LOBUE V. CHRISTOPHER: AGE-OLD SEPARATION OF POWERS DEBATE RAGES ON AS COURT RULES EXTRADITION STATUTE UNCONSTITUTIONAL

*Joseph G. Silver**

I. FACTUAL BACKGROUND

In early 1994 the Canadian government charged two Chicago police officers, Anthony Lobue and Thomas Kulekowskis, with kidnapping for their participation in a friend's attempt to retrieve his physically and mentally disabled wife, Tammy, from her parents' home in Winnipeg, Canada.[1] Canadian authorities, alerted of the kidnapping by Tammy's parents, were able to thwart the conspiracy at the border.[2]

The two Chicago police officers were returned to the United States but had to submit to extradition proceedings pursuant to the United States-Canada extradition treaty.[3] The Canadian government executed the first step of the extradition process by requesting surrender of the two men for prosecution of the kidnapping charge. Following a United States federal magistrate's certification of extraditability and the Secretary of State's issuance of surrender warrants, Lobue and Kulekowskis brought an action in the District Court for the District of Columbia seeking an injunction and declaratory judgment challenging the constitutionality of the United States extradition statute.[4]

What makes this particular case important are not the facts leading up to the extradition request but the district court's ruling that the United States extradition statute,[5] on which all foreign extradition treaties are based, was

---

* J.D. 1997.

[1] Lobue v. Christopher, 893 F. Supp. 65, 67 (D.D.C. 1995), *vacated on other grounds*, 82 F.3d 1081 (D.C. Cir. 1996).

[2] *Lobue*, 893 F. Supp. at 67.

[3] Treaty with Great Britain, Dec. 22, 1931, U.S.-U.K., 47 Stat. 2122, T.S. No. 849 (applicable to Canada, New Zealand, and Ireland). *See also* 18 U.S.C. §§ 3181-3196 (1994).

[4] *Lobue*, 893 F. Supp. at 67.

[5] 18 U.S.C. § 3184 (1994). The statute originated in the Act of August 12, 1848, 9 Stat. 302. It was continued as Rev. Stat. § 5270 and was codified in substantially its present form in 1948, 62 Stat. 822. *See* Kin-Hong v. United States, 926 F. Supp. 1180 (D. Mass. 1996).

unconstitutional. The extradition statute was deemed violative of separation of powers doctrine and thus unconstitutional because it purportedly gives the Secretary of State authority to review legal findings of extradition judges.[6] In light of the *Lobue* holding, several fugitives have attempted to emulate Lobue's strategy and argue that the extradition statute is violative of separation of powers doctrine. However, this argument has not been successful in any other federal district court. This comment examines the foreign policy and governmental implications of the district court's holding. In particular, this comment will analyze the subsequent extradition proceedings that have blatantly rejected the *Lobue v. Christopher* holding.[7] The comment concludes that the manner in which the judiciary and the executive share responsibility in the extradition process is constitutional and that *Lobue* is probably a mere aberration in the 148 year history of the extradition statute.

II. LEGAL BACKGROUND

A. Extradition Procedure

Extradition is the formal surrender of a person by one nation to another for prosecution or punishment.[8] In the United States, extradition is considered a national act exclusively controlled by the federal government under its constitutional power[9] to conduct foreign relations and make treaties.[10] Under this constitutional power, Congress enacted an extradition

---

[6] *Lobue*, 893 F. Supp at 67.

[7] For courts that have considered the question since *Lobue* and have held to the contrary, *see In re* Lang, 905 F. Supp. 1385 (C.D. Cal. 1995); *In re* Lin, 915 F. Supp. 206 (D.Guam 1995); *In re* Sutton, 905 F. Supp. 631 (E.D. Mo. 1995); Cherry v. Warden, Metro. Correctional Ctr., No. 95 Cr.Mis.1 p.7(LB), 1995 WL 598986 (S.D.N.Y. 1995); Carreno v. Johnson, 899 F. Supp. 624 (S.D. Fla. 1995); *In re* Sidali, 899 F. Supp. 1342 (D.N.J. 1995); *In re* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996); Lo Duca v. United States, 93 F.3d 1100 (2d Cir. 1996). The author finds the reasoning of these courts more persuasive.

