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Recent Developments

Lobue v. Christopher: A Demonstration of the Failures of U.S. Extradition Law?

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I. INTRODUCTION

The current U.S. extradition statute[1] is 147 years old in its present form.[2] When reviewing the aged statute, the United States District Court for the District of Columbia did not uphold the US extradition statute.[3] While that judgment was vacated recently at the appeals level[4], *Lobue* demonstrates how this area of the law has become more important, the focus of more interest and in need of reform. To be constitutionally correct, an effort must be made to rewrite the current statute and place the statutorily grantedpowers granted with an administrative agency controlled by the executive branch. While the reasoning in this case has not been consistently upheld, it reveals to the legal community in this country and in others that US extradition law is outdated, unclear and in need of many revisions. This case note first summarizes the holding and reasoning of the court in *Lobue*. Other recent cases criticize the reasoning of the *Lobue* court, therefore this case note examines the reasoning of these attacks. Then it discusses how, under close analysis, these criticisms also show the need for a change in the current law. Finally, this article concludes with a recommendation for revisions needed to improve the law.

The language and structure of the actual statute is relatively unclear and archaic. However, normal extradition procedure is described in the next few sentences. 18 U.S.C. §3184 (1996), "Fugitives from foreign country to United States" specifies that whenever an extradition treaty exists between the US and a foreign government,

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1. Fugitives from foreign country to United States, 18 U.S.C. §3184 (1996).
2. The statute first became effective in 1848 through the Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.
3. Lobue v. Christopher, 893 F.Supp. 65 (D.D.C. 1995).
4. Lobue v. Christopher, 1996 U.S. App. LEXIS 9933.

any judge[5] can issue a warrant for arrest of the criminally charged person and that the person may be brought before a judge to hear the evidence of criminality. If the judge believes the evidence sufficient to sustain the criminal charge under the provisions of the treaty with the foreign country, the judge will certify this criminality along with a record of the hearing to the Secretary of State. In finding that an individual is extraditable, the court must justify its conclusion by finding that the offense charged is covered by the extradition treaty with that country, that the alleged behavior is criminal in the U.S. and the requesting country, and that probable cause exists to support the guilt of the extradite. The Secretary of State then reviews this record and issues a warrant for the commitment of the individual to the "proper jail"[6] and kept there until surrendered to the foreign country. This procedure was the focus of the plaintiffs attack in the *Lobue* case, as described in the next section.

II. *LOBUE V. CHRISTOPHER*

Reportedly, the accused in this case were two off duty Chicago police officers who went to Winnipeg to help a man bring his disabled wife to Chicago for the purpose of medical tests related to a lawsuit regarding her injuries. The woman's parents reported her as kidnapped after she taken from her home and the officers were stopped at the U.S.-Canada border with the quadriplegic woman and her husband. The woman was returned to her home and the Canadian authorities filed kidnapping charges against the two police officers three months later.[7]

Pursuant to the extradition treaty, the Canadian government requested the surrender of the plaintiffs. The magistrate issued an order and certification for the extradition of the plaintiffs. Following normal procedure under the current US statute, the Secretary of State then authorized the surrender of plaintiffs, which was not executed, however, until this court ruled on the parties' cross-motions for summary judgement and the plaintiff's class-certification motion.

The court analyzed the current extradition statute and raised the question of "[w]hether a statute may confer upon the Secretary of State the authority to review the legal determinations of federal extradition judges."[8] The court stated its holding and concluded that the Constitution forbids the Secretary of State from exercising this review

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5. The statute states "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judges of a court of record of general jurisdiction of any State, . . . " 18 U.S.C. §3184 (1996).

6. *Id.*

7. Michael Briggs, *Cops Face Canadian Kidnap Charges; City Officers Say Favor Turns Into Nightmare*, CHICAGO SUN-TIMES, Aug. 14, 1995, at 1.

