Extradition and Article III: A Historical Examination of the "Judicial Power of the United States"

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The same constitutional questions concerning extradition that were raised after the United States' first extradition more than 200 years ago have returned as the focal point of challenges to extradition today. When President Adams initiated the extradition of Jonathan Robbins in 1799, he was accused of violating the separation of powers by usurping the role of the judiciary.[1] The public outcry led to a debate over censuring the President in the House of Representatives, calls for his impeachment, and ultimately contributed to a landslide loss for President Adams and his Federalist Party in the 1800 elections.[2] Although extradition proceedings do not have the same hold on public attention that they had two hundred years ago, the debate over the constitutionality of the extradition system has resurfaced.

An examination of the historical understanding of the relationship between extradition and the requirements of Article III of the Constitution is important for two reasons. First, the statute that provides extradition procedures for implementing numerous extradition treaties is facing several constitutional challenges based on Article III.[3] These attacks were spawned by Judge Lamberth's 1995 decision in *Lobue v. Christopher*, which was later reversed on jurisdictional grounds, holding

1. Motions to censure President Adams were introduced in the House of Representatives charging the President with committing "a dangerous interference of the Executive with Judicial decisions" and alleging that "a sacrifice of the Constitutional independence of the Judicial power" had resulted. 10 ANNALS OF CONG. 533 (1800); *see, e.g.*, Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367, 369-70 (1999) (noting that "the Republican critique centered on Adams's alleged violation of the Constitution's separation of powers"); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, *passim* (1990) (providing an excellent historical account of the Robbins extradition).

2. *In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852) (Catron, J.) (explaining that the Robbins extradition "most materially aided to overthrow the administration"); Wedgwood, *supra* note 1, at 234 (noting that the backlash against President Adams' decision to extradite Robbins led to "Adams' close escape from censure and impeachment, and the Federalists' defeat in the 1800 election"); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 42 (3d rev. ed. 1996) ("President Adams' decision in the highly publicized extradition of Robbins was considered one of the reasons for his failure to be reelected . . . ."); 1 JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 550 (1891) ("The case created great excitement, and was one of the causes of the overthrow of John Adams' administration.").

3. 18 U.S.C. § 3184 (2000) (establishing procedures for international extradition that apply where an extradition treaty exists).

that the statute violates Article III.[4] Although every subsequent court that has considered the issue has upheld the statute, the courts have done so for different reasons, and the United States' defense of the statute has been modified to meet each challenge.[5] When read together, the seemingly contradictory opinions of the courts and the defenses offered by the United States fail to provide a coherent defense of the statute's constitutionality.

Second, a historical look at extradition law reveals an understanding of Article III that rarely has been examined by the courts or scholars. This Article seeks to demonstrate that the "public rights" doctrine, which provides the traditional justification for legislative courts' and administrative agencies' power to adjudicate matters outside the control of Article III courts,[6] is derived from then-Congressman John Marshall's defense of President Adams' decision to extradite Jonathan Robbins. By viewing the "public rights" doctrine in this context, this Article seeks to eliminate many of the misunderstandings associated with the doctrine and to pave a way out of the Supreme Court's hopelessly contradictory decisions construing Article III.

This Article concludes that the current dispute over the constitutionality of the Extradition Act rests upon a fundamental misunderstanding of extradition's history. The ultimate source of this mistake lies in Congressman John Marshall's defense of President Adams' decision to extradite Jonathan Robbins. Congressman Marshall argued that extradition is essentially a political question committed to the discretion of the President pursuant to the President's treaty power and authority to conduct foreign affairs.[7] Under Congressman Marshall's theory, there was no role for Article III courts in conducting extradition.[8]

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4. Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *rev'd on jurisdictional grounds*, 82 F.3d 1081 (D.C. Cir. 1996).

5. *See infra* notes 494-509 and accompanying text (addressing the varying responses of courts to *Lobue*). The United States vigorously attacks the *Lobue* decision. *E.g.*, Supplemental Brief for the Government at 6-7, *In re* Kirby, 106 F.3d 855 (9th Cir. 1997) (C.A. No. 96-10068) (arguing that since *Lobue* was decided, "no judge in the country has been persuaded in the slightest by its reasoning").

6. *See, e.g.*, Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6-7 (1983) (explaining that the distinction between "public" and "private" rights provides the basis for adjudication by administrative agencies).

7. *See id.*

8. Congressman Marshall first presented his defense of President Adams anonymously in the *Virginia Federalist* in September, 1799. VIRGINIA FEDERALIST (Sept. 7, 1799), *reprinted in* 4 THE PAPERS OF JOHN MARSHALL, 1799-1800, at 24-26 (Charles T. Cullen ed., 1984) [hereinafter MARSHALL PAPERS]. Congressman Marshall later set out his theory on the House floor in March of 1800 to refute a motion to censure the President. Speech of John Marshall, 10 ANNALS OF

There can be no doubt, however, that Congressman Marshall's theory of presidential power over extradition is wrong and that it has never been the law of the United States. Before Congressman Marshall advanced his defense of President Adams, President Washington and his Secretary of State, Thomas Jefferson, recognized the necessary role of Article III courts in extradition matters.[9] President Adams also recognized the necessity of Article III involvement in the Robbins extradition by directing the matter to a federal judge.[10] The judge who conducted the extradition claimed that his authority to act as an extradition judge was derived from Article III.[11] Moreover, the Supreme Court recognized the authority of a federal court to refuse a request from the Executive Branch to extradite as early as 1795.[12] After Congressman Marshall issued his defense of President Adams, the Executive and Judicial Branches continued to recognize a necessary role for Article III courts in extradition matters.[13] Once on the Supreme Court, Chief Justice Marshall never endorsed this theory of presidential power over extradition and issued several opinions that appear to undermine the theory.[14] In short, the Supreme Court has consistently recognized that the constitutional rights of a relator (i.e., the person whose extradition is sought) are implicated by extradition and has assured the availability of habeas corpus relief to protect those rights.[15]

CONG. 613 (1800), *reprinted in* 18 U.S. (5 Wheat) app. at 3-32 (1820); MARSHALL PAPERS, *supra*, 85-97. Congressman Marshall's defense of President Adams is described in more detail *infra* notes 101-143 and accompanying text.

9. *See* Letter from Thomas Jefferson, Secretary of State, to George Washington, President (Nov. 7, 1791), *quoted in Ex parte* Dos Santos, 7 F. Cas. 949, 954 (C.C.D. Va. 1835) (No. 4016); Letter from Thomas Jefferson, Secretary of State, to Edmund Charles Genet, French Minister (Sept. 12, 1793), *quoted in* Short v. Deacon, 10 Serg. & Rawle 125, 133 (Pa. 1823); United States v. Lawrence, 3 U.S. (3 Dall.) 42, 48-49 (1795) (describing the Attorney General's argument that Article III jurisdiction was appropriate).

10. *See* United States v. Rob[b]ins, 27 F. Cas. 825, 826-27 (D.S.C. 1799) (No. 16,175).

11. *Id.* at 832-33.

12. *See Lawrence*, 3 U.S. at 53.

13. *See, e.g.*, Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 574 (1840) (Taney, C.J.); *id.* at 582 (Thompson, J.); *Ex parte* Dos Santos, 7 F. Cas. at 954; Short, 10 Serg. & Rawle at 133.

14. *See infra* notes 180-183 and accompanying text (describing Marshall's views as Chief Justice).

15. *See, e.g.*, Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) (holding that the President cannot extradite in the absence of a treaty because "the Constitution creates no executive prerogative to dispose of the liberty of the individual"); Grin v. Shine, 187 U.S. 181, 184 (1902) (holding that extradition "treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused"). The United States Court of Appeals for the Second Circuit has noted that although many constitutional rights are not implicated by what a foreign government does outside the United States, "to the extent that the United States itself acts to detain a relator pending

In defending the extradition statute, the United States finds itself in an impossible situation. Although the United States conceded before Judge Lamberth that an extradition judge exercises the "judicial power" of Article III, it now realizes that it cannot admit that extradition judges exercise Article III responsibilities.[16] The problem is that extradition matters are decided both by federal judges with salary and tenure protection conferred by Article III and by federal magistrates who do not enjoy such constitutional protections.[17] The government's theory is lacking because it fails to supply any logical basis for why extradition is not an exercise of the "judicial power" of Article III.

Although the United States wisely avoids relying on Congressman Marshall's misguided theory of presidential power in defending the Extradition Act, it relies heavily upon a concurring opinion issued by Justice Curtis in 1852 that appears to rest upon Congressman Marshall's theory.[18] Justice Curtis stated that the commissioner (now called a magistrate) who sat as the extradition judge in that case could not have exercised the judicial power of Article III because he was not entitled to Article III's salary and tenure protections.[19] In *In re Kaine*, Justice Curtis did not explain how it would be constitutional for a non-Article III commissioner to sit as an extradition judge, but the Supreme Court later explained that the conclusion rests upon Congressman Marshall's theory of presidential power over extradition.[20]

Three years after *In re Kaine*, Justice Curtis offered some insights into the basis for his opinion when he described the "public rights" doctrine in *Murray's Lessee v. Hoboken Land & Improvement Co.*[21] Following Congressman Marshall's theory, Justice Curtis explained that there are subjects that are committed to the discretion of the political

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extradition, it is bound to accord him due process." Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980). The Supreme Court has said that extradition proceedings are "of a criminal nature." Rice v. Ames, 180 U.S. 371, 374 (1901); *see also* United States v. Doherty, 786 F.2d 491, 500 (2d Cir. 1986) (Friendly, J.) ("[T]he Supreme Court and we have referred to [extradition proceedings] as being of a criminal nature."). The Supreme Court also noted that extradition proceedings "assimilate very closely those . . . for the arrest and detention of an alleged criminal." *In re* Strauss, 197 U.S. 324, 333 (1905). And the United States recently acknowledged in briefs before the D.C. Circuit that "[e]xtradition proceedings . . . are quasi-criminal rather than civil." Supplemental Brief for the Appellants at 11, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

16. *See infra* note 471 and accompanying text.
17. *See* 18 U.S.C. §§ 3181-3196 (2000).
18. *See In re* Kaine, 55 U.S. (14 How.) 103, 120 (1852) (Curtis, J., concurring).
19. *Id.* (Curtis, J., concurring).
20. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893).
21. 59 U.S. (18 How.) 272 (1855).

branches that can be brought within, or excluded from, the cognizance of the judiciary with the discretion of the political branches.[22] Justice Curtis described a commissioner acting as an extradition judge as an example of an exercise of this discretion.[23]

Although the United States relies heavily upon Justice Curtis' opinion in *In re Kaine* to argue that extradition judges do not exercise the judicial power of Article III, the United States goes to great lengths to avoid elaborating on Justice Curtis' explanation for that conclusion. Justice Curtis' "public rights" rationale provides the only arguable justification for excluding extradition matters from Article III, but the United States does not advance the position because it is plainly wrong. Recognizing as it must that Justice Curtis' position that extradition is committed to the discretion of the Executive Branch is indefensible, the United States has avoided drawing attention to the rationale behind Justice Curtis' argument and merely restates his conclusion. Indeed, in recent litigation, the United States has not offered any justification for Justice Curtis' conclusion at all. The United States merely presents Justice Curtis' argument as a tautology, claiming that because non-Article III judges decide extradition matters, extradition is not part of the "judicial power" of Article III. Of course, this analysis is entirely unconvincing because it would allow Congress to eviscerate Article III by simply giving all Article III powers to non-Article III tribunals. This is not what Justice Curtis had intended. A more careful reading of *Murray's Lessee* confirms that Justice Curtis did not rely upon such an unprincipled basis for excluding extradition from Article III jurisdiction.

In examining the historical understanding of the relationship between extradition and Article III, this Article concludes that the Extradition Act is unconstitutional to the extent that it allows magistrates to sit as extradition judges. This Article also explains that, despite Justice Curtis' flawed belief that extradition is a subject that is committed to the discretion of the Executive Branch, his reliance on that premise shaped his understanding of the "public rights" doctrine. This Article explains that Justice Curtis' reliance on extradition law indicates that he did not perceive the "public rights" doctrine as granting Congress an open-ended authority to exclude any category of cases from the jurisdiction of Article III courts, but only those subjects that are committed by the Constitution to the discretion of the political branches. When viewed from this

22. *Id.* at 284.
23. *See id.* at 280.

perspective, the "public rights" doctrine is a principled and limited doctrine that does not pose a threat to the separation of powers.

I. AN OVERVIEW OF THE EXTRADITION SYSTEM

Extradition in the United States is conducted pursuant to both treaties and a statute. The substantive requirements for extradition are determined from over one hundred extradition treaties that the United States has entered into with countries around the world.[24] The procedures for conducting extradition under each of these treaties is provided by the Extradition Act, which has remained largely unchanged since it was first enacted in 1848.[25]

A foreign government initiates the extradition process by sending the Secretary of State a formal diplomatic request seeking extradition.[26] If the State Department agrees with the request, it will ask the Office of International Affairs at the Department of Justice (DOJ) to initiate extradition proceedings.[27] An arrest warrant will then be sought for the relator from the United States Attorney for the district where the relator is believed to be located.[28]

Section 3184 of the Extradition Act governs international extradition proceedings.[29] By statute, the extradition judge can be "any justice or judge of the United States, or any magistrate authorized so to

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24. *E.g.*, CHARLES DOYLE, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES, CRS REPORT FOR CONGRESS NO. 98-958 A, at 34-38 (1999) (citing all effective extradition treaties with the United States). In addition to extradition treaties, the United States has entered into numerous Mutual Legal Assistance Treaties in Criminal Matters (MLATs) that foreign governments may use to obtain information, by subpoena or otherwise, concerning the person whose extradition is sought. *See* United States v. Balsys, 524 U.S. 666, 714-15 (1998) (noting that the United States has pursued a policy of "cooperative federalism" in international criminal investigations by recently entering into approximately twenty MLATs, signing fifty new extradition treaties, and increasing the number of law enforcement officials stationed abroad by an order of magnitude); *see also* Irvin B. Nathan, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for Constitutional Rights*, 42 VA. J. INT'L L. 820, 822 n.1 (2002) (describing an increasing level of international cooperation in criminal investigations); Irvin B. Nathan & Christopher D. Man, *The USA Patriot Act of 2001 Poses a New Threat to Grand Jury Secrecy*, 9 BUS. CRIMES BULL. 1 (2002) (same); Irvin B. Nathan & Christopher D. Man, *Preventing Disclosure of Grand Jury Materials to Foreign Governments Pursuant to MLATs*, 8 BUS. CRIMES BULL. 1 (2001) (same).