[8] *Harvard Research in International Law, Draft Convention on Extradition*, 29 AM. J. INT'L L. Supp. 21 (1935).

[9] U.S. CONST. art. II, § 2.

[10] 1 JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION §§ 44-69 (1891). This rationale is premised on two grounds: First, extradition is a treaty-founded process and a matter of foreign affairs within the enumerated powers of the Federal Government and vested in the President. Second, treaties are ratified by means of the "advice and consent" of the Senate. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 29-30 (1974).

statute whereby the Secretary of State will only surrender a fugitive when a treaty exists between the United States and the demanding country[11] and a reviewing court has certified that sufficient evidence exists to extradite.[12]

The process and procedure for extraditing a fugitive from the United States to a foreign country where he has been charged with committing a crime is set forth in 18 U.S.C. § 3184.[13] Under this statutory scheme, a federal extradition judge conducts a hearing, receives evidence, and issues a legal determination concerning the extraditability of the fugitive.[14] In order to certify the fugitive as extraditable, the United States government must establish the following jurisdictional and legal elements: (1) the offense charged is extraditable under the applicable treaty;[15] (2) the offense satisfies the "dual criminality"[16] requirement; (3) there is probable cause to

---

[11] 18 U.S.C. § 3184 (1994).

[12] For a political criticism of the United States extradition process, *see* Kai I. Rebane, *Extradition & Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 FORDHAM INT'L L.J. 1636 (1996). Rebane concludes that extradition procedures are in conflict with international human rights and that only an impartial, extra-national body should oversee extradition to guarantee that individual rights are honored. *Id.* at 1686.

[13] The statute provides: Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, 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, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. 18 U.S.C. § 3184 (1994).

[14] 18 U.S.C. § 3184 (1994).

[15] In order to satisfy this requirement, the United States government must show that the court has jurisdiction over the subject matter and the individual. *See In re* Lin, 915 F. Supp. 206, 208 (D. Guam 1995).

[16] The conduct alleged must be unlawful in both the United States and the requesting country. *See* Oen Yin-Choy v. Robinson 858 F.2d 1400, 1404 (9th Cir. 1988) (holding that no offense is extraditable unless it describes conduct which is criminal in both jurisdictions), *cert. denied*, 490 U.S. 1106.

believe that the accused committed the crime for which he is sought;[17] and (4) the accused has not shown by a preponderance of the evidence a valid defense to the extradition.[18] If the judge determines that any of these four requirements is not satisfied, the accused is released. If, on the other hand, the judge concludes that each of these criteria have been met, the accused is certified as extraditable and a copy of the court testimony is turned over to the Secretary of State.[19]

B. Lobue v. Christopher

Ever since the enactment of the Constitution in 1787, there has been considerable controversy concerning if and when the three branches of the United States government can interact. In what is commonly referred to as the separation of powers debate, the executive, judicial, and legislative branches have been in constant conflict over the boundaries of their respective power. *Lobue v. Christopher* resurrected this age-old separation of powers debate by holding that the United States extradition statute imbues the Secretary of State with the authority to review the legal findings of extradition judges.[20] The court reasoned that the Secretary of State has discretion under domestic law to deny extradition even after a United States court has certified that the accused may be extradited under the terms of an applicable treaty or agreement. In finding that the statute and the authority it confers to the Secretary of State was unconstitutional, the *Lobue* court applied a rigid and formalistic view of separation of powers doctrine which led to the conclusion that the executive branch was interfering in the judicial domain. The court grounded its conclusion in a three prong analysis consisting of a textual examination of the statute, the consistent statutory interpretation by the three branches of government, and the historical practice of implementing the statute.

---

[17] *E.g.*, Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 932 (1978).

[18] 18 U.S.C. § 3184 (1994); *see also*, Spatola v. United States, 741 F. Supp. 362, 364 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2d Cir. 1991); Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 932 (1978).

[19] 18 U.S.C. § 3184 (1994).

[20] *Lobue*, 893 F. Supp. at 71.