8. Lobue, *Supra* note 3 at 68.

of extraditability. The court continued its analysis of the statute to find that the discretion allowed to the Secretary of State in determining extradition suitability is vague and ambiguous. The court then examined and rejected the government's argument, finding that the judicial decision is an advisory opinion.[9]

The court further stated that the executive branch review of an extradition judge's legal determinations is unconstitutional.[10] It supported this holding by finding that the extradition judge's decisions are neither binding nor final. This is because under current law, there is no limit to the number of times an individual may be the object of extradition proceedings and the Secretary of State has wide discretion in rejecting the court's decision. This ties into the idea that the extradition judge's decisions are subject to executive review. This finding also supports the court's conclusion.[11] The court added the fact that similar statutes have not survived the separation of powers analysis this statute should be considered under.[12] Also, the court stated that the foreign policy concerns of the country do not legitimize the otherwise unconstitutional commingling of powers and that the procedure under the extradition statute is not comparable to preliminary judicial rulings in criminal cases for separation of powers purposes.[13]

The court in *Lobue* also found a great lack of accountability both to the accused individual and to the public. This is because it is not immediately apparent which branch has made the extradition decision.[14] The decision making is shielded through obscurity. The Secretary of State may not allow extradition, regardless of the court's conclusions. Consequently, the accused and the public do not know to which branch to attribute the decision. This process lacks further credibility because the arguments raised at the proceedings are often not within the Secretary's expertise. It is often unclear who made the actual extradition determination and the Secretary is appointed to his position and therefore not subject to any public scrutiny that would result from a popular election.

Finally, the court concluded that the statute is unconstitutional. It noted that the statute has not been challenged on the separation of powers basis before and, although the statute has remained unchanged for 150 years, the court reasoned that it could not compound errors by allowing this process to continue and found the statute unconstitutional.[15]

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9. *Id.* at 70.
10. *Id.* at 71.
11. *Id.* at 72.
12. *Id.* at 72-73.
13. *Id.* at 73-75.
14. *Id.* at 76.
15. *Id.* at 78.

III. CRITICISM BY OTHER COURTS

There is much criticism of the *Lobue* court's reasoning. *In the Matter of the Extradition of Gregory J. Sutton*[16] considered the *Lobue* case. The court decided that the extradition proceeding is similar to the issuance of a search warrant or a preliminary examination, where the judiciary and the executive work together, with each step in either procedure a separate exercise of that branch's governmental responsibility.[17] The court cited *Cherry v. Warden Metropolitan Correctional Center*,[18] to support the finding that the courts really are not making a final determination that extradition should or should not be carried out. The court concluded this is actually a foreign policy issue which needs to be controlled by the executive branch.

The extradition statute was also addressed in the case *In the Matter of the Extradition of Raymond C. Lin*.[19] The *Lin* court found that the *Lobue* holding was not binding upon them.[20] First, the court reasoned that the injunction in *Lobue* only affects the Secretary of State's surrendering of an extraditable detainee and teh injunction did not control judicial extradition proceedings. Secondly, the court agreed with the search warrant reasoning used in *Sutton*.[21] As a result, the court believed that the two branches may execute similar roles without violating the separation of powers doctrine. After considering what it sees as the Madisonian intent regarding the separation of powers doctrine,[22] the court concludes by stating, "The extradition process is a flexible employment of the individual expertise inherent in each branch, providing a workable and constitutional solution to a complex problem."[23]

In the Matter of the Extradition of Ferdinand Gino Lang[24] is one of many cases concluding that the US extradition statute is Constitutional. That court did not attack the reasoning of the *Lobue* court, but found that the plaintiff in *Lobue* lacked standing.[25] The court stated that the

> "review by the Secretary of State works only to the benefit of extradites, never to their harm.[26] It serves as a second chance for them to be determined not extraditable. In other words, any potential

16. 905 F. Supp. 631 (E.D. Mo. 1995)
17. *Id.* at 637.
18. 1995 WL 598986 (S.D.N.Y. 1995).
19. 915 F.Supp 206 (D.C. Guam).
20. *Id.* at 211.
21. *Id.*
22. *Id.* at 213.
23. *Id.* at 215.
24. 905 F. Supp. 1385 (C.D.Cal. 1995).
25. *Id.* at 1391.
26. *Id.* at 1392.

> unconstitutionality in the statutory scheme occurs after the extradite has been determined to be legally extraditable. The extradites therefore suffer no injury or harm from the unconstitutionality of the statute."[27]

The court also found that there was no advisory opinion,[28] that there was subject matter jurisdiction, and that because the extradition ruling was not a final judgement, there was no need for appellate review.[29]

Following the *Lobue* arguments, the plaintiff in *Lang* attacked the lack of accountability in the extradition system and the overall constitutionality of the statute. The court found no defects with 18 U.S.C. §3184, so there was no injury to the plaintiff and he had no standing.[30] The court went on to state that there is no imminent harm to the plaintiff, no causation because there is no harm and therefore no remedy present for the plaintiff.[31] This trail of logic leads one in a circular route and therefore lacks credibility. The court in Lang states that any relief given to the plaintiff in this case is only temporary. This is because the government is not prevented from trying to extradite the plaintiff again. Repeated extradition attempts are allowed because this is not considered a criminal procedure and is therefore not subject to the Ex Post Facto Clause nor the Double Jeopardy Clause.[32]