25. *Compare* 18 U.S.C. §§ 3181-3196 (2000), *with* Extradition Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.

26. *See, e.g.*, BASSIOUNI, *supra* note 2, at 658.

27. *See id.*

28. *See id.* at 659-60.

29. 18 U.S.C. § 3184.

do by a court of the United States, or any judge of a court of record of general jurisdiction of any State."[30] The federal district courts have issued blanket rules authorizing all magistrates in their districts to sit as extradition judges.[31] Although state court judges are authorized by the statute to act as extradition judges, they are never asked to sit in this capacity.[32] The extradition judge is authorized to issue arrest warrants[33] and to hold extradition hearings that essentially determine whether or not there is probable cause to believe that the relator committed an extraditable offense.[34]

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30. *Id.*

31. *See, e.g.*, N.D.N.Y. U.S.D.C. L.R. CRIM. P. 58.1(a)(2)(B); S. & E.D.N.Y. U.S.D.C. L.R. CRIM. P. 58.1(b).

32. The Assistant United States Attorney will seek extradition only from a federal judge or federal magistrate judge. UNITED STATES ATTORNEY MANUAL § 95-15.700(2) (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.700. State judges were authorized to act under the statute because in 1848 the federal judiciary was comparatively small and "[b]ecause of the need to get quickly to a magistrate in order to prevent a refugee from losing himself in the wilds of our country." 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, 181 (1974); *see also* Letter from James Buchanan, Secretary of State, to Alphonse Pageot (Nov. 10, 1847), *in* 7 WORKS OF JAMES BUCHANAN 454 (John Bassett Moore ed., 1909) (explaining to the French government that "State Magistrates are found everywhere; whilst a fugitive from justice of France might escape during the time lost by the French agent in travelling the necessary distance to find a United States Judge"). Although the United States does not involve state judges in extradition as a matter of policy, the involvement of state judges in extradition matters would not appear to be constitutionally permissible if extradition is not an exercise of the judicial power. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997); New York v. United States, 505 U.S. 144, 161 (1992).

33. 18 U.S.C. § 3184. According to the United States, "[t]he majority of persons arrested for extradition choose to waive the extradition process entirely, just as the majority of criminally charged persons plead guilty." Defendants' Memorandum in Opposition to Class Certification at 5, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995) (No. 95-1097).

34. 18 U.S.C. § 3184. Although this Article will not describe the proceedings before extradition judges in much detail, it should be recognized that a relator has few rights in those proceedings. Many of the traditional limitations are summarized in *United States v. Galanis*, 429 F. Supp. 1215, 1224-29 (D. Conn. 1977). Courts have held that the fugitive has no right to discovery; he may not cross-examine anyone who testifies at the extradition hearing; he may not cross-examine the affiants or deponents on whose affidavits or depositions the foreign complaint is based; his right to present evidence is severely limited; the Sixth Amendment guarantee of a speedy trial does not apply to an extradition hearing; the Federal Rules of Evidence do not apply to extradition proceedings; the Federal Rules of Criminal Procedure do not apply to extradition proceedings; a fugitives right to controvert the evidence against him is extremely limited; the constitutional prohibition against double jeopardy does not apply in the context of extradition; a fugitive who defeats an extradition attempt cannot claim the protection of double jeopardy or res judicata in a later extradition proceeding on the same charge; the exclusionary rule does not apply in extradition proceedings; hearsay is allowed in extradition proceedings; unsworn summaries of witness statements can be used in support of a finding that the fugitive is extraditable; and, the extradition may go forward even if the accused is not sane. It also should be noted, however, that several courts have begun expanding the rights of relators in extradition proceedings. *See, e.g.*, Parretti v. United States, 122 F.3d 758, 767, 773 (9th Cir. 1997) (recognizing a right to a probable

If the extradition judge believes that an extraditable offense has been committed, the judge will "certify" that finding and send it, "together with a copy of all the testimony taken before him, to the Secretary of State."[35] The Secretary of State has the discretion to refuse extradition for any constitutionally valid reason.[36] There is no appeal from the extradition judge's decision, but it can be reviewed collaterally through a writ of habeas corpus.[37]

If the extradition judge refuses to certify the extradition, the Secretary of State cannot order the extradition, but that is not necessarily the end of the matter. The extradition judge's decision is not given a res judicata effect and subsequent attempts to extradite the relator are not barred by double jeopardy.[38] Consequently, the United States can continue to seek extradition on the same charge until it finds a judge who is willing to certify extradition.[39]

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cause hearing under the Fourth Amendment and a right to bail under the Fifth Amendment), *withdrawn on other grounds*, 143 F.3d 508, 509 (9th Cir. 1998) (en banc) (invoking the fugitive disentitlement doctrine to prevent a person who skips bail the benefit of the court's decision); Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th Cir. 1993) (recognizing the applicability of the *Brady* rule that the prosecution's suppression of exculpatory evidence violates the relator's due process rights). This expansion of constitutional rights in extradition proceedings "threaten[s] to wipe out a century of U.S. law regulating the arrest and detention of international fugitives found in the United States." Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 730 (1998).

35. 18 U.S.C. § 3184.

36. *See* BASSIOUNI, *supra* note 2, at 766-67; *In re* Stupp, 23 F. Cas. 296, 302 (C.C.S.D.N.Y. 1875) (No. 13,563) (recognizing the Secretary of State's authority to refuse extradition after extradition was approved by an extradition judge). The actual exercise of discretion by the Executive Branch has been shameful. Despite protests of persecution, the United States routinely extradited Jews to Nazi Germany during the 1930s and, until the 1981 revolution, extradited Jews and Christians alike to Iran. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1487-88 (1988). Since 1940, the Secretary of State has declined to extradite only four times where the courts have approved extradition. *See In re* Extradition of Cheung, 968 F. Supp. 791 (D. Conn. 1997). In contrast to these actions by the United States, foreign governments often act to protect the interests of the persons they extradite to the United States when they fear that the American justice system would offend their sense of human rights. *See, e.g.*, United States v. Bin Laden, 156 F. Supp. 2d 359, 370 (S.D.N.Y. 2001) (noting that many countries condition the extradition of persons to the United States upon an express agreement that the death penalty will not be imposed).

37. *See, e.g.*, *In re* Kaine, 55 U.S. (14 How.) 103 (1852). However, "virtually no habeas petitions are granted in extradition cases." Nathaniel A. Persily, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407, 419 (1998).

38. *See, e.g.*, Collins v. Loisel, 259 U.S. 309, 312 (1922).

39. *See id.*

II. THE HISTORICAL ROLE OF COURTS IN EXTRADITION PROCEEDINGS

In confronting matters like international extradition, the Framers of the Constitution demonstrated their understanding of Article III by implementing it in practice. Early in this country's history, the government was forced to consider whether Article III required the involvement of the courts in international extradition proceedings.[40] Beginning with President Washington and Chief Justice Jay's Supreme Court, the Executive and Judicial Branches unanimously recognized that the involvement of Article III courts in international extradition was necessary. Consequently, Article III courts have always played a vital role in international extradition.

Unfortunately, some courts have gotten lost in what has been described as a "dark shroud of a nearly forgotten history."[41] By looking only to Congressman Marshall's defense of President Adams and Congress' failure to provide a statutory role for the courts in extradition proceedings until 1848, some courts have misinterpreted the history of this issue. For example, the United States Court of Appeals for the Eleventh Circuit recently explained that "[h]istorically, the judiciary played no role in extradition. Between 1794 and 1842, 'the Executive exercised complete control over extradition without reference to the courts.'"[42] This conclusion is unmistakably false. As the leading treatise on extradition law explains, "[d]uring that period [from 1794-1848], the proponents of the view that extradition treaties are self-executing prevailed and extradition proceedings were adjudicated by federal district courts on request of the President or the Secretary of State."[43]

A. The Jonathan Robbins Affair

For the past 200 years, American extradition practice has been shaped by the Jonathan Robbins affair.[44] This was the United States' first

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40. The Framers had to consider other separation of powers issues as well, such as whether the House of Representatives had to approve implementing statutes to make treaties effective and whether the federal authority over extradition was exclusive of the states.

41. Michael Edmund O'Neill, *Article III and the Process Due a Connecticut Yankee Before King Arthur's Court*, 76 MARQ. L. REV. 1, 41 (1992).

42. Martin v. Warden, 993 F.2d 824, 828 n.6 (11th Cir. 1993) (quoting Eain v. Wilkes, 641 F.2d 504, 513 n.13 (7th Cir. 1981)); *see id.* at 828 n.5 (quoting Congressman Marshall's speech that "'the power to extradite pursuant to a treaty rests in the executive branch as part of its power to conduct foreign affairs'" (citation omitted)).

43. BASSIOUNI, *supra* note 2, at 67.

44. *See, e.g.*, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 996 (1998) ("The Robbins affair delayed the development of

extradition, and it botched the job badly. For the Adams Administration, the Robbins extradition became a political nightmare.[45] Jefferson's remark on the scandal that followed was that he thought "no one circumstance since the establishment of our government has affected the popular mind more."[46] President Adams, who ordered the extradition, faced calls for his impeachment and narrowly escaped congressional censure.[47] Due in large part to the scandal associated with the Robbins extradition, President Adams and his then majority Federalist Party suffered a landslide loss in the 1800 elections.[48] As the Supreme Court would later note, the Robbins affair "most materially aided to overthrow the administration."[49] Congressman John Marshall was one of the few Federalist winners in the Robbins affair. Marshall's emphatic defense of the President on the House floor led to his rapid ascent to the Cabinet and then to the Supreme Court.[50]

The Robbins affair began with a mutiny on board the British frigate HERMIONE on September 22, 1797.[51] The captain, Hugh Pigot, was notorious and hated by Americans for impressing American sailors and tormenting his crew.[52] The mutiny was excessively bloody; the murders were horrific and even the lowliest of the ship's officers was murdered.[53] In an effort to prevent future mutinies, the British sought to make an example of the HERMIONE mutineers.[54] In the American press, the

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international extradition practice in the United States. For this and other reasons, once the Jay Treaty provision on extradition expired in 1807, the United States did not enter into another extradition treaty until the Webster-Ashburton Treaty of 1842, also with Great Britain.").

45. *See supra* note 2 (describing the landslide loss for the Federalists in 1800).

46. Letter from Thomas Jefferson to Charles Pickney (Oct. 29, 1799), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 397 (P. Ford ed., 1896); *see also* SWISHER, *supra* note 32, at 175 (noting that "the case made good anti-Federalist and anti-British propaganda, and the Jeffersonians made the most of it").

47. *See supra* note 2 (describing the political fallout from the Robbins extradition).

48. *See id.* (describing the political fallout from the Robbins extradition).

49. *In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852) (Catron, J.).

50. *See* Wedgwood, *supra* note 1, at 234 n.3 (speculating that there was a connection between Congressman Marshall's defense of President Adams and Adams' decision to make Marshall Secretary of War, then Secretary of State, and finally Chief Justice of the United States).

51. *Id.* at 235. Professor Wedgwood's article provides an excellent description of the Robbins extradition and its immediate political aftermath in far more detail than is presented here.

52. Professor Wedgwood notes that published accounts of Pigot's impressment of American sailors began as early as 1795. *See id.* at 283 nn.207-08 (citing JERSEY CHRONICLE (Mount Pleasant, N.J.), Aug. 22, 1795, at 145, col. 2; AURORA (Phila., Pa.), Aug. 8, 1795, at 2, col. 2; JERSEY CHRONICLE (Mount Pleasant, N.J.), July 4, 1795, at 83, col. 2).

53. *See id.* at 236.

54. *See id.* at 237.

slaughter was downplayed and the mutiny was praised.[55] The Jay Treaty had failed to stop British impressment as the Americans had hoped, and the popular sentiment was that the mutiny should serve as a warning for the British to end the practice.[56]

In February 1798, a former crew member of the HERMIONE (named Simon Marcus) was discovered in the United States, and Britain sought extradition.[57] The available evidence merely showed that Marcus was on the ship and not that he had participated in the mutiny.[58] Over Britain's objection, President Adams denied extradition on this ground.[59]

In March 1798, William Brigstock and two other mutineers from the HERMIONE were discovered in the United States, and the British again sought extradition.[60] There was a rift within the Adams Cabinet regarding how the matter should be handled, but extradition was denied on the grounds that the only available evidence showed that the accused were on the ship and not that they participated in the mutiny.[61] Nevertheless, they were tried in the United States for violating the international laws against piracy and murder, but all were acquitted.[62] No record of the trial has survived.[63] Secretary of State Pickering wrote that the case against Brigstock was strong and speculated that the jury acquitted because Brigstock was an American, impressed and abused by Pigot; and that the jury believed that Brigstock was justified in participating in the mutiny to regain his liberty.[64]

In February 1799, Jonathan Robbins was arrested in the United States after bragging about his role in the HERMIONE mutiny.[65] Robbins was initially held on a shipmate's testimony.[66] Later, a British Officer testified that he knew Robbins from the HERMIONE to be an

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55. *See, e.g.*, *id.* at 285 n.216 (citing AURORA (Phila., Pa.), Jan. 22, 1798, at 3, col. 4 (claiming that the mutineers "deserve a gold medal, or a pension rather than imprisonment")).