1. Executive Review of Judicial Determinations

The extradition statute provides that if the extradition judge "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all testimony taken before him, to the Secretary of State."[21] The *Lobue* court concluded that there was no plausible explanation why Congress would require the extradition judge to certify the evidence and turn over a copy of the testimony other than to permit the Secretary of State to perform his own independent review of the legality of the extradition.[22]

The *Lobue* court's historical support for this textual interpretation was an opinion by the Solicitor General written in 1881 when the statute was enacted.[23] The *Lobue* court further stated that this "double protection," allowing the Secretary to review the extradition judge's determination, might be desirable in the extradition scheme, but it may not be achieved in a manner which violates the Constitution.[24]

According to the court, all three branches of government have consistently taken the position that the Secretary's review of extradition proceedings extends to the legal conclusions of the extradition judge.[25] The *Lobue* court further relied on *Ornelas v. Ruiz* for the proposition that the extradition judge "is to certify his findings on the testimony to the Secretary of State that the case may be reviewed by the executive department of the government."[26]

Finally, in the third prong of its analysis, the *Lobue* court reasoned that historical evidence revealed a past practice by Secretaries of State of

---

[21] 18 U.S.C. § 3184 (1985).

[22] *Lobue*, 893 F. Supp. at 68.

[23] The Solicitor General's interpretation of the statute at the request of the Secretary was unambiguous. He stated, "I am of the opinion that the proceedings below come before you upon a quasi certiorari, and that your discretion extends to a review of every question therein presented." *See Lobue*, 893 F. Supp at 68-69 (citing 17 U.S. Op. Att'y Gen. 184, 185 (1881)).

[24] *Lobue*, 893 F. Supp. at 69 (citing Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting)).

[25] The Executive has the power of reviewing all the proceedings and passing judgment on their correctness. Furthermore, the Judiciary can neither order the delivery of the requested person nor bind the action of the President. *See, e.g.*, S. Rep. No. 82, 47th Cong., 1st Sess. 3 (1882).

[26] Ornelas v. Ruiz, 161 U.S. 502, 508 (1896). *See also* 3 Dep't State Legal Advisor Op. 2356, 2367 (1931) ("The Secretary of State may review the evidence and reach an entirely different conclusion.").

reviewing and setting aside the legal conclusions of extradition judges.[27] The *Lobue* court relied primarily on *In re Stupp*,[28] the first case to recognize executive discretion over judicial determinations of extradition.[29] In that case, the extradition judge certified that the accused was extraditable to the Secretary of State.[30] However, the Secretary of State, in his review, sought assistance from the Attorney General who found that the accused was not legally extraditable. Following the Attorney General's conclusion, the Secretary refused to issue a warrant of surrender.[31] On the basis of *In re Stupp*, the *Lobue* court concluded that there was "overwhelming evidence that the Secretary of State does in fact subject the legal determinations of extradition judges to executive branch review."[32] The *Lobue* court's conclusion that the extradition statute did indeed authorize executive revision was tantamount to its finding of unconstitutionality.

2. *Finding of Unconstitutionality*

The constitutional issue in *Lobue* arises from the fact that the judicial officer must turn over a copy of the testimony to the Secretary of State. The court concluded that by requiring testimony to be turned over to the executive, the extradition statute forces the judiciary to issue non-final, non-binding "advisory opinions which are subject to review and revision by the

---

[27] *Lobue*, 893 F. Supp. at 70.

[28] *In re* Stupp, 23 F. Cas. 296, 301 (No. 13563) (C.C.S.D.N.Y. 1875).

[29] *See* Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1328 (1962) (detailing the infrequent use of executive extradition review, but concluding that the role of the Secretary of State "is really one of conducting a de novo examination of the case to determine whether the requirements of the treaty have been met").

[30] 23 F. Cas. at 301. The court held that the accused was not extraditable to Prussia in light of the fact that the conduct with which he was charged occurred in Belgium, while the United States-Prussia extradition treaty permitted extradition only for crimes committed within the jurisdiction of the requesting country.