Another court held that the extradition statute was not unconstitutional in the case it was considering. The court in *Manrique Carreno v. Johnson*[33] found that the ruling in *Lobue* held no precedent and that there was no authority which required it to interpret the statute as being unconstitutional. It also found no facially unconstitutional provisions with the statute.[34] The court added that there was no evidence of the Secretary of State conducting an unconstitutional review in this case. The court went on to state that it would not consider whether the practice of such a review was constitutional or not. The opinion ended, however, on a note which could support some of the arguments raised in *Lobue*. It stated, "[T]he Court need not reach the government's arguments analogizing the extradition process to presidential pardons and to probable cause determinations in connection with search and seizure warrants. The Court notes, however, that such comparisons appear inapposite to the extradition process." It seems as

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27. *Id.*
28. *Id.* at 1393.
29. *Id.* at 1394-1395.
30. *Id.* at 1395.
31. *Id.* at 1401.
32. *Id.* at 1400.
33. 899 F.Supp. 624 (S.D.Fla. 1995).
34. *Id.* at 632.

though this court found the search warrant reasoning as inapplicable to these cases.

Most recently, the U.S. District Court for the Southern District of New York approved the extradition of an individual to Israel and flatly rejected the *Lobue* reasoning. *In re Extradition of Abu Marzook*.[35] This court stated that the Executive Branch's power under the statute to reject an extradition court's decision on extraditability is not a violation of the separation of powers. This reasoning is justified by finding that the final responsibility for extradition is an executive power that merely uses the Judicial Branch for a function it is well suited to perform.

IV. DEFECTS IN THE ARGUMENTS IN THESE CASES

Many of the courts criticizing *Lobue* use the extradite's lack of standing argument to support their decision to ignore the apparent violation of the separation of powers. This reasoning demonstrates a serious flaw in current extradition law. If there is no standing for an extradite because there is no possible injury to them in only being extradited for a criminal trial, then why is an Article III court reviewing the case at all? The law of sufficient standing requires that if a party in a suit lacks the necessary standing, the case must be dismissed. In reviewing extradition proceedings, the court should then not make any decisions on these cases because, as an Article III court, they are violating their own precedent. This is because the court is ruling on a case where supposedly one party has no standing to be in court because there is no injury. This demonstrates how, if there is no injury to the extradite, these cases should not be absorbing the time and energy of the Article III courts.

Many of the courts in the above referenced cases state that the intrusion on the judiciary's power is justified by the need for the executive to command foreign affairs. This is a basic power of the executive, granted to it by Article I of the Constitution. In a sense then, the judiciary is the branch infringing upon this clearly executive power. To allow the executive to have the control it needs to efficiently fulfill its obligation to this area of government, no other branch should interfere with its operations in foreign policy. The executive branch could then have complete control of this process, as the Constitution states.

Another criticism of these decisions is that the courts are actually making a final determination as to extraditability. In *Lobue*, the court supports its decision by looking at the fact that the Secretary of State has only revoked the determination of extraditability by a court twice in the past fifty years. One must then consider if the process really should involve two branches, when one branch obviously places great

35. DC SNY, No. 95 Cr. Mis. 1, 5/7/96, 59 Crim. L. 1234.

deference on the decisions of another. It seems as though the statute has left itself open for attack on this front without ever utilizing the dual branch process successfully to support itself.

However, one court believes that extradition is primarily a function of the executive branch.[36] To agree with this court's belief, the statute needs to be revised so that the executive extradition power is complete and not mixed with another branch. There seems to be some confusion by both branches as to who is actually making the decision in these cases. Under the current procedure, it seems as though the courts are subject to the executive, while the executive fails to use its power in the process. As a result, each branch beleives that the other branch is, in effect, making the determination and the extradition of an individual is not being considered to its full extent by any one branch.

Finally, these cases simply reject, with little support, the *Lobue* reasoning concerning many of the areas explicitly advanced in that case. The courts should recognize the arguments brought up in *Lobue* and offer strong counterarguments. Instead, these courts often simply reject the points raised with no explanation. Examples are *Lang* with its unexplained dismissal of the advisory opinion argument,[37] and *Lin* with the separation of powers arguments brought up by *Lobue*.[38] These courts do not recognize the legitimacy of some of the *Lobue* arguments and reject them without directly addressing the central issues.