56. *See id.* at 262, 284-85.

57. *Id.* at 269-70.

58. *Id.*

59. *See id.* at 270 n.153 (citing Letter from Timothy Pickering, Secretary of State, to Robert Liston, British Minister (Feb. 21, 1798), *in* DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, 1784-1861 (National Archives Microfilm Publication M40, roll 10)).

60. *See id.* at 271-72.

61. *See id.* at 270.

62. *Id.* at 277.

63. *Id.* at 277 n.178 (noting that all accounts of the Brigstock trial have been lost).

64. *Id.* at 277 (citing Note from Thomas Pickering to Robert Liston (Apr. 13, 1798), *in* PICKERING PAPERS, roll 8, 335 (F. Allis ed., Massachusetts Historical Society microfilm ed. 1966)).

65. *Id.* at 286.

66. *Id.* at 286-87.

Irishman named Thomas Nash.[67] The officer also introduced hearsay accounts from other British court martial proceedings where Nash was named as a leader of the mutiny.[68]

Britain requested Robbins' extradition and Secretary of State Pickering advised President Adams to grant the request. Pickering noted the Brigstock acquittal and suggested that it would be better, for a variety of reasons, for the British to conduct the trial. President Adams agreed, but wrote to Pickering that "[h]ow far the president of the U.S. would be justifiable in directing the judge, to deliver up the offender, is not clear."[69]

President Adams, an accomplished lawyer, did not elaborate on what he meant by this, but his concern appears well-founded. First, the Judiciary Act of 1789 did not provide district courts with federal question jurisdiction and did not address extradition.[70] Robbins was not charged with violating a U.S. law, so the Judiciary Act would not authorize the court to proceed against him. The Jay Treaty did not set forth a procedure for conducting extradition; it merely established an obligation for each country to extradite under certain circumstances.[71] Consequently, it is doubtful that the district court had jurisdiction to decide the extradition matter or even to issue the initial arrest warrant for Robbins. Second, President Adams may have been concerned that, by making the extradition request, he would be interfering with the court that was holding Robbins.

If the latter was President Adams' concern, it would have been calmed a few days later when the British Minister advised the Secretary of State that Judge Bee and the federal prosecutor had agreed that they could not extradite without a request from the President.[72] After consulting with President Adams, the Secretary of State sent a letter to Judge Bee stating that the President believed that Robbins' alleged acts on a British warship were under British jurisdiction. Pursuant to the extradition provision of the Jay Treaty, "Nash ought to be delivered up

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67. *Id.* at 287.

68. *Id.*

69. Letter from John Adams to Thomas Pickering (May 21, 1799), *in* ADAMS PAPERS, LETTERBOOK, roll 119 (Massachusetts Historical Society microfilm ed.).

70. *E.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275 (1997) (noting that there was no general federal question jurisdiction until 1875).

71. *In re* Mackin, 668 F.2d 122, 134 (2d Cir. 1981) ("Jay's Treaty contained no provision regarding the procedure to be followed in extradition cases, and at the time there was no legislation on the subject.").

72. *See* Note of Robert Liston to Timmothy Pickering (May 23, 1799), *in* NOTES FROM THE BRITISH LEGATION IN THE UNITED STATES TO THE DEPARTMENT OF STATE, 1791-1906 (National Archives Microfilm Publication M50, roll 3).

. . . [p]rovided such evidence of his criminality be produced, as by the laws of the United States, or of South Carolina, would justify his apprehension and commitment for trial, if the offense had been committed within the jurisdiction of the United States."[73]

Robbins' extradition hearing was scheduled for July 23, 1799, but was postponed two days because his counsel, who had done virtually no pretrial work, was unprepared.[74] On July 25, 1799, Jonathan Robbins dropped the bombshell that would soon divide the country. Robbins claimed to be an American citizen who had been impressed by the British and pled alternatively that he had not taken part in the mutiny and that, if he had, it was to obtain his liberty.[75] This was the first time Robbins had ever made this claim.[76] Judge Bee viewed Robbins' failure to notify anyone that he was an American in the six months since his arrest as a desperate lie.[77] No one could vouch for Robbins' citizenship, and the only evidence that he introduced in his support was an affidavit of citizenship that was signed when the HERMIONE was at sea (apparently forged documents attesting to U.S. citizenship were widely used by seamen to resist impressment by the British).[78]

Judge Bee decided the case quickly. Judge Bee explained that the United States had concurrent jurisdiction to try the case because it arose under the law of nations.[79] Nevertheless, Judge Bee felt that Britain had an absolute right to demand Robbins pursuant to the Jay Treaty.

Judge Bee then explained:

> When application was first made, I thought this a matter for the executive interference, because the act of congress respecting fugitives from justice, from one state to another, refers it altogether to the executive of the states; but as the law and the treaty are silent on the subject, recurrence must be had to the general powers vested in the judiciary by law and the constitution, the [third] article of which declares the judicial power shall extend to treaties, by express words. The judiciary have in two instances in this state, where no provisions were expressly stipulated, granted

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73. Wedgwood, *supra* note 1, at 293 (quoting Letter from Timothy Pickering to Thomas Bee (June 3, 1799), *in* PICKERING PAPERS, roll 11, at 209 (F. Allis ed., Massachusetts Historical Society microfilm ed. 1966)).

74. Wedgwood, *supra* note 1, at 294-96.

75. *Id.* at 295.

76. *Id.* at 295, 298-99.

77. *See* United States v. Rob[b]ins, 27 F. Cas. 825, 832 (D.S.C. 1799) (No. 16,175).

78. *See* Wedgwood, *supra* note 1, at 310-11.

79. *Rob[b]ins*, 27 F. Cas. at 832-33.

> injunctions to suspend the sale of prizes under existing treaties. If it were otherwise, there would be a failure of justice.[80]

What Judge Bee appears to be saying is that where a treaty confers a right, Article III is self-executing in providing a judicial remedy. Under the Judiciary Act of 1789, there was no federal question jurisdiction nor jurisdiction to construe treaties.[81] Nevertheless, Judge Bee points to Article III's language showing that the judicial power shall extend to treaties and notes that the courts in two prize cases had issued injunctions to enforce treaties despite the lack of express authority in the Judiciary Act.[82] In *Marbury v. Madison*, Chief Justice Marshall would later intimate the same understanding of Article III's self-executing nature.[83]

Judge Bee then announced that Robbins could be extradited.[84] Robbins was put in irons, walked outside and given to British troops that had been waiting for him throughout the trial.[85] Robbins was quickly taken to Jamaica for a court martial, found guilty, and hanged.[86] Before his execution, Robbins reportedly confessed that he was an Irishman named Thomas Nash and the fact of his Irish nationality was confirmed by his shipmates who had testified against him. Because of the speed with which Robbins was removed, no appeal or writ of habeas corpus was ever filed.[87]

Although President Adams did not know of Robbins' claim to citizenship when he requested the extradition and may not have learned of it until after Robbins was executed, President Adams was blamed for what was widely perceived as a tragedy.[88] The public's resentment of the British had continued after the Revolutionary War and had been rekindled by the enormously unpopular Jay Treaty.[89] The failure of the Jay Treaty to stop impressment and searches of ships by the British, while promising the repayment of war-related debts to the British had made the situation even worse.[90] President Adams' secretive conduct in

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80. *Id.* at 833.
81. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275 (1997).
82. *Rob[b]ins*, 27 F. Cas. at 832-33.
83. *See infra* notes 180-181 and accompanying text (describing Marshall's views in *Marbury*).
84. *Rob[b]ins*, 27 F. Cas. at 833.
85. *Id.*
86. David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 309 (1992).
87. *See Rob[b]ins*, 27 F. Cas. at 833.
88. *See* Wedgwood, *supra* note 1, at 310.
89. *See id.* at 262.
90. *Id.* at 262-63.

getting the Jay Treaty ratified led to allegations that he was a monarchist (before the Constitution was ratified Adams had advocated a lifetime monarchy and he still caught grief for these views).[91] With the Robbins incident, President Adams was accused of striking down the Bill of Rights and assuming vast powers for himself.[92]

The arguments that President Adams had overstepped his constitutional authority were several. First, Adams was accused of ordering the judge to extradite Robbins, which was perceived as encroaching on judicial authority.[93] Second, Adams was accused of bypassing the Bill of Rights by extraditing an American citizen.[94] It was argued that Robbins should be tried in the United States and receive the right to a jury and other constitutional protections.[95] Third, Adams was accused of using the treaty power to strip the House of Representatives of its authority. House members claimed that the Jay Treaty was not self-executing and required implementing legislation.[96] At that time, only a handful of votes from senators (who were not directly elected by the people) were needed to create the two-thirds majority to ratify a treaty.[97] Critics claimed that Adams had transformed the Senate into his personal Privy Council, and was using it to strip away constitutional rights. Implementing legislation by both Houses of Congress was argued to be necessary to preserve a role for the popularly elected House members.[98]

B. Congressman Marshall's Defense of the President

While the House took up resolutions to censure the President, others also called for Adams' censure. The major debate on the resolutions pitted Congressman Marshall against Congressman Gallatin. In his speech before Congress and in an unsigned essay published in the *Virginia Federalist*, Marshall claimed remarkable powers for the President. In doing so, Marshall claimed authority far broader than had

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91. *See id.* at 282.
92. *See id.* at 310.
93. 10 ANNALS OF CONG. 533 (1800).
94. *See id.* at 511-12.
95. *See id.* at 511.
96. *See id.*
97. *See id.* at 533.
98. Representative Gallatin apparently made these arguments in a two-hour speech on the House floor, but a description of the speech is omitted from the Annals of Congress. *See id.* at 596. Professor Wedgwood has reconstructed the arguments that were made from press accounts and personal papers. *See* Wedgwood, *supra* note 1, at 335-39.

been claimed by President Adams.[99] These views were refuted to some extent by the positions that Marshall would later take as Chief Justice.[100]

Congressman Marshall first explained that the British had jurisdiction over Robbins' alleged crimes and then explained that under international law the United States had no jurisdiction to prosecute Robbins.[101] Whatever the merits of Marshall's argument, his conclusion that the United States would not have jurisdiction to try Robbins is at odds with the fact that the Brigstock defendants had been tried for their crimes in the United States. Justice Samuel Chase[102] and District Judge Robert Morris presided in that case, apparently without any objection to their jurisdiction.[103]

Marshall then defended the propriety of President Adams' communication with the judge.[104] Marshall argued that the Jay Treaty placed an affirmative obligation on the United States to extradite under these circumstances and that the country had no grounds for refusal.[105] Marshall explained that foreign governments always communicate with one another through the executive, and deduced that the President was the appropriate person to receive the extradition request from Britain.[106] Marshall argued that the President had to provide directions so that his advice on the extradition would be followed.[107] Marshall wrote that President Adams' letter to the judge was the official act necessary to give the judge the authority to proceed.[108] In this sense, Marshall claimed that the letter was not designed to influence the judge, but merely to initiate the process.[109] Marshall noted that Judge Bee had agreed that he could

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99. *See* Wedgwood, *supra* note 1, at 335-39.

100. *See id.*

101. Speech of John Marshall (Mar. 7, 1800), *reprinted in* MARSHALL PAPERS, *supra* note 8, at 85 [hereinafter Marshall Speech of Mar. 7].

102. *See infra* note 184 (describing Justice Chase's agreement with Congressman Marshall regarding President Adams' conduct in the Robbins affair).

103. Wedgwood, *supra* note 1, at 276-77 & nn.177-78 (explaining that no records of the judicial proceedings survived).

104. *See* Marshall Speech of Mar. 7, *supra* note 101, at 93.

105. *See id.* at 94. Marshall also makes this argument in the MARSHALL PAPERS, *supra* note 8, at 24. This was an arguable position in his day, but the Supreme Court later confirmed that the President has the authority to decline extradition even when it would appear required by a Treaty.

106. *See id.* at 104-05. Marshall also makes this argument in the MARSHALL PAPERS, *supra* note 8, at 265.

107. *See* Marshall Speech of Mar. 7, *supra* note 101, at 104-05.

108. *See* MARSHALL PAPERS, *supra* note 8, at 26.

109. *See id.* at 25-27.

not conduct the extradition hearing without the President's approval.[110] This view remains true today.[111]

At this point Marshall's defense appears to be the same as President Adams' defense. Adams submitted Robbins' extradition to the court for decision. President Adams said that Robbins must be extradited if the court found the evidence sufficient for placing Robbins on trial. By deferring to the judge's decision on the evidence, it does not appear that President Adams was imposing his will upon the judge.

In the remainder of his speech, Marshall sets forth his "radical" and "extraordinary theory of Executive power."[112] First, Marshall set forth a rather weak argument that Article III did not provide for judicial authority to construe the treaty in this instance.[113] Marshall correctly noted that Article III courts do not have the authority to issue advisory opinions on all questions of law, but can only consider issues that come to it in a legal form.[114] Marshall deduced that there are some issues of treaty interpretation that cannot be decided by Article III courts because they will never take on a legal form, such as whether a treaty sets the proper boundary line between states.[115] Marshall concedes that where a treaty confers rights upon people, the courts may be called upon to construe the treaty in adjudicating those rights.[116] Nevertheless, Marshall considers the legal questions in extradition nonjusticiable.[117]

Marshall's argument for the lack of justiciability is unusual. Marshall undoubtedly was correct when he explained that in an Article III proceeding, "[t]here must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit."[118] However, the Robbins extradition proceeding before Judge Bee would appear to fit this description. The parties, as the case caption suggests, were the United States and Robbins—parties that had come into court,

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110. *See id.*

111. *See* Kester, *supra* note 36, at 1441 n.3.