[31] *Id.*

[32] *Lobue*, 893 F. Supp. at 70. Although the *Lobue* court concluded that the Executive Branch does have this power to review extradition proceedings, it has been rarely exercised. *See* 4 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 260 (1990) ("On only two occasions since 1950 has the Secretary declined to issue a warrant for the surrender of a person found extraditable.").

executive branch."[33] As a result, the statute was declared unconstitutional because Congress cannot vest review of the decisions of Article III courts in officials of the executive branch.[34]

3. Procedural Posture

On September 15, 1995, following the resolution of the case, the district court issued an order certifying as a class "all persons who presently are or in the future will be under threat of extradition from the United States."[35] The order enjoined the Secretary of State, the State Department, and the United States from surrendering any member of the plaintiff class.[36] It further stayed extradition of all class members.[37] However, the Court of Appeals for the District of Columbia Circuit issued a partial stay of the district court's order pending appeal. The stay allowed extradition of any class members other than the two named plaintiffs and a third individual who intervened.[38]

In April 1996 the D.C. Circuit Court of Appeals heard the appeal and vacated the District Court's judgment for lack of subject matter jurisdiction to issue declaratory relief.[39] The District Court lacked subject matter jurisdiction because Lobue and Kulekowskis, who were under constructive custody of the United States marshall for the Northern District of Illinois, could challenge the extradition statute through a petition for habeas corpus in Illinois. Since the plaintiffs had an available habeas remedy in Illinois,

---

[33] *Lobue*, 893 F. Supp. at 70-71. The government advanced several arguments in opposition, but they were all summarily rejected. These arguments will be revisited in the Legal Analysis section of this comment.

[34] *Lobue*, 893 F. Supp. at 71 (citing Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453 (1995)).

[35] Lobue v. Christopher, 893 F. Supp., *modified to grant class certification*, Civil Action No. 95-1097 (Sept. 15, 1995). The order expressly provides that the injunction does not extend to extradition proceedings, only to surrender of a member of the plaintiff class.

[36] Lobue v. Christopher, 893 F. Supp. 65, *modified to grant class certification*, Civil Action No. 95-1097 (RCL), P(3).

[37] *Id.*

[38] Lobue v. Christopher, 893 F. Supp. 65, *stay of class lifted*, No. 95-5293 (D.C. Cir. Sept. 29, 1995).

[39] Lobue v. Christopher, 893 F. Supp. 65, *vacated on other grounds*, 82 F.3d 1081, 1084 (D.C. Cir. 1996) (determining that Congress intended to displace more general remedies by promulgating the more specific habeas statute; rejecting conception that a fugitive contesting his imprisonment could pursue redress in the nature of mandamus or declaratory judgment).

they could not bring an action for declaratory judgment in another district.[40] The D.C. Circuit did not address the issue of the constitutionality of the extradition statute, thus it seems that the reasoning of the District Court concerning the extradition statute still remains good law.

III. LEGAL ANALYSIS

Prior to *Lobue v. Christopher*, the constitutionality of the extradition statute had never been challenged on separation of powers grounds.[41] Setting legal precedent, the district court interpreted historical practice to find the extradition statute unconstitutional. If later courts adopt the *Lobue v. Christopher* court's reasoning, the extradition procedure, premised for almost 150 years on 18 U.S.C. § 3184, will have to be reexamined and reformulated. The implications of this possible reformulation are profound in that every treaty between the United States and a foreign country concerning extradition is based on 18 U.S.C. § 3184. Treaties will have to be rewritten with another statutory basis. Furthermore, hundreds of extradition proceedings take place each year, and the fugitives in these cases will either have to be set free or remain jailed pending resolution of the constitutionality of the statute. However, when one looks at the United States government's arguments in extradition cases following *Lobue v. Christopher*, it seems probable that the court's "rigid and formalistic application of separation of powers principles"[42] will not be adopted by later courts.

---

[40] The fugitive must pursue whatever habeas corpus relief he seeks against his actual custodian in the district of his confinement. *Lobue*, 82 F.3d at 1084 (citing Topazov v. U.S. I.N.S., 929 F. Supp. 479 (D.D.C. 1996); Chatman-Bey v. Thornburgh, 864 F.2d 804, 813 (D.C. Cir. 1988)).