V. OTHER CRITICISMS OF THE STATUTE

Currently, the Secretary of State is not forced to provide any explanation with its determination of extradition. This provides little guidance for practitioners and extradites. While the Administrative Procedure Act does not require an agency to state its reasoning with specificity, an extradition hearing following the APA requirements would provide more guidance than that currently required by 18 U.S.C. §3184. A statement of reasoning, a developed record and a distinct formal or informal decision making process would be more likely in following administrative procedure. This argument supports the conclusion that an administrative agency would best fulfill the needs of extradition in today's international setting.

18 U.S.C. §3184 is, in simple terms, old. It was originally formed in 1848.[39] In light of the many changes over the past 148 years it is logical to assume that the statute requires some revision.

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36. Sutton, *supra* note 16 at 635.
37. Lang, *supra* note 24 at 1392, 1395 and 1397, respectively.
38. Lin, *supra* note 19 at 211-212.
39. *See supra* note 2.

It is also important to note that the extradition procedure is one that cannot respond to the political process. Anyone who believes he or she was the victiim of an ineffective extradition proceeding will already be outside the US and under the control of the courts of another state. Any revisions to the statute as it stands and as the courts have interpreted it must come from the legislature. This political failure is a serious flaw and perhaps one of the reasons that US extradition has not been reformed in recent years. Without political representation in the US, extradites are then unable to exert any influence on reforming the current extradition law. As a result, the statute cannot respond to any negative criticism citizens or extradites may have for it.

Finally, one might also look at current US extradition law as adopting the legal standards of other states and perhaps committing the same human rights violations present in such other states. Other states do not have the same due process and evidentiary standards for criminal convictions that the US requires. Many states allow a criminal conviction based on less evidence than needed here. Since the accused will normally be subject to a criminal trial in another state should he or she be found extraditable, the US standards and processes should be made to be reliable and constitutional in order to protect the rights of those being extradited. Finding an accused person extraditable in the US may mean there is enough evidence, however lacking by US standards, for a criminal conviction in the other state because another state may have minimal requirements for a criminal conviction. This is a danger to an extradites' human rights. As a result, this process should receive more attention and should be reformed to make it less ambiguous.

VI. CONCLUSION

The original judgment in the original *Lobue* case was found to be lacking in jurisdiction. This occurred when the case was appealed from the district court to the circuit court.[40] Because the plaintiffs are in the constructive custody of the U.S. Marshal for the Northern District of Illinois, the circuit court reasoned that they can challenge the statute through a petition for habeas corpus in that jurisdiction. Without commenting on the constitutionality of the statute, the circuit court concluded that the district court lacked subject matter jurisdiction to hear the case. The circuit court then vacated the district court judgment.[41] Therefore, the original *Lobue* judgment does not stand and provides no precedent. The circuit court chose not to address the substantive issues raised *Lobue* at the district level and dismissed the arguments due to inadequate jurisdiction. Due to its dismissal of the case without addressing its merits, the lack of reasoning makes it

40. 1996 U.S. App. LEXIS 9933 (C.A.D.C. 1996).
41. *Id.* at 8.

seem as though the Court of Appeals for the District of Columbia was reluctant to take responsibility for either affirming or denying the validity of the current US extradition statute and passed this difficult task to a different district.

In light of the criticisms of the current US extradition statute, one can conclude that a more appropriate forum is required. Not all government decisions can be made with complete separation of the branches. Administrative agencies often fulfill the need for a commingling of powers. Such agencies institutions are allowed to exist in the name of practicality and efficiency. The blending of powers in extradition proceedings lends support to the idea that an administrative setting is perhaps the most qualified for this role. In sum, because such a violation of the separation of powers doctrine is allowed to exist within the administrative agencies, it would then follow that proceedings which apparently violate the separation of powers doctrine be made in a setting experienced with this style of decision making. This view does not advocate that poorly written statutes should be followed because of practicality and tradition, but instead argues that the entire statute and process should be revised.

The plaintiffs in *Lobue* have already filed a petition for habeas corpus in Illinois. That court will have to hear these similar arguments and decide on that petition. Until the Illinois court decides to either recognize the need for extradition law reform or continue to support the current procedure, much of the future of 18 U.S.C. §3184 remains uncertain.