112. Wedgwood, *supra* note 1, at 234.

113. *See* Marshall Speech of Mar. 7, *supra* note 101, at 95-96.

114. *See id.* at 95.

115. *See id.* at 96; *see also* Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 YALE J. INT'L L. 310, 312 (2000) (noting that Congressman Marshall's "view of presidential power was broad indeed, for he contemplated a final authority in the President to determine certain questions of treaty law, beyond the power of judicial revision").

116. Marshall Speech of Mar. 7, *supra* note 101, at 96.

117. *Id.*

118. *Id.*

were bound by the court's power, and whose rights would be determined by the court's decision.

However, in Marshall's view, "[t]he case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance."[119] Marshall did not view Robbins as a central figure in the dispute at all. Marshall even trivialized the consequences of extradition as "mere banishment from the United States."[120] In Marshall's view the case simply involved "the performance of a contract for the delivery of a murderer."[121]

Marshall also questioned the authority of the judge who arrested Robbins. Marshall asked "[w]hat power does a court possess to seize any individual, and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts."[122] Later, Marshall commented that the President could unilaterally cause an arrest under the treaty.[123]

In the absence of any implementing legislation for the treaty or any treaty provision setting forth extradition procedures, there is little support for Marshall's argument that the President had the authority to implement the treaty and that the courts did not. Marshall argued that the treaty was self-executing, regardless of whether Congress had provided the implementation procedure.[124] Marshall further explained that "Congress unquestionably may prescribe the mode; and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the executive department to execute the contract, by any means it possesses."[125] Marshall's acknowledgment that Congress could "devolve on others the whole execution of the contract" is in tension with his claim that the courts could not decide extradition cases pursuant to

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119. *Id.* at 104.

120. *Id.* at 103. To its credit, the United States does not claim that a relator has no individual interest in his own extradition. Supplemental Brief for the Appellants at 10, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315) (noting "that the consequences of the extradition process for the fugitive—arrest, detention, and eventual surrender—constitute Article III injuries").

121. Marshall Speech of Mar. 7, *supra* note 101, at 102.

122. *Id.* at 96.

123. *See id.* at 106.

124. *See id.*

125. *Id.* at 104.

Article III and his assertion that extradition rests exclusively within the President's authority over foreign affairs.[126]

Marshall suggested that there was no role for the court in this case.[127] Marshall agreed with President Adams' critics that there were legal issues that must be decided in this case regarding whether extradition is required under the treaty.[128] For Marshall, however, the determination of whether the British had jurisdiction over the offense and whether the treaty required extradition were questions to be decided exclusively by the Executive. Marshall explained:

> [T]he casus foederis [situation contemplated] under the 27th article of the treaty with Britain is a question of law, but political law. The question to be decided is whether the particular case proposed be one, in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.
>
> If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the casus foederis of the 27th article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.[129]

Marshall further declared that "the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question of power to decide which, rests alone with the executive department."[130]

Marshall's statements make clear that he did not believe in any role for the court in construing the questions of law in extradition cases, but his statements also suggest that the Executive can make the ultimate determination on the facts. Toward the end of his argument, Marshall reiterated this point. In discussing the fact that President Adams did not know of Robbins' claim to be an American with a defense based on impressment, Marshall says that Judge Bee should have alerted the President if he had believed Robbins.[131] Marshall emphasized that "[s]atisfactory as this defence might appear, [Judge Bee] should not resort to it, because to some it might seem a subterfuge."[132] Marshall's

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126. *See id.*
127. *See id.*
128. *See id.* at 103.
129. *Id.* at 104.
130. *Id.* at 106.
131. *See id.* at 108.
132. *Id.*

statement suggests that the judge was not entitled to decide the case on the basis of an affirmative defense, but that the judge could only request the President to reconsider his decision.

Marshall may have back-tracked from this statement somewhat later. Marshall explained that the President had submitted the sufficiency of the evidence determination entirely to the judge and had instructed that Robbins should not be surrendered if he had not committed murder.[133] Marshall further explained that any killing by an impressed American to obtain his liberty would be justifiable and would not be considered murder.[134] In these circumstances, Marshall says only that Robbins should not be surrendered.[135] Read consistently, perhaps all Marshall is saying is that if the judge accepts Robbins' defense, he should notify the President and not surrender Robbins until the President reconsiders.

After rejecting any constitutionally required role for the courts in extradition matters, Marshall contends that Judge Bee was merely engaging in the ministerial act of executing a treaty obligation. It is clear, however, that Judge Bee did not perceive his role so narrowly.[136] Judge Bee stated that he was reviewing a habeas corpus case, had considered constitutional objections to the treaty, and explicitly stated that the authority he was acting upon was "vested in the judiciary by law and the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words."[137]

Nevertheless, Marshall made the extraordinary claim that Judge Bee did not mean what he had said regarding his authority under Article

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133. *Id.* at 109.

134. *Id.*

135. *Id.* at 108.

136. *See, e.g.*, BASSIOUNI, *supra* note 2, at 66-67 ("The court held that its judicial power under Article III extended to the interpretation and application of extradition treaties, and did not require federal legislation specifically implementing procedures for judicial review in extradition proceedings."); Engdahl, *supra* note 86, at 309 (noting that Judge Bee was explicit in saying that he had made his own decision and was not extraditing Robbins on the President's orders).

137. United States v. Rob[b]ins, 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16,175). The United States recently offered a similar distortion of the Robbins affair by suggesting that Robbins' extradition was made "without any independent judicial involvement." Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, Lobue v. Christopher, at 15 n.7, 893 F. Supp. 65 (D.D.C. 1995) (No. 95-1097). On appeal, however, the United States recanted and argued that in the Robbins affair "the Executive Branch was commonly (albeit incorrectly) understood to have excluded the judiciary from the extradition process." Supplemental Brief for the Appellants at 10, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

III.[138] Marshall asserted that Judge Bee could not have intended to suggest that the courts had the right to deny the authority of the President.[139] According to Marshall, all Judge Bee intended to say was that because

> the Judicial power extended to Treaties, [Judge Bee] was then satisfied that the Judges might be called on where circumstances rendered it proper, to take the necessary steps, in order to have the Treaty carried into effect, as by issuing a warrant to secure the fugitive, until the determination of the government could be known, and after that was promulgated, giving the necessary orders for carrying the determination into effect.
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> With this qualification, the opinion of the Judge was correct . . . .[140]

The only point in his speech where Marshall contemplates judicial involvement is "if the President should cause to be arrested under the treaty, an individual who was so circumstanced, as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of the arrest, before a Judge by a writ of habeas corpus."[141] In view of everything else Marshall said, this statement is difficult to comprehend. Marshall had stated that the legal issues are of a contractual nature between two governments and are therefore beyond Article III jurisdiction.[142] This argument should apply to habeas jurisdiction as well. Apparently, Marshall is speculating that, in a case similar to Robbins' where new circumstances are raised after the President's order is issued, a court may use the writ of habeas corpus to examine the new circumstance and raise the issue with the President if necessary.

Clarifying his views of the President's extradition powers, Congressman Marshall later suggested an amendment to proposed implementing legislation for the Jay Treaty. Marshall's amendment stated that "testimony should be taken in writing and transmitted to the Secretary of State, and by him laid before the President of the United States, whose opinion should decide whether the matter was cognizable in any court of the United States, or whether the offender should be delivered up."[143] This proposed amendment demonstrates Marshall's view that the President could choose to utilize or completely exclude the courts from extradition decisions at his discretion.

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138. *See* MARSHALL PAPERS, *supra* note 8, at 28.

139. *See id.*

140. *Id.*; *see also* United States v. Rob[b]ins, 27 F. Cas. 825, 835 (D.S.C. 1799) (No. 16,175).

141. Marshall Speech of Mar. 7, *supra* note 101, at 106.

142. *See id.*

143. 10 ANNALS OF CONG. 654 (1800).

C. Congressman Marshall's Views on Presidential Power Were Wrong

Professor Wedgwood describes Marshall's theory of executive power as "[r]iviting in its implications for an unchecked Executive . . . [where] the judiciary may be called upon in an Article III capacity to aid implementation, yet apparently may be limited to carrying out the Executive's legal determinations."[144] Wedgwood adds that:

> Marshall is sketching a potential radical refocusing of constitutional power—permitting the Executive and treaty power magistracy to make legal determinations and to affect the dearest of domestic entitlements, to detain persons who may happen to be citizens and deliver them into the custody of foreign governments. If one took this truncated view of Article III powers, and allowed some sort of moonlighting magistracy to act in execution of Executive determinations, without any implementing statute or jurisdictional legislation, Congress' control of the Executive would seem much more fragile.[145]

Fortunately, the theory that Congressman Marshall espoused has never been the law.

1. Marshall's View on Article III Jurisdiction Had Been Rejected Previously by a Unanimous Supreme Court

In 1795, four years before Jonathan Robbins' extradition trial began, the United States Supreme Court considered its first extradition case.[146] In that case, France had approached District Judge Lawrence seeking the arrest and extradition of a French captain who had deserted his ship. The United States and France had signed a Consular Convention that expressly authorized each nation to approach one another's courts for the delivery of deserters.[147] Judge Lawrence took a strict view of the evidentiary requirements specified in the treaty and denied the arrest warrant.[148] France complained to the Executive, and the United States sought a writ of mandamus from the Supreme Court to compel Judge Lawrence to issue the warrant.[149]

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144. Wedgwood, *supra* note 1, at 342.

145. *Id.* at 351.

146. *See* United States v. Lawrence, 3 U.S. (3 Dall.) 42 (1795).

147. Convention Between His Most Christian Majesty and the United States of America for the Purpose of Defining and Establishing the Functions and Privileges of Consuls and Vice-Consuls, Unites States-France, art. 9, 8 Stat. 106, T.S. No. 84 (signed Nov. 14, 1788; proclaimed Apr. 9, 1790).

148. *See Lawrence*, 3 U.S. at 53.

149. *See id.* at 42; 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 785-86 (1971) (describing *Lawrence*).

The Attorney General argued that the strict evidentiary standard used by Judge Lawrence was appropriate for determining whether to extradite, but that the issuance of the arrest warrant should be subject to a lesser standard.[150] According to the Attorney General, the act of issuing the arrest warrant was a ministerial task that had to be granted on a showing of any kind of proof.[151] Claiming that the issuance of the arrest warrant was ministerial and that Judge Lawrence had no discretion but to issue the warrant, the Attorney General claimed that mandamus was appropriate.[152]

By contrast, opposing counsel argued that the issuance of the warrant was a judicial and not a ministerial act.[153] Because the act was judicial, in the sense that the judge had to evaluate the facts and the law in making his decision, counsel argued that mandamus was inappropriate.[154] All parties agreed that mandamus was not appropriate for reviewing decisions made within a judge's discretion, even erroneous ones, but could only be used to compel a lower court to exercise its jurisdiction.[155] Counsel for Judge Lawrence insisted that the judge had acted within his discretion in deciding not to issue the warrant, and that the refusal to issue the warrant was unlike a refusal not to try a case that was before him.[156]

In a brief per curiam opinion, the Supreme Court held that it was "clearly and unanimously" of the opinion that no case for mandamus was present.[157] The Court explained that "[i]t is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre."[158]

Despite the brevity of the opinion, *Lawrence* is significant for many reasons. Most importantly, it makes clear that extradition judges are exercising the "judicial power" of Article III. Even the Attorney General

150. *See Lawrence*, 3 U.S. at 48-49.
151. *See id.* at 49.
152. *See id.* at 53.
153. *Id.* at 47 ("The act of issuing the warrant is *judicial*, and not *ministerial*; and the refusal to issue it for want of legal proof, was the exercise of a *judicial* authority.").
154. *See id.* at 48.
155. *Compare id.* at 48 (counsel for Judge Lawrence), *with id.* at 52-53 (Attorney General).
156. *See id.* at 48.
157. *Id.* at 53.
158. *Id.*

agreed that the judicial power is exercised in making the decision of whether to extradite.[159] He explained that

> the delivery is obviously a subsequent act, to be performed after the party has been brought before the Judge; when, not only the allegations against him, but his answers and defence, are heard, and the Judge has decided that he is an object of the article. Natural justice, and the safety of our citizens, require that such a hearing take place.[160]

The Supreme Court also made it clear in *Lawrence* that it was not reviewing a decision from a judge in an extra-judicial capacity and was instead reviewing the exercise of Article III judicial power.[161] In *Hayburn's Case*,[162] decided three years earlier in 1792, all but one Justice held in separate circuit court opinions that Congress cannot impose non-Article III responsibilities on Article III courts. Because it was clear what the Supreme Court's decision would be, Congress amended the statute before the Supreme Court could decide the case.[163] The rule that has come to be known as the rule in *Hayburn's Case*, that Congress cannot impose non-Article III responsibilities on an Article III court, was fresh in the minds of the same Supreme Court that decided *Lawrence*. In this context, the *Lawrence* Court's finding that the lower court "was acting in a judicial capacity" takes on added importance.[164] In *Hayburn's Case*, Chief Justice Jay and Justice Cushing rejected the statute at issue because the task Congress assigned was "not judicial."[165] Justices Wilson and Blair wrote that it was "not of a judicial nature . . . [and] forms no part of the power vested by the Constitution in the courts of the United States."[166] Justice Iredell wrote that it was not "properly of a judicial nature."[167] Clearly, the Supreme Court would not have described Judge Lawrence as having acted in a "judicial capacity" if it believed that he was really acting in some extra-judicial capacity.