[41] With regard to the failure of the courts to raise the issue on its own initiative, the *Lobue* court stated, "It is certainly unfortunate that this fundamental flaw has gone unnoticed for so long; however, the court will not further compound this error by turning a blind eye to the statute now." *Lobue*, 893 F. Supp. at 78. However, several post-*Lobue* extradition proceedings took a less activist approach and recognized "a well established principle of statutory construction requires that courts, whenever possible, interpret statutes in a manner that avoids constitutional difficulties." *See* Carreno v. Johnson, 899 F. Supp. 624, 629 (S.D. Fla. 1995); *In re* Sutton, 898 F. Supp. 631, 635 (E.D. Mo. 1995). Given the extensive body of extradition case law, it is highly improbable that all of these courts could have overlooked the constitutional infirmity found by the court in *Lobue*.

[42] *Lobue*, 893 F. Supp. at 76.

A. The Lobue Court Failed to Address the Threshold Issue of Whether the Plaintiffs in the Case Actually Had Standing to Challenge the Extradition Statute

In the absence of a plaintiff with standing, a federal court lacks subject matter jurisdiction to hear the case.[43] Standing consists of three elements: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) redressability.[44] In *Extradition of Lang*, the district court concluded that although a plaintiff who is the subject of government action typically has standing, the plaintiffs challenging the extradition statute did not.[45] This conclusion was based on the fact that the alleged illegality in the extradition process, executive revision, causes no injury in fact.[46] In addition, the court determined that the review by the Secretary of State works only to the benefit of the plaintiffs, never to their harm.[47] It only serves as a second chance for them to be deemed not extraditable, and any potential unconstitutionality occurs only after the plaintiff has been found legally extraditable.[48] Although the court in *Extradition of Lang* found that the plaintiffs did not have standing, a foreign government seeking extradition of a person would have standing in federal court to challenge the extradition statute's constitutionality.[49] Based on the fact that a foreign government could challenge the constitutionality of the extradition statute, a further analysis of the United States government's arguments advanced in post-*Lobue* extradition hearings must be undertaken.

---

[43] *See In re* Lang, 905 F. Supp. 1385, 1391 (C.D. Cal. 1995) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[44] *See In re* Lang, 905 F. Supp. at 1391 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[45] *See In re* Lang, 905 F. Supp. at 1391.

[46] *See id.*

[47] If the judicial officer refuses to certify the detainee as extraditable, the Secretary of State cannot reverse that decision. Thus, the executive revision can only work to the plaintiff's benefit. *See In re* Lang, 905 F. Supp. at 1392, *citing* Eain v. Wilkes, 614 F.2d 504, 508 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

[48] *See In re* Lang, 905 F. Supp. at 1392. One commentator has suggested that in extradition, the executive exercises "benign discretion," discretion that benefits the losing party at the expense of the government. This discretion raises no separation of powers concerns because it does not threaten judicial independence nor does it interfere with the ability of the judiciary to vindicate the rights of successful litigants. Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020 *passim* (1996).

[49] *See In re* Lang, 905 F. Supp. at 1400.

B. The Extradition Statute Is Comparable to Other Law Enforcement Procedures

In determining that the extradition statute was unconstitutional, the *Lobue* court concluded that extradition judges' findings were simply non-binding, non-final advisory opinions subject to review by the Secretary of State.[50] Because courts are not allowed to issue advisory opinions for review by other branches of government, the court found the statute unconstitutional. The court rejected the government's argument that Congress patterned the extradition procedure on other law enforcement processes, such as the decision to arrest, search, or prosecute in criminal cases, in which executive branch discretionary decisions follow judicial determinations of legality.[51] Although the *Lobue* court rejected this argument, subsequent courts have found the analogy of an extradition to both a search warrant procedure or a preliminary hearing to be compelling.[52]

In *Extradition of Lin*, the district court concluded that the divisions of functions between the judicial and executive branches under 18 U.S.C. § 3184 were similar to several well established criminal procedures.[53] The court found most persuasive the comparison to the separate, but interconnected roles of the judiciary and the executive in the initial stages of a criminal prosecution based on a criminal complaint.[54] In the criminal prosecution context, once the judge determines that there is probable cause to detain a defendant, the prosecutor applies his discretion whether to continue or halt the proceedings.[55] Moreover, in the criminal setting, the division of functions between the judge and the prosecutor is not a violation of constitutional separation of powers. *In Extradition of Lin*, the court reasoned

---

[50] *Lobue*, 893 F. Supp. at 71.

