus review of the rulings of the extradition magistrates. It would seem reasonable to limit review of ALJ decisions on extradition in the same fashion.\footnote{134} This scheme—an initial review by an ALJ in the Department of State to replace the current extradition magistrate’s review, followed by the same review currently performed by the Secretary of State—has a number of advantages. It avoids the charge of unconstitutional violation of separation of powers. It follows closely the existing procedure, an initial review for compliance with the basic legal requirements, followed by a policy-oriented review by the Secretary of State.

Using ALJs instead of extradition magistrates to adjudicate extradition complaints has another advantage. Under current procedure, the judge or magistrate who serves as an extradition magistrate in a particular case may never have handled an extradition before. ALJs in the Department of State would accumulate experience with extradition complaints, which would likely result in more uniform outcomes.

V. Conclusion

Extradition is described by some as \textit{sui generis}.\footnote{135} Its unusual combination of executive and judicial participation is an effort to balance the needs of foreign policy with the rights of those sought to be extradited, to face criminal proceedings in countries where their rights may not be as well protected as they would be in the United States. In attempting to achieve that balance, according to

\footnote{134}{5 U.S.C. § 701(a) (1994). Making judicial review unavailable to defendants in extradition proceedings before ALJs would not be inconsistent with the Administrative Procedure Act. The Act itself provides that judicial review is available except to the extent that statutes preclude it. \textit{Id.}}

\footnote{135}{Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976).}
a federal district court, the law violated the constitutional require-
ment for separation of powers.

If the rationale of the district court decision in Lobue v. Christopher were to be adopted, there would be considerable uncertainty concerning to what extent, if at all, the extradition procedure would survive, or if it did not, how to replace it. The best option for a replacement would be to vest the responsibility for extradition entirely in the executive branch, but to assure the rights of defendants by having independent administrative law judges perform the functions formerly assigned to extradition magistrates.

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