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159. *See id.* at 49.
160. *Id.* at 49.
161. *See id.* at 53.
162. 2 U.S. (2 Dall.) 409 (1792).
163. The Supreme Court recently explained that "[a]lthough this Court did not reach the constitutional issue in *Hayburn's Case*, the statements of five Justices, acting as circuit judges, were reported, and we have since recognized that the case 'stands for the principle that Congress cannot vest review of decisions of Article III courts in officials of the Executive Branch.'" Miller v. French, 530 U.S. 327, 343 (2000) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995)).
164. *Lawrence*, 3 U.S. at 53.
165. *Hayburn's Case*, 2 U.S. at 410.
166. *Id.* at 411.
167. *Id.* at 413.

Similar proof that the Supreme Court did not believe that Judge Lawrence was acting in an extra-judicial capacity comes from *United States v. Todd*, decided a year before *Lawrence* in 1794.[168] In that case, the Supreme Court decided unanimously that because the statute at issue in *Hayburn's Case* vested jurisdiction in "courts," rather than judges, it could not be construed as authorizing the Article III judges to act in an extra-judicial capacity. The Consular Convention addressed in *Lawrence*, like the statute at issue in *Todd*, made a similar reference to the authority being vested in "courts."[169]

The Consular Convention specified that foreign governments seeking extradition "shall address themselves to the Courts, Judges, and Officers competent" to hear such claims.[170] All parties and the Supreme Court had agreed that the district court had jurisdiction pursuant to the Judiciary Act of 1789.[171] Counsel for Judge Lawrence had suggested to the Supreme Court that this "act of Congress, vesting this jurisdiction in the District Judges, may, indeed, be too restricted, inasmuch as it does not give each District Judge a power to issue his warrant to all parts of the United States."[172] Although it is unclear which of two provisions of the Judiciary Act are being referred to, either the civil or criminal provision, both concern proceedings before a "court" and not merely a judge.[173] Attorney General Bradford's Letter to the Secretary of State concerning *Lawrence* explained that the Supreme Court agreed at the hearing that the Judiciary Act "had made each district judge (within his district) the competent judge for the purposes expressed" in the Convention.[174] Therefore, both the Consular Convention and the Judiciary Act empowered Judge Lawrence to sit in the extradition case as a court, and not as a judge acting in an extra-judicial capacity.

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168. *United States v. Todd* was decided February 17, 1794, when there was no official reporter, and the opinion has not been printed. The case is summarized in an attached note from Chief Justice Taney in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851).

169. *See* Lawrence, 3 U.S. 42-44.

170. *Id.* at 43.

171. *See id.* at 47.

172. *Id.* at 46.

173. Section 11 of the Judiciary Act, which provided that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (1789). Section 33 of the Act authorized an arrest "for any crime or offence against the United States . . . for trial before such court of the United States as by this act has cognizance of the offense." *Id.* § 33, at 91.

174. Letter from William Bradford, Attorney General, to Secretary of State, 1 Op. Att'y Gen. 56 (1795).

Lawrence casts doubt upon other portions of Marshall's theory as well. The Attorney General's acknowledgment that "the safety of our citizens" requires a judicial hearing where a defense can be made,[175] undercuts Marshall's dubious notion that extradition is of trivial importance to an individual. *Lawrence* also demonstrates that extradition poses justiciable cases for Article III purposes. Marshall's attempt to belittle the interests of the relator in an extradition proceeding by suggesting that no rights requiring a remedy are implicated is remarkably weak. As the critics of the Robbins affair demonstrate, extradition results in imprisonment; being expelled from the United States; and being forced to stand trial in a foreign land, under foreign laws, and before a foreign system of justice. In Robbins' case that meant a summary trial without a jury before a court martial where, upon conviction and within four days of the start of his trial, he was executed.

In addition, the very fact that the Consular Convention specified that the extradition process would be initiated by France through our courts undercuts Marshall's contentions that extradition must be conducted through the Executive.[176] The Jay Treaty did not specify how extradition was to be conducted and there was no implementing legislation. Marshall's conclusion through deductive reasoning that the Executive was the only branch that could conduct extradition was wrong. Since the Consular Convention was the only other United States extradition treaty in existence, the country's practice in extradition was entirely contrary to the view Marshall espoused.

Moreover, the fact that the judiciary acted in *Lawrence* demonstrates that there is no constitutional doctrine that would force extradition into the President's exclusive authority. The Attorney General made this point clear as well: "In the present case, however, from the nature of the subject, as well as from the spirit of our political Constitution, the Judiciary Department is called upon to decide; for it is essential to the independence of that department, that judicial mistakes should only be corrected by judicial authority."[177]

In his speech before the House of Representatives, Marshall sought to distinguish *Lawrence* on the grounds that the Consular Convention

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175. *Lawrence*, 3 U.S. at 49.

176. Convention Between His Most Christian Majesty and the United States of America for the Purpose of Defining and Establishing the Functions and Privileges of Consuls and Vice-Consuls, United States-France, *supra* note 147, art. 9, 8 Stat. 106, T.S. No. 84 (signed Nov. 14, 1788; proclaimed Apr. 9, 1790).

177. *Lawrence*, 3 U.S. at 48-49.

expressly provided authority to the courts while the Jay Treaty did not.[178] In the absence of an established procedure, Marshall asserted his theory of letting the President fill in the gaps until Congress acted otherwise.[179] Although Marshall's point is valid, noting the possibility of a different procedure under the Jay Treaty, it does not provide a satisfactory answer to the Supreme Court's determination that "judicial power" is exercised in extradition.

2. Chief Justice Marshall Undermined the Views He Stated as a Congressman

Although Chief Justice Marshall never officially repudiated his legal theory in the Robbins affair, those views were undercut substantially by his opinions as Chief Justice. Most notably, an expansive theory of executive power was cast aside in *Marbury v. Madison*.[180] In that opinion, Marshall continued to recognize that

> the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . .
>
> . . . The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive . . . .
>
> . . . But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the law of his country for a remedy.[181]

This qualification on executive power would appear applicable to extradition because an individual who is wrongfully forced to leave the country to stand trial abroad suffers an obvious injury.

Marshall, however, may not have seen the tension between his argument in *Marbury* and his views as a Congressman. It is possible that Marshall's view of the political question doctrine remained the same, but that Congressman Marshall had misapplied the doctrine to extradition by assuming that the relator had no rights at stake.

Justice Marshall also back-tracked from his theory that treaty obligations are self-executing. In *Foster & Elam v. Nielson*[182] and *United*

178. *See* Marshall Speech of Mar. 7, *supra* note 101, at 97.
179. *See id.*
180. 5 U.S. (1 Cranch) 137 (1803).
181. *Id.* at 165-66.
182. 27 U.S. (2 Pet.) 253 (1829).

States v. Percheman,[183] Chief Justice Marshall held that when treaties do not direct their means for implementation that they are not effective without an implementing statute. Under this view, it appears unlikely that President Adams had the gap filling authority to implement the Jay Treaty. Consequently, the United States would not have had jurisdiction to extradite anyone under the treaty.

By acknowledging not only that treaty implementation could be directed by Congress, but that in some cases it must be, Chief Justice Marshall recognized a more limited authority of the President in conducting foreign affairs than he apparently saw as a congressman. Moreover, Congressman Marshall's suggestion that political necessity requires deference to the Executive in determining whether and how treaties are enforced holds far less credibility when Congress has the power to proscribe standards governing the President's exercise of discretion.

3. Congressman Marshall's Theory Was Rejected by the Executive Branch and Early Courts

The notion that Article II provides the President with some all-encompassing extradition power never has been accepted.[184] In 1791,

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183. 32 U.S. (7 Pet.) 51 (1833).

184. In 1800, Justice Samuel Chase instructed a jury that Congressman Marshall's theory defending President Adams' conduct in the Robbins affair was correct. United States v. Cooper, 25 F. Cas. 631, 642 (C.C.D. Pa. 1800) (No. 14,865). This fact is not entitled to much weight. Justice Chase was charging a jury in a politically motivated trial of a reporter accused of criminal sedition against President Adams. *See id.* at 644 (Reporter's note). Justice Chase's conduct in these Federalist-led criminal sedition cases was one of the grounds for the House of Representatives' vote to impeach him in November 1804. *See id.* at 645 (Reporter's note); 13 ANNALS OF CONG. 1171, 1180 (1804) (explaining that the House voted 73-32 in favor of impeachment). Although three of the impeachment charges carried a majority vote for Chase's removal in the Senate, none received the two-thirds vote required. 14 ANNALS OF CONG. 666-69 (1805). Justice Chase had a "stormy career on the bench" and his behavior on the bench earned him the reputation as "the most hated member of the federal judiciary." RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 79 (1971); *see also* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FORREST L. REV. 219, 250 (1998) ("There had long been complaints about Chase's aggressive conduct of trials for sedition and treason, his political charges to grand juries, and his absence from the Bench to campaign for John Adams."). Although Justice Chase's impeachment can be attributed to partisan politics, many contemporary scholars regard the impeachment as proper. *See, e.g.*, WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 108 (1992) (finding that Chase's impeachment "was not devoid of substance"); 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON, bk. II, at 230 (1930); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 250 (1973) (concluding that Justice Chase should have been impeached and removed from the bench). *But see* Currie, *supra*, at 258

Secretary of State Jefferson advised President Washington that English "laws have given no power to their executive, to surrender fugitives of any description; they are, accordingly, constantly refused."[185] Jefferson further explained that where extradition is practiced among European countries, they do so "in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place."[186] By 1793, the official view of the United States, as stated by Secretary of State Jefferson on President Washington's behalf, was that the President had no power to extradite in the absence of a treaty. In refusing a French extradition request on these grounds, Jefferson wrote that

> [t]he laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. . . . [N]o person in this country is authorized to deliver them up, but on the contrary, they are under the protection of laws.[187]

Therefore, the policy of our first President, as implemented by the man who would become the third President, plainly recognized limitations on executive authority and the fact that extradition implicates the liberty interests of individuals.[188]

In 1823, Chief Judge Tilghman of the Pennsylvania Supreme Court observed that

> [t]he *American* government has never recognized the principle of delivering up fugitives, except when bound by treaty. . . . The opinion of the

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(concluding that Chase's conduct was "at least arguably proper"). Consequently, Justice Chase's comments made in a highly partisan political speech from the bench in a criminal sedition trial are not entitled to much weight.

185. *See Ex parte* Dos Santos, 7 F. Cas. 949, 954 (C.C.D. Va. 1835) (No. 4016) (Barbour, J.) (quoting Secretary of State Thomas Jefferson's Letter to President George Washington dated November 7, 1791).

186. *Id.*

187. Short v. Deacon, 10 Serg. & Rawle 125, 132-33 (Pa. 1823) (quoting Secretary of State Thomas Jefferson's Letter to French Minister Mr. Genet dated September 12, 1793). Chief Judge Tilghman praised Jefferson by commenting that "no government ever considered that important subject with more candor, or formed its resolutions with more integrity, good faith, and sound judgment, than did our's on that occasion." *Id.*

188. Jefferson's mind was not changed by Marshall's speech; he continued to believe that President Adams' action "was a violation of the Constitutional independency of the Judiciary." Handwritten inscription by Jefferson on the last page of a printed pamphlet entitled *Speech of Hon. John Marshall, Delivered in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (Virginia Historical Society, Political Pamphlets I, no. 7), *reprinted in* MARSHALL PAPERS, *supra* note 8, at 109 n.1.

> executive hitherto has been, that it has no power to act [absent a treaty]. Should it ever depart from that opinion, it will be for judges to decide on the case as it shall then stand.[189]

This statement acknowledges both the absence of presidential power to act without a treaty and that any such power must be subject to judicial review.

Two early Justices, Barbour and Story, also cast doubt on whether extradition could be made absent a treaty. In 1835, District Judge Barbour, who became Justice Barbour the next year, made this point in rejecting a Portuguese request for extradition.[190] Judge Barbour observed that through Jefferson's actions on behalf of President Washington and through the government's use of a treaty to determine extradition obligations, "the principle has been announced to the world, that the United States acknowledge no obligation to surrender fugitives, except by virtue of some treaty stipulation."[191] Judge Barbour further explained that courts make arrests so that our laws can be prosecuted, but have no authority to make arrests in support of prosecutions by foreign governments in the absence of a treaty.[192] Absent an extradition treaty, Judge Barbour explained that "as a judicial officer of the United States, I have no authority whatsoever, either to arrest or detain, with a view to such surrender."[193] In 1837, Justice Story refused an extradition request because

> he had never known any such authority exercised by our courts, except where the case was provided for by the stipulations of some treaty. He had great doubts, whether . . . any court of justice was either bound in duty, or authorized in its discretion, to send back any offender to a foreign government whose laws he was supposed to have violated.[194]

The authority of states to conduct extradition was debated by an evenly divided Supreme Court in *Holmes v. Jennison*.[195] In 1840, the Court's "fragmented decision[s]" in that case "indicated that state

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189. *Short*, 10 Serg. & Rawle at 134-35.

190. *See Ex parte* Dos Santos, 7 F. Cas. at 955.

191. *Id.*

192. *See id.*

193. *Id.* at 957.

194. United States v. Davis, 25 F. Cas. 786, 788 (C.C.D. Mass. 1837) (No. 14,932) (Reporter's note).

195. 39 U.S. (7 Pet.) 540 (1840). At that time, "American experience with extradition had thus far been confused and unsatisfactory. The people had no desire to see their country a dumping ground or a place of refuge for criminals, but they did not want mere allegations of crime to provide a means of capturing political refugees who had fled there." SWISHER, *supra* note 32, at 175.

extradition trespassed on federal power."[196] In that case, the State of Vermont sought to extradite a Canadian citizen to Canada and its decision to do so had been affirmed by the Supreme Court of Vermont.[197] Chief Justice Taney, joined by Justices Story, McLean, and Wayne, would have reversed.