[51] *Lobue*, 893 F. Supp. at 75.

[52] *See, e.g., In re* Lin, 915 F. Supp. 206, 212 (D.Guam 1995); *In re* Sutton, 905 F. Supp. 631, 634 (E.D. Mo. 1995); Cherry v. Warden, Metro. Correctional Ctr., No. 95 Cr.Misc.1 P.7(LB), 1995 WL 598986 (S.D.N.Y. 1995).

[53] 915 F. Supp. at 212.

[54] *Id.*; *see also* FED. R. CRIM. P. 5.1 ("If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court."); *In re* Sutton, 905 F. Supp. at 634 (citing several courts that have concluded that the extradition hearing is similar to the determination of whether there is probable cause to hold a defendant for trial).

[55] *In re* Lin, 915 F. Supp. at 212.

that each step of extradition is a separate exercise of the judicial and executive branch's governmental responsibility.[56] The court then analogized the Secretary's review of a judge's determination of extraditability to the prosecutor's review of a judge's determination of the existence of probable cause, concluding that "just as the two branches can have separate but related roles in the context of law enforcement, they may be permitted to execute similar roles in matters of extradition."[57]

The *Lobue* court rejected this analogy because in the criminal prosecution context, the judiciary has several opportunities to determine whether the arrest or search warrant was supported by probable cause, but in the extradition context the judge's decision is the final word of the judiciary on the question of extraditability.[58] However, the court failed to take into account that once a defendant is certified as extraditable he will be given a fair criminal trial in the country to which he is extradited. Therefore, contrary to the court's reasoning, the extradition hearing will not be the final judicial avenue for the defendant since he will have several opportunities to prove his innocence in the country of his origin.

C. The Extradition Statute Does Not Convey an Affirmative Grant of Power to the Secretary of State to Review and Set Aside the Extradition Judge's Legal Determination

The extradition statute provides that, if the judicial officer, "deems the evidence sufficient to sustain a charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue . . . ."[59] The *Lobue* court concluded that "there is simply no plausible explanation for why Congress would require the extradition judge to certify

---

[56] *Id.*

[57] *Id. See also* Cherry v. Warden, Metro. Correctional Ctr., No. 95 Cr.Misc.1 P.7(LB), 1995 WL 598986 at *3 (S.D.N.Y. 1995) (holding that the extradition hearing is analogous to a judge issuing a search warrant upon a finding of probable cause). The argument goes as follows: in the criminal prosecution context Article Three is not offended when the executive branch declines to prosecute after a magistrate has determined that there is sufficient evidence to justify the holding of the accused. Therefore, the fact that the testimony from extradition hearings is reviewed by a member of the executive branch is not violative of separation of powers doctrine.

[58] *Lobue*, 893 F. Supp. at 74.

[59] 18 U.S.C. § 3184 (1994).

the evidence . . . other than to permit the Secretary to perform his own independent review of the legality of the extradition."[60] As a result, the court determined that the statute provided an affirmative grant of power to the Secretary of State to review the extradition judge's findings.

Other courts interpreting the text of the statute have concluded that these words do not convey an affirmative grant of power to review the extradition judge's findings; instead, they have found the language to prescribe the *method* by which the judicial officer shall convey a finding of extraditability to the Secretary of State.[61] Furthermore, courts have held that the compilation of a complete record is not simply for the Secretary to perform his own "independent review of the legality of the extradition,"[62] but is instead for the purpose of forwarding such a record to the requesting country.[63] In light of the need to forward a judicial record to the requesting country and the intricacies involved when the judiciary and executive branches are required to function in unison, the *Lobue* court's conclusion that the extradition statute provides an affirmative grant of power to the Secretary of State to review judges' findings of extraditability is unfounded.[64]

D. Extradition Is Primarily a Function of the Executive Branch and Not a Function of the Judicial Branch

The basis of the *Lobue* court's holding that the extradition statute was violative of separation of powers principles was the belief that extradition proceedings were a matter for the judiciary, and the Secretary of State's review of the proceedings was an impermissible intrusion into judicial

---

[60] *Lobue*, 893 F. Supp. at 68.

[61] The key word in the statute is "may." "May" merely provides for a permissive grant of power, not an affirmative one. *See, e.g.*, Carreno v. Johnson, 899 F. Supp. 624, 630 (S.D. Fla. 1995) (holding that although the Secretary "may" issue a surrender warrant it is not an affirmative grant of power to review extradition judge's findings). *See also In re* Sutton, 905 F. Supp. 631, 635 (E.D. Mo. 1995) (concurring with the conclusion reached by the court in *Carreno*).

[62] *Lobue*, 893 F. Supp. at 68.

[63] *See* Carreno v. Johnson, 899 F. Supp. 624 at 630 (S.D. Fla. 1995); *In re* Sutton, 898 F. Supp. 631 at 635 (E.D. Mo. 1995).

[64] *See In re* Lang, 905 F. Supp. 1385, 1391 n.10 (C.D. Cal. 1995) ("Actually, it is possible that the Secretary of State would want as much information as possible concerning the circumstances of the crime and of the extradition so as to exercise his or her discretionary judgment whether to extradite."); Carreno v. Johnson, 899 F. Supp. 624, 630 (S.D. Fla. 1995); *In re* Sutton, 898 F. Supp. 631, 635 (E.D. Mo. 1995).

domain. However, when looking to the United States Constitution, Congressional direction, and extradition case law, it seems as if the *Lobue* court misunderstood the constitutional allocation of authority over extradition determinations.[65]

The United States Constitution gives the President the power to make treaties with the "advice and consent" of the Senate.[66] Although the Constitution gives the judiciary the power to hear cases involving treaties made under the authority of the federal government,[67] Congress enacted a statute giving the judiciary only a limited review function in extradition cases.[68] Historically, once the judge has certified his findings, the Secretary of State has conducted an independent review of the case to determine whether to issue a warrant of surrender to the requesting nation.[69] Through the textual language of the Constitution and the limitations placed on the judiciary by Congress, the executive remains the controlling branch in the extradition process.

Another example of the limited function of the judiciary is illustrated in *Cherry v. Warden*, which held that an extradition judge is only deciding whether extradition would be lawful and is not making a final determination that extradition should or should not be carried out.[70] The *Cherry* court reasoned that the judiciary should make legal determinations and foreign policy political determinations should be within the discretion of the Secretary of State.[71]

In addition, the ultimate decision to surrender the individual falls within the purview of the executive branch as part of the executive's power to

---

[65] Extradition determinations which are made pursuant to treaties are constitutionally committed to the executive branch not the judicial branch. U.S. CONST. art. II, § 2, cl. 2. For a provocative argument along the foregoing lines, *see* Judith Hippler Bello & Jacques Semmelman, *Extradition Statute—Constitutional Law—Separation of Powers—Injunction Against U.S. Government—Class Action*, 90 AM. J. INT'L L. 102 (1996). *See also In re* Marzook, 924 F. Supp. 565, 571 (S.D.N.Y. 1996) (holding that there is no impermissible aggrandizement of power by either the Executive or Judicial Branch because extradition is an Executive Branch function not an Article III function of the judiciary).

[66] U.S. CONST. art. II, § 2, cl. 2.

[67] U.S. CONST. art III, § 2, cl. 1.

[68] 18 U.S.C. § 3184 (1994).

[69] *Lobue*, 893 F. Supp. at 69-70.

[70] Cherry v. Warden, Metro. Correctional Ctr., No. 95 Cr.Misc.1 P.7(LB), 1995 WL 598986 at *3 (S.D.N.Y. 1995) (holding that extradition may involve foreign policy considerations and review by the executive branch of an extradition judge's decision does not violate the separation of powers doctrine).