Chief Justice Taney argued that extradition is an exclusive federal power involving foreign affairs and that it is subject to the treaty power. Chief Justice Taney further explained that since the expiration of the Jay Treaty,

> the general government appears to have adopted the policy of refusing to surrender persons . . . . [I]n every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of Congress to authorize it.[198]

Justice Thompson did not believe that the Judiciary Act gave the Supreme Court the jurisdiction to review the case.[199] Nevertheless, Justice Thompson agreed with Taney that "such power or authority [to extradite] has been expressly disclaimed by the President."[200] Justice Thompson quoted a note sent by the Secretary of State to the Governor of Vermont in 1825, advising that an extradition to "Canada cannot be complied with under any authority now vested in the executive government of the United States."[201] Justice Thompson explained that this

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196. Neuman, *supra* note 44, at 996.

197. At that time, "not all the governors of the northern tier of states were as meticulous about the exercise of constitutional powers as was Governor Van Ness." SWISHER, *supra* note 32, at 175. Other governors, "without consulting Washington . . . surrendered fugitives to Canada and successfully claimed American fugitives who had fled there." *Id.* Interestingly, Governor Van Ness of Vermont had years earlier "discovered by correspondence between Secretary of State Henry Clay that there was no law of extradition between the United States and Canada" and served as Holmes' counsel. *Id.* at 176.

198. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 574 (1840) (Taney, C.J.). To some, Chief Judge Taney's opinion was surprising. Carl Swisher explained that "[f]or a judge bearing the label of the Democratic Party and of the South, the opinion was regarded as highly nationalistic." SWISHER, *supra* note 32, at 176. Then Democratic Senator, occasional Supreme Court advocate and, later, President, "James Buchanan lamented that some portions of the opinion of the Chief Justice, for whom he had always entertained the highest respect, where 'latitudinous and centralizing beyond anything I ever read, in any other judicial opinion.'" *Id.* (internal citations omitted). Swisher writes that "Justice Story, on the other hand, thought Taney's opinion a masterly performance and predicted that it would elevate his judicial reputation. He was surprised that it had not been unanimously adopted." *Id.*

199. *See* Holmes, 39 U.S. at 582 (Thompson, J.).

200. *Id.*

201. *Id.* at 582-83.

> is a direct denial by the President of the existence of such a power in the executive, in the absence of any treaty on the subject. And such has been the settled and uniform course of the executive government of the United States upon this subject, since the expiration of our treaty with England.[202]

Several justices believed that the states had not ceded all of their authority over extradition to the federal government.[203] Justice Barbour agreed that the United States could control extradition through a treaty and that the President had no authority to extradite absent a treaty.[204] Justice Barbour believed that if the federal government had not acted upon this power, then the power to extradite remained with the states.[205] Justice Baldwin's opinion espoused a similar view.[206] Justice Catron concluded that the state had the authority to extradite and refused to consider whether the federal government could have preempted state power.[207] After the divided opinions of the United States Supreme Court were rendered, the Supreme Court of Vermont reconsidered its decision and refused extradition.[208]

A description of extradition law prior to the adoption of the Extradition Act is provided in Judge Betts' decision for the Southern District of New York in *In re Metzger*, decided a year before the Extradition Act was passed.[209] In upholding a French request for extradition pursuant to a treaty, Judge Betts was explicit in recognizing that extradition raised Fourth Amendment issues that necessarily require the involvement of an Article III court. Judge Betts explained that

> it is manifest that the provision [of the treaty] demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country, but by aid of judicial authority. Not only in the distribution of the powers of our government does it appertain to that

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202. *Id.* at 583.

203. *See generally id.*

204. *See id.* at 582 (Barbour, J.).

205. *See id.*

206. *Id.* at 614 (Baldwin, J.). Justice Baldwin's opinion was submitted to the reporter in time to be included with the other opinions and is provided in Appendix II. *Id.*

207. *See id.* at 594-95 (Catron, J.). Justice McKinley did not participate.

208. *See generally Ex parte* Holmes, 12 Vt. 631 (1840); *see also* SWISHER, *supra* note 32, at 177 n.8; *see also* United States v. Rauscher, 119 U.S. 407, 414 (1886) (holding that international extradition is an exclusive federal power).

209. *In re* Metzger, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9511) [hereinafter *Metzger I*]. *Metzger* itself was an important case because it was the first to arise under the Convention with France. Then Secretary of State James Buchanan asked Benjamin F. Butler, former Attorney General of the United States and then current U.S. Attorney for the Southern District of New York, to personally assist in the case. Letter from James Buchanan to Benjamin F. Butler of (Nov. 15, 1846), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 106-07.

> branch to receive evidence and determine upon its sufficiency to arrest and commit for criminal offences, but the prohibition in the constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a judicial act.[210]

Judge Betts added that

> [i]n every authority I have consulted, it seems to be regarded as an elementary principle that the extradition is to be effectuated through the agency of the tribunals of justice whose province it is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify putting the accused upon his trial.[211]

In looking back at the Robbins extradition, Judge Betts noted that President Adams had recognized that it was appropriate for the judiciary to examine the evidence and issue the arrest warrant.[212] Judge Betts also commented that the House had debated whether extradition was a matter that "belonged to the judiciary and not to the executive," and that the House overwhelmingly passed a resolution in favor of the procedure used.[213] Judge Betts claimed that there had not been an "instance since that period in which the justness of the decision has been called in question."[214] Later, Judge Betts emphasized that weighing the "sufficiency of the evidence" is a "case of a strictly judicial character."[215]

Judge Betts dismissed the argument that the court was not acting in a judicial capacity because it did not have jurisdiction to try the criminal case. He noted by analogy that courts often exercise their jurisdiction to transfer prisoners from an improper venue to a proper venue for trial.[216] Judge Betts added that it "seemed to be conceded in the Robins Case" that a person whose extradition was sought "was entitled to a writ of habeas corpus."[217]

Looking at the relationship between the President and the courts, Judge Betts held that the President has the absolute discretion to decide against extradition or to initiate extradition proceedings.[218] Judge Betts explained that questions of a "diplomatic character," such as whether a

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210. *Metzger I*, 17 F. Cas. at 233. Judge Betts acknowledged that the holding of *Metzger I* was through a "civil process." *Id.*

211. *Id.*

212. *See id.* at 238.

213. *Id.* at 233.

214. *Id.*

215. *Id.* at 235.

216. *Id.*

217. *Id.* at 238.

218. *See id.*

treaty imposes an obligation of surrender, whether the offense is extraditable, whether the treaty is in effect, and whether the treaty will be honored,[219] are in "the province of the president, at least in the first instance, to decide them at his discretion."[220] Judge Betts explained that these "are considerations addressed to the political department of the government. Over these questions the judiciary has no immediate control or jurisdiction."[221] If the President seeks extradition, however, Judge Betts emphasized that the judiciary must approve the extradition. Judge Betts explained that "[t]he judicial authority can only be invoked incidentally and indirectly, to pass upon such provisions of a treaty; and it is only in that manner that acts of the president in execution of a treaty contract can be reviewed and adjudicated upon in courts of justice."[222]

In letters from then Secretary of State Buchanan to the U.S. Attorney handling the Metzger extradition, it is clear that the Executive Branch concurred in Judge Betts' understanding that extradition required the exercise of the judicial power.[223] Buchanan wrote that the decision on whether Metzger should be committed was "a case clearly judicial in its character" and that because extradition involved "a Judicial, not an Executive, duty" the President [Polk] had decided that he could not take action without judicial participation.[224] In writing to the French government, Buchanan explicitly rejected the French suggestion, which was similar to Congressman Marshall's theory that extradition was a political question, that the Executive Branch could have obtained the extradition on its own.[225] Buchanan advised that "[t]he Convention with France is, under the Federal Constitution, the supreme law of the land; but, like all other laws, it must be subject to judicial construction, when

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219. *Id.* at 237-38.

220. *Id.* at 237.

221. *Id.* at 238.

222. *Id.*

223. *See* Letter from James Buchanan to Benjamin F. Butler (Nov. 13, 1846), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 115.

224. Letter from James Buchanan, Secretary of State, on behalf of President Polk, to Benjamin F. Butler, U.S. Attorney (Nov. 25, 1846), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 124-25; *see also* Letter from James Buchanan to Benjamin F. Butler (Nov. 13, 1846), *supra* note 223, at 115 ("Whether the facts make out a case for extradition is a question which belongs to the Judicial authority appealed to."); Letter from James Buchanan to Alphonse Pageot (Feb. 26, 1847), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 230 (describing the extradition decision as one to be made by "competent judicial authority").

225. *See* Letter from James Buchanan to Alphonse Pageot (Feb. 26, 1847), *supra* note 224, at 230.

private rights are involved."[226] Similarly, Buchanan advised other governments that the United States could not extradite without express authorization by treaty or legislation by Congress.[227]

Judge Betts authorized extradition and Metzger appealed the denial of habeas corpus to the Supreme Court.[228] The problems with modern extradition arose out of the Supreme Court's opinion in that case.

D. Metzger *and* Kaine*: The Supreme Court's Examination of Extradition Before and After the Extradition Act*

The Supreme Court's decision in *In re Metzger*[229] has created much confusion in the field of extradition law.[230] The Court began by noting that "[t]he mode adopted by the executive in the present case seems to be the proper one. Under the provisions of the constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, it may become a subject of judicial cognizance."[231] The Court then stated:

> 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 judgment 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.[232]

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226. Letter from James Buchanan to Alphonse Pageot (Nov. 3, 1847), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 450.

227. *See* Letter from James Buchanan to F.M. Auboyneau (May 24, 1847), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 314-15 (advising France that "the Executive of the United States is without authority to accede to the [extradition] request" because it was not authorized by treaty); Letter from James Buchanan to L.P. De Luze (Sept. 17, 1847), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 416 (advising Switzerland that absent an extradition treaty "the President possesses no authority whatever" to extradite); Letter from James Buchanan to Right Hon. Richard Pakenham (Oct. 15, 1846), *in* 7 WORKS OF JAMES BUCHANAN, *supra* note 32, at 105-06 (advising Great Britain that a particular extradition request fell outside the treaty's authorization and that "the President does not possess the power to deliver up such deserters"); *see also* Neuman, *supra* note 44, at 996 (noting that in the period from 1807-1842, "the federal government maintained its position that it could not grant extradition due to the absence of an authorizing statute or treaty"); Wedgwood, *supra* note 1, at 361 (noting that following the Robbins extradition "the federal Executive eschewed any formal power to act upon the law of nations [to conduct extradition] in the absence of Congressional statute").

228. *See Metzger I*, 17 F. Cas. 232, 240 (S.D.N.Y. 1847) (No. 9511).

229. *In re* Metzger, 46 U.S. (5 How.) 176 (1847) [hereinafter *Metzger II*].

230. *See, e.g.*, SWISHER, *supra* note 32, at 180.

231. *Metzger II*, 46 U.S. at 188.

232. *Id.* at 188-89.

This passage is significant because it shows that the Supreme Court was in agreement with Judge Betts in that he was acting in an Article III capacity when deciding the extradition case in chambers.[233] This is the same view that had earlier been expressed by Judge Barbour, and by Judge Bee in the very first extradition.[234]

The sole issue decided in *Metzger* was whether the Supreme Court, not the lower courts, had jurisdiction.[235] The Supreme Court in *Metzger* explained that the Judiciary Act provided it with original and appellate jurisdiction.[236] The Supreme Court clearly did not have original jurisdiction in the case.[237] The Attorney General argued that there was no appellate jurisdiction either, because appellate jurisdiction must be created through an act of Congress and Congress had not passed an extradition statute.[238] Although its language is cryptic, the Supreme Court appears to agree with this claim by saying that

> the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have power to confer it.[239]

The Supreme Court noted that the case was heard by the district judge in chambers, and not as a court.[240] The Supreme Court explained that the lower court "exercises a special authority, and the law has made no provision for the revision of his judgment."[241] The Supreme Court then explained that it has no jurisdiction over a lower court's decisions that are made in chambers, so no appeal can lie with the Supreme Court.[242] Furthermore, the Court held that it had no jurisdiction to hear a writ of habeas corpus because that would require it to consider the merits

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233. *See* O'Neill, *supra* note 41, at 13 (noting that the *Metzger* "Court never denied that the [extradition judge's] authority was an exercise of the judicial power").

234. *See* United States v. Rob[b]ins, 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16,175) (describing Judge Bee's views); *Ex parte* Dos Santos, 7 F. Cas. 949, 957 (C.C.D. Va. 1835) (describing Judge Barbour's views).

235. *See generally Metzger II*, 46 U.S. (5 How.) 176 (1847).

236. *See id.* at 180.

237. *See id.* at 183.

238. *See id.* at 184.

239. *Id.* at 191-92.

240. *Id.*

241. *Id.* at 191.

242. *Id.*

of the decision by the lower court, which would be tantamount to an appeal.[243]

Nothing in the Supreme Court's opinion in *Metzger* casts any doubt upon Judge Betts' analysis in the opinion below that extradition involves the judicial power. Reading the opinions together, it is clear that the "special authority" that Judge Betts was exercising was derived from a self-executing provision of the treaty, but the absence of a statute conferring jurisdiction on the Supreme Court prevented appellate review. Judge Betts' "special authority" could not have come from Congress because Congress had taken no action to implement the treaty.

The Supreme Court did not find appellate jurisdiction over the decision of the extradition judge because that decision was made in chambers.[244] Decisions made in chambers typically are not final because there will be further review and a decision on the merits will be entered by the court.[245]

In response to *Robbins* and *Metzger*, Congress passed the Extradition Act of 1848. In *In re Kaine*,[246] the Supreme Court considered this statute for the first time in the context of a request for extradition by Great Britain.[247] Justice Catron's opinion observed that "the eventful history of Robbins's case had a controlling influence . . . especially on Congress, when it passed the act of 1848, is, as I suppose, free from doubt."[248] Justice Catron noted Congressman Marshall's defense of President Adams on the ground that the President had complete authority to implement the treaty at his discretion until Congress passed enabling legislation.[249] Justice Catron stated the lesson learned from the Robbins affair:

> [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

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243. *See id.* at 191-92.

244. *See id.*

245. *See id.*

246. 55 U.S. (14 How.) 103 (1852).

247. This case, like *Robbins*, was highly politicized. The relator was Irish, as was his counsel, and "[a]mong the Irish population in New York and among other groups as well large numbers of persons opposed surrendering any fugitive to Great Britain, whatever the alleged offense." SWISHER, *supra* note 32, at 180. The district court found that public sentiment "made it inexpedient to bring the prisoner into court lest he be released by the mob." *Id.*

248. *In re* Kaine, 55 U.S. at 112.

249. *Id.*

> of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this, the judicial power has acted in cases of extradition, and all others, independent of executive control.[250]

Justice Catron added:

> Public opinion had settled down to a firm resolve . . . that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest, founded on them, and long imprisonments inflicted under such warrants, and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country.[251]

Accordingly, Justice Catron observed, "Congress obviously proceeded on this public opinion, when the act of 1848 was passed."[252]

Although no majority opinion concerning the merits of Kaine's appeal addresses whether the Executive Branch must initiate the request for extradition, seven of the eight sitting justices agreed that the Court had jurisdiction.[253] Kaine's extradition had been authorized by a magistrate (then called a commissioner) without the recommendation of the Executive Branch, and review was sought pursuant to a writ of habeas corpus.[254] Justice Catron's opinion, joined by Justices McLean, Wayne, and Grier, accepted the jurisdiction to hear this writ of habeas corpus but rejected the writ on the merits.[255] Justice Catron's opinion does not even cite *Metzger*, or even indirectly comment on its holding that habeas corpus review is unavailable where there is no appellate review.[256] Justice Nelson, joined by Chief Justice Taney and Justice Daniel, agreed with Justice Catron that it had jurisdiction over the writ of habeas corpus and would have sustained the writ.[257] Later opinions confirm that *Kaine* had rightfully discredited *Metzger*'s holding respecting appellate review through habeas corpus.[258]

Justice Nelson explained the error of *Metzger* at length in concluding that the Supreme Court had jurisdiction to hear a writ of

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250. *Id.*
251. *Id.* at 113.
252. *Id.*
253. *See id.* at 148.
254. *See id.* at 104.
255. *Id.* at 107, 117.
256. *See id.* at 108-17.
257. *See id.* at 147 (Nelson, J., dissenting); *id.* at 148 (Taney, J., dissenting) (noting agreement with Justice Nelson); *id.* (Daniel, J., dissenting) (same).
258. *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 341-42 (1879); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 99-100 (1868).

habeas corpus whenever a person was in custody under the authority of the United States.[259] With respect to *Metzger*, he explained that "[t]his case undoubtedly stands alone, and has very much narrowed the power of the court in issuing this great writ in favor of the liberty of the citizen, from that repeatedly asserted in previous cases."[260] Justice Nelson later criticized *Metzger* again because it "stands alone," and claimed that continued recognition of the case would "shake the authority of a long line of decisions in this court . . . decided in 1795, down to the present one."[261]

Justice Nelson also agreed with Justice Catron that extradition decisions must involve the judiciary. Justice Nelson explained:

> The Executive alone possesses no authority, under the Constitution and laws, to deliver up to a foreign power any person found within the States of this Union, without the intervention of the judiciary. The surrender is founded upon an alleged crime, and the judiciary is the the [sic] appropriate tribunal to enquire into the charge.[262]

Justice Nelson also objected to the use of a broadly defined class of magistrates deciding extradition matters because they "cannot agree" that the "just protection to the personal liberty of the citizen against the abuse of power, shall be made to yield to the suggestions of convenience . . . indulgence of any such convenience in its execution, is regarded as too dangerous to the subjects of that government."[263] Justice Nelson would have rejected the role of the magistrate to act as the extradition judge because he had not been appointed or authorized to act by a federal court.[264]

On the merits, Justice Nelson would have upheld the writ due to the inadequacy of the evidence and the fact that the magistrate had not been appointed or authorized to act by a federal court.[265] Justice Catron found the evidence sufficient and considered it acceptable that the magistrate was specifically empowered to decide the case by the Extradition Act.[266] Because the majority of the Court could not agree on these issues, Justice

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259. *See In re* Kaine, 55 U.S. (14 How.) 103, 133 (1852) (Nelson, J., dissenting).
260. *Id.* (Nelson, J., dissenting).
261. *Id.* at 146 (Nelson, J., dissenting).
262. *Id.* at 140 (Nelson, J., dissenting).
263. *Id.* at 140-41 (Nelson, J., dissenting).
264. *See id.* at 142-43 (Nelson, J., dissenting).
265. *See id.* at 143-44 (Nelson, J., dissenting).
266. *See id.* at 115.

Nelson, who had been the Circuit Justice in the case, followed his own conscience and issued the writ on remand.[267]

The remaining opinion by Justice Curtis reiterated *Metzger's* holding that the Court lacked jurisdiction and would have decided the case on that ground without reaching the merits.[268] Justice Curtis emphasized that in *Metzger* the extradition judge "exercised a special authority" and that there was no statutory provision for appeal.[269] Justice Curtis claimed that "strictly speaking," the extradition judge "does not exercise any part of the judicial power of the United States. That power can be exerted only by Judges, appointed by the President, with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries."[270]

III. EXTRADITION AS A "PUBLIC RIGHTS" CASE

Whether he recognized it or not, Justice Curtis' opinion for himself alone in *In re Kaine* was fundamentally at odds with the historic understanding that extradition required the exercise of the judicial power of Article III. Indeed, the Supreme Court had no doubt that "judicial power" was exercised in *Lawrence*, the Executive Branch had consistently acknowledged the necessity of involving Article III courts in extradition proceedings since President Washington's Administration; and no federal judge had ever before questioned the wisdom of this conclusion. Moreover, Justice Curtis' opinion was cryptic at best in explaining why the judicial power was not being exercised.

At first glance, Justice Curtis' reasoning appears entirely circular. Justice Curtis explained that the judicial power must be exercised by judges with Article III protection, that the extradition judge did not have Article III protection and, therefore, extradition must not be a part of the judicial power of Article III. If this is the full extent of Justice Curtis'

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267. *See In re* Kaine, 14 F. Cas. 78 (C.C.S.D.N.Y. 1853) (No. 7597). In response to Justice Nelson's decision, the United States modified its extradition practice to allow foreign governments to seek a mandate from the Executive Branch supporting extradition to alleviate concern that Justice Nelson or others with similar views would dismiss the request without Executive Branch approval. SWISHER, *supra* note 32, at 182.

268. *See In re* Kaine, 14 F. Cas. at 93 (Reporter's note). *Compare also Ex parte* Wells, 59 U.S. (18 How.) 307, 330 (1855) (Curtis, J., dissenting) (reasserting his jurisdictional theory from *Ex parte* Kaine, which would have allowed a man to be executed even though he had received a Presidential pardon), *with Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 100-01 (1868) (emphasizing that Justice Curtis' opinions on jurisdiction in *Ex parte* Kaine and *Ex parte* Wells never commanded much support on the court and were patently wrong).

269. *In re* Kaine, 55 U.S. (14 How.) 103, 120 (1852).

270. *Id.*

decision, his assertion is easily refuted. That construction would reduce the judicial power of Article III to a tautology that would allow the scope of Article III to be defined by whether or not Congress chose to confer the Article III safeguards on the judges it assigned to hear any given case. The judicial independence that Article III was designed to secure would be meaningless if Congress could determine whether or not Article III's safeguards should exist on a case by case basis.

Upon closer examination, however, Justice Curtis' conclusion in *In re Kaine* appears to rest upon a more substantial basis. In crafting the "public rights" doctrine in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[271] three years after *Kaine* was decided, Justice Curtis provided additional insights into his understanding of the relationship between extradition and Article III. Following Congressman Marshall's theory of presidential power, Justice Curtis explained that there are certain subjects that the Constitution gives the political branches the absolute discretion to determine and that extradition is one of those subjects.[272] Although Justice Curtis does not explicitly cite Congressman Marshall's theory, the Supreme Court later confirmed that Congressman Marshall's theory was the source of this doctrine.[273]

In *Murray's Lessee*, Justice Curtis recognized that the judicial power of Article III is not present wherever government officials apply the law to facts.[274] In defending this point, just as he had done in *In re Kaine*,[275]

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271. 59 U.S. (18 How.) 272 (1855).

272. *See generally id.*

273. In upholding the Chinese Exclusion Act in *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893), the Supreme Court explained that

> surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate . . . . [T]he President's power in this regard was demonstrated in the masterly and conclusive argument of John Marshall in the House of Representatives.

274. *See Murray's Lessee*, 59 U.S. at 280. Justice Curtis explained:

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 . . . or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact.

Id. (citing United States v. Ferreira, 54 U.S. (13 How.) 40 (1851)).

275. 55 U.S. (14 How.) 103, 120 (1852) (Curtis, J., concurring) (relying on *Ferreira*).

Justice Curtis relied upon the Court's decision in *United States v. Ferreira*.[276] In *Ferreira*, the application of law to fact by a federal judge was held not to be a judicial act because Executive Branch officials had the power to revise the judge's decision.[277] Therefore, Justice Curtis recognized that the judicial power of Article III did not apply to all applications of law to fact, but only to those instances where the determination of an Article III court would be conclusive.[278]

The critical aspect of Justice Curtis' opinion, however, was his recognition that there are some instances where the political branches can make the conclusive determination of legal issues. Justice Curtis sought to "avoid misconstruction upon so grave a subject" by emphasizing the limited nature of this authority.[279] He explained that the Court:

> do[es] not consider [that] congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.[280]

Justice Curtis then set forth what is now known as the "public rights" doctrine by explaining that,

> [a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[281]

Murray's Lessee involved a waiver of sovereign immunity, which is the classic application of the "public rights" doctrine.[282] Justice Curtis explained that Congress has the discretion to preserve or waive the United States' immunity, and that Congress has the discretion to define the circumstances in which any waiver will occur.[283] Justice Curtis added that the adjudication of both public and private wrongs was cognizable by the judiciary, and that Article III courts could adjudicate such matters to the extent that they are permitted to do so by Congress.[284]

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276. 54 U.S. (13 How.) 40 (1851).
277. *See Murray's Lessee*, 59 U.S. at 281.
278. *See id.*
279. *Id.* at 284.
280. *Id.*
281. *Id.*
282. *See id.* at 283-84.
283. *Id.* at 284.
284. *Id.* at 283-84.

Although some have argued that Justice Curtis did not offer any basis for his decision,[285] a close examination of *Murray's Lessee* suggests that Justice Curtis was building the "public rights" doctrine from Congressman Marshall's theory of presidential power over extradition. In *Murray's Lessee*, Justice Curtis identified "a commissioner who makes a certificate for the extradition of a criminal" as an example of a government agent application of law to fact without exercising the judicial power of Article III.[286]

The central problem with the theory espoused by Congressman Marshall and Justice Curtis is not in their recognition that there are political questions that the Constitution commits to the political branches, but in their conclusion that extradition is one of those subjects. The error is in the assumption that extradition is a political question. Congressman Marshall's belief that the President's treaty power and authority to conduct foreign relations gave the President a plenary power to conduct extradition has never been accepted.[287] The same is true of Congressman Marshall's contention that a relator's constitutional rights

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285. Professor Redish argues that "Justice Curtis makes no reference to the language, history, or policies of article III to support his suggested dichotomy. Therefore, nothing but blind adherence to antiquated dicta—something for which the Supreme Court certainly is not known—justifies modern acceptance of Justice Curtis' statement." Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 205 (1983). In fairness to Justice Curtis, it should not readily be assumed that Justice Curtis drew this argument out of thin air or that the rest of the Supreme Court would have unanimously joined the opinion if he had. Although Justice Curtis was by no means infallible as a jurist (as *In re* Kaine demonstrates), "[d]espite his relatively short tenure Curtis is widely considered one of the greatest Justices in U.S. history." Charles T. Fenn, *Supreme Court Justices: Arguing Before the Court After Resigning from the Bench*, 84 GEO. L.J. 2473, 2476 (1996). In evaluating the greatest justices to have served on the bench, Felix Frankfurter stated that Justice Curtis was among only "sixteen Justices whom I deem preeminent." Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957); *see also* Stuart S. Nagel, *Characteristics of Supreme Court Greatness*, 56 A.B.A. J. 957, 957-59 (1970) (distinguishing Justice Curtis as among the greatest Supreme Court justices); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1108 (1953) (claiming that Justice Curtis was "one of the small number of really brilliant lawyers, besides Marshall and Story, who have sat upon the Court"). For example, Justice Curtis' ability as a jurist was demonstrated clearly in his legendary dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564 (1856) (Curtis, J., dissenting). *See, e.g.*, Stuart A. Streichler, *Justice Curtis' Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 510-11 (1997) (emphasizing the greatness of Justice Curtis' dissent in Dred Scott); *see also* Kathleen Shurtluff, *Benjamin R. Curtis*, *in* THE SUPREME COURT JUSTICES 156, 160 (Clare Cushman ed., 1993) (noting that, after his resignation from the Court over his disagreement with Chief Justice Taney in *Dred Scott*, Curtis argued more than fifty cases before the Supreme Court, served as President Johnson's impeachment counsel, and was offered, but declined, the job of Attorney General).