[71] *Id.*

conduct foreign affairs and consider factors that may affect foreign policy and relations.[72] The foreign policy concerns for allowing extradition proceedings to be a function of the executive branch and not the judicial branch are threefold.[73] First and foremost, the Secretary of State, unlike the courts, is in the best position to engage in the discreet diplomatic maneuvering the extradition process may require.[74] Second, the Secretary of State controls the circumstances of surrender of the detainee to the foreign country.[75] Third, a judicial decision not to extradite based on humanitarian grounds may adversely affect important foreign policy concerns.[76] Thus, the underlying premise in *Lobue*, that the judiciary has priority in extradition proceedings, is unjustified in light of Constitutional safeguards, Congressional direction, and case law.

E. The Extradition Statute Is a Constitutional Combination of the Powers of the Executive and Judicial Branches and Not a Violation of Separation of Powers Principles

The *Lobue* court's conclusion that the extradition statute is unconstitutional as violative of separation of powers doctrine is dubious. Taking into account the fact that the process by which extradition takes place involves independent determinations by both the judicial and executive branches, this "dual branch procedure is pragmatically designed to deal with a federal issue that directly confronts both legal and foreign policy considerations."[77] Furthermore, the merger of activities between the judiciary and executive in

---

[72] *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-322 (1936); Cherry v. Warden, Metro. Correctional Ctr., No. 95 Cr.Mis.1 p.7(LB), 1995 WL 598986 at *3 (S.D.N.Y. 1995).

[73] Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1229 (1991).

[74] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." (citing 8 U.S. Sen. Rep. Comm. on Foreign Relations, p.24 (1816)).

[75] *See In re* Singh, 123 F.R.D. 127, 137 (D.N.J. 1987).

[76] *See In re* Singh, 123 F.R.D. 127, 136-37 (D.N.J. 1987) ("Any judicial determination might embarrass the United States in its foreign relations and do harm to those relations."). *See also* Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) ("The degree of risk to [defendant's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch."), *cert. denied*, 451 U.S. 912 (1981).

[77] *See In re* Lin, 915 F. Supp. 206, 212 (D. Guam 1995).

the extradition process involves exactly "the integration of dispersed powers into a workable government contemplated by Madison and our founding fathers."[78] The Supreme Court has consistently reaffirmed two central Madisonian principles of separation of power: (1) the separation of government power is essential to the preservation of democracy and our federal system of government; and (2) separation of powers is not defined by an absolute or clear line of demarcation.[79] The *Lobue* court's "rigid and formalistic"[80] view of separation of powers is contrary to the framers' intent and Supreme Court precedent. The framers were aware of the need for separation of powers, but they also realized the essential and pragmatic need for cooperation and interdependence among the three branches of government. In addition, the Supreme Court has consistently held that the rigid and formalistic view of separation of powers advanced by the *Lobue* court would cause the government to cease to operate efficiently.[81] As Justice Holmes so adequately stated, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[82] The *Lobue* holding does not allow for any play in those joints.

IV. CONCLUSION

The extradition process is a complex problem encompassing many democratic and foreign policy concerns. Congress has implemented these concerns into the design of the extradition statute by allowing both the judiciary and the executive the opportunity to participate in the proceedings. The "rigid and formalistic" view of separation of powers advanced by the district court in *Lobue v. Christopher* does not allow the extradition process to achieve the pragmatic results it so desperately demands. By allowing both the judiciary and the executive to flexibly apply their own expertise, the extradition statute allows for both a workable and constitutional answer to the intricacies of extradition. In light of the government's arguments advanced in subsequent cases after *Lobue*, it is likely that *Lobue* will remain an aberration in the 148 year history of the extradition statute, and that courts will continue to uphold the statute's constitutionality.

---

[78] *See id.* at 213.

[79] *See id.* at 212. *See generally* THE FEDERALIST, No. 47 (James Madison).

[80] *Lobue*, 893 F. Supp. at 76.

[81] The view that separation of the three branches of the federal government must be complete has been rejected as too rigid and outdated. *See* Mistretta v. United States, 488 U.S. 356, 380 (1981); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

[82] *See* Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501 (1931).