286. *Murray's Lessee*, 59 U.S. at 280.

287. *See id.*

are not implicated by extradition proceedings.[288] When these facts are evaluated under the legal definition of political questions that Chief Justice Marshall established in *Marbury*, it is clear that the President cannot have complete discretion to decide extradition matters.[289] Absent a treaty, the President has no authority to order an extradition, so extradition is not among the "certain important political powers" where the Constitution declares that "the decision of the executive is conclusive."[290] Instead, extradition proceedings must be conducted in accordance with the Constitution and the applicable treaty, and "individual rights depend upon the performance of that duty."[291]

The historical recognition by the Executive Branch that it has no authority to extradite in the absence of a treaty is a plain indication that extradition is not a decision left to Executive discretion by the Constitution. The fact that the Legislative Branch must authorize the President to extradite, and can decide the terms on which extradition can be made, further demonstrates that the President's authority over extradition is far from plenary.

Moreover, the policy rationale in favor of exclusive presidential power over extradition is weak. Congressman Marshall argued that extradition determinations involved complicated matters of international relations that are beyond the competence of the courts.[292] Nevertheless, courts make these kinds of decisions all the time. In the extradition context, courts decide whether extradition can be denied under the political offense exemption.[293] In making that determination, courts are asked to decide whether a foreign government is persecuting a person for political reasons. Similarly, in immigration cases the courts are called upon to grant asylum to persons whom they find have a well-founded fear of persecution in their home country.[294] It is certainly strange that a court can declare that a foreign government does not afford its own citizens fundamental human rights in those contexts, when a fear of disrupting international relations prevents the same courts from deciding more mundane extradition matters.

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288. *See id.* at 281.
289. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 347, 165-66 (1801).
290. *Id.*
291. *Id.* at 166.
292. *See id.*
293. *See, e.g.*, BASSIOUNI, *supra* note 2, at 502-80 (summarizing the political offense exception found in numerous extradition treaties).
294. *E.g.*, Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 162 n.11 (1993).

The contention that courts are not competent to decide such matters also is inconsistent with the Alien Tort Claims Act, a statute that was first enacted in 1789.[295] That statute authorizes a federal court to award damages against foreign nations who injure aliens in their own countries for violating the law of nations.[296] When this justification for the Extradition Act is read against the background of the Alien Tort Claims Act, it produces a surprising result. The concern with jeopardizing international relations prevents a court from considering whether a person would be tortured when making an extradition decision, but can hold the foreign government liable if the same person is actually tortured.

The Supreme Court's decision in *Ng Fung Ho v. White* also casts doubt upon the notion that the President could order extradition without any judicial review.[297] That case holds that while Congress has plenary authority to exclude any class of aliens it chooses, due process requires that an alien who invokes U.S. citizenship as a defense is entitled to a judicial hearing.[298] The Court explained that the deportation of "a citizen, obviously deprives him of liberty," and therefore due process requires a judicial hearing.[299] Extradition is not only like deportation in that it sends a person out of the country, but it is far more intrusive of liberty because it subjects the person to imprisonment and a foreign trial. To the extent that extradition concerns a U.S. citizen, *Ng Fung Ho* suggests that the relator is entitled to judicial review.[300]

IV. USING EXTRADITION LAW TO CLARIFY ARTICLE III'S REQUIREMENTS

Courts and scholars typically look to *Murray's Lessee* and the cases that followed it to understand the "public rights" doctrine, without acknowledging that the seeds of the doctrine were planted much earlier. A closer look at Justice Curtis' treatment of extradition in *In re Kaine* and *Murray's Lessee* demonstrates that the "public rights" doctrine is borrowed from Congressman Marshall's defense of executive discretion involving political questions, a view that Chief Justice Marshall elaborated upon in *Marbury v. Madison*. When "public rights" cases are

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295. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
296. *See id.* at 880.
297. 259 U.S. 276 (1922). The case was reaffirmed in *Agosto v. INS*, 436 U.S. 748, 753 (1978).
298. *See Ng Fung Ho*, 259 U.S. at 284-85.
299. *Id.* at 284.
300. *See id.* at 284-85.

viewed as similar to political questions, much brighter lines can be established to delineate a narrow scope for that category of cases.

A. Article III Case Law Is in a State of Confusion

Evaluating the constitutionality of the Extradition Act or any statute under Article III is complicated by the Supreme Court's failure to provide a coherent, much less consistent, construction of Article III. Justice White commented that the Supreme Court's Article III jurisprudence is "one of the most confusing and controversial areas of constitutional law."[301] Similarly, Chief Justice Rehnquist remarked that the Court's Article III cases "do not admit of easy synthesis" because the area is filled with "frequently arcane distinctions and confusing precedents."[302] Indeed, many of the Supreme Court's cases have been decided without a clear majority opinion[303] and those decisions that have commanded a majority of the Court often have been overruled.[304] There is a virtually unanimous consensus that "this is an area of the law in which there is no possibility of lining up all or even nearly all of the Supreme Court's decisions to match a coherent theory."[305]

The language of Article III is deceptively simple. Section 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[306] This language parallels the vesting of legislative power in Congress in Article I[307] and the vesting of executive power in the President in Article II.[308] Section 2 provides that

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301. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 93 (1982) (White, J., dissenting) (citing Glidden Co. v. Zdanok, 370 U.S. 530, 537 (1962)).

302. *Id.* at 90-91 (Rehnquist, J., concurring).

303. *See generally id.*; Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

304. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929), *overruled in part by* Olsen v. Nebraska, 313 U.S. 236 (1941).

305. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 947 (1988); *see also* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990) (describing the Supreme Court's precedents in this area as "troubled, arcane, confused and confusing as could be imagined"); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 46-47 (1980) (explaining that Congress' authority to create Article I courts "remains in a state of confusion" where "it has not been conclusively determined whether there exist *any* cases described in Article III, section 2, which cannot be given to legislative courts, and if so, what types of cases constitute that category").

306. U.S. CONST. art. III, § 1.

307. *See id.* art. I, § 1.

308. *See id.* art. II, § 1.

this "judicial Power" extends to nine categories of cases.[309] Looking at the text, the most natural reading is that the power of the United States has been carved into distinct legislative, executive, and judicial components.[310]

As Professor Fallon has noted, there is "nearly universal consensus" that the most natural reading of Article III is that "if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by article III."[311] For a variety of reasons, however, many Justices and scholars have assumed that the United States departed from this model with the first Congress and that the structure of the government in no way resembles a system that the Framers of the Constitution would have thought permissible.[312] It is argued by some that this pure Article III model has been undermined by territorial courts, military courts, judicial adjuncts and, most importantly, administrative agencies. Accepting this view, Justice White argued that adhering to this pure vision of Article III would require the Court to "overrule a large number of [its] precedents," and he concluded that "[i]t is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in The Federalists Nos. 78-82."[313]

The perception that the United States has departed dramatically from the true textual requirements of Article III, coupled with the concern that returning to that model would be impossible as a practical matter, has generated a multitude of theories that would create some sort of middle ground. The most recent Supreme Court opinions have followed Justice White's suggestion and balanced Article III values against Congress' purpose in vesting the judicial power of Article III in non-Article III bodies. Nevertheless, several justices appear committed to the view that the pure Article III model is the general rule and have sought to cabin those categories of supposed departures from the model

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309. *See id.* art. III, § 2.

310. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1157-58 (1992) (arguing that whatever authority Congress has to structure the Executive or Judicial Branches should be similar because of the strong similarity in the Vesting Clauses of Articles II and III). *But see* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1350 (1994) (arguing at length that the theory advanced by Calabresi and Rhodes oversimplifies the constitutional text).

311. Fallon, *supra* note 305, at 916.

312. *See id.*

313. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982) (White, J., dissenting).

into limited exceptions. Both approaches have been subjected to serious criticism because neither provides an understanding of Article III that is true to the text or that can be applied predictably.

The problem with both positions is that they are attempting to resolve a nonexistent conflict between current practices and the original understanding of Article III. Although the activities that take place before non-Article III tribunals deciding cases are similar to the activities that take place before Article III tribunals, they are not necessarily both exercising the judicial power of Article III.

In many respects, actions taken by the Executive and Judicial Branches resemble one another. In deciding whether to make an arrest, issue a permit, award an entitlement, or request extradition, the Executive Branch makes a quasi-judicial decision by applying law to facts in the first instance. The Executive Branch must make such decisions if it is to execute the laws, and it is clear that the mere application of law to fact does not constitute an exercise of the judicial power of Article III.[314] The significance of Article III is not in the mechanics of having courts repeat the exercise of applying the law to the facts. The critical attribute of the judicial power of Article III is the Judicial Branch's power to make the *conclusive* determination on questions of federal law.[315] Nevertheless, the fact that both the Judicial and Executive Branches often appear to be applying law to fact has generated confusion in identifying where the judicial power is being exercised.

B. Taking Another Look at the "Public Rights" Doctrine

A careful reading of *Murray's Lessee* makes it clear that the political questions that were committed to the discretion of the political branches involved certain subject matters, rather than cases. However, that point can be obscured by Justice Curtis' terminology in establishing a dichotomy between "public" and "private" rights. Justice Curtis himself explained that this "public" or "private" right distinction is not controlling because "even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is

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314. *See* Bator, *supra* note 305, at 264.

315. *See, e.g.*, Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 228 (1955) ("[J]udicial review is a deliberate check upon democracy through an organ of government not subject to popular control.").

conclusive."[316] The real question is whether the subject matter is committed to the discretion of the political branches.

Murray's Lessee also makes it clear that the subject matter within the discretion of the political branches may be narrower than the "cases or controversies" that arise under Article III. Therefore, the political branches may have the complete discretion to resolve a subject that is part of an Article III case, but the court's authority to resolve the remaining issues in the case would remain unimpaired.

In support of this proposition, Justice Curtis cited *Luther v. Borden*[317] and *Doe v. Braden*.[318] *Luther* and *Doe* involved traditional common law claims, which the Supreme Court adjudicated subject to the conclusive findings of the political branches or a state on important legal issues.[319] In *Luther*, the question was whether a trespass was justified by state agents in suppressing a rebellion or whether the agents were without justification because the state government had been overthrown.[320] The Supreme Court held that the existence of a legitimate state government was a political question and accepted the construction of the state court's determination of the true state government as conclusive.[321] In dicta, the Supreme Court noted that Congress had the authority, which it had not exercised, to interfere in state affairs pursuant to the constitutional guarantee that every state maintain a republican form of government.[322] The Supreme Court explained that under that constitutional provision, the determination of which government was the legitimate state government was a political question for Congress to conclusively determine.[323] By accepting the state court's conclusion that the agents were acting upon the orders of the lawful government, the Court easily found the existence of a justification defense to the claim of trespass.[324]

Similarly, *Doe* involved a question of title under a treaty where it was argued that the domestic law of the foreign country prevented that country from ratifying the treaty.[325] The Court held that the treaty power provided the President with exclusive jurisdiction to determine whether a

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316. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284-85 (1855).
317. 48 U.S. (7 How.) 1 (1849).
318. 57 U.S. (16 How.) 635 (1853).
319. *See generally Luther*, 48 U.S. 1; *Doe*, 57 U.S. 635.
320. *See Luther*, 48 U.S. at 39.
321. *See id.* at 40.
322. *See id.* at 42 (citing U.S. CONST. art. IV, § 4).
323. *Id.*
324. *See id.* at 45.
325. *See* Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

foreign government or any particular branch of that government had the authority to enter into a treaty.[326] By honoring the conclusive determination of the Executive Branch on the political question of whether the foreign government had ratified the treaty, the Court easily resolved the title dispute.[327]

Luther and *Doe* are useful to the understanding of the "public rights" doctrine because they indicate the limits of the doctrine. The Supreme Court did not decline jurisdiction in either case or abdicate the resolution of the disputes to the political branches. Instead, the Court merely gave conclusive weight to a matter that was within the discretion of the political branches to decide.[328] Although the Court's deference to the political branches' resolution of the political questions in those cases proved outcome determinative, the Court's analysis showed that it decided the cases for itself subject to the resolution of those isolated issues by the political branches. In other words, the political branches were not allowed to decide all issues in those cases, but only those issues that were in their exclusive discretion.[329]

This understanding of the "public rights" doctrine is consistent with Congressman Marshall's views on extradition and Chief Justice Marshall's opinion in *Marbury*. Congressman Marshall viewed extradition as a matter arising between two nations where the individual involved had no rights.[330] In *Marbury*, Marshall reaffirmed his belief that where the President conducts the affairs of the nation, discretion exists, but added the caveat that the courts have the power to protect individual rights when they are threatened by the exercise of the President's discretion.[331] Marshall's theory supports Curtis' notion that the political branches' discretion is limited by subject matter, rather than by cases.

Much of the confusion in Article III is due to the assumption that the determination whether a case arises under Article III depends on whether it fits within either the "public" or "private" label. The Supreme Court initially looked to whether the parties were all private parties or

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326. *Id.*

327. *See id.* at 657-58.

328. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1872) (refusing to honor Congress' attempt to make conclusive findings that persons who had received pardons were disloyal because it was not within Congress' authority to decide such matters).

329. *See Luther*, 48 U.S. at 39; *Doe*, 57 U.S. at 658.

330. *Compare* Marshall Speech of Mar. 7, *supra* note 101, at 104 (describing argument by Congressman Marshall), *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1801) (describing argument by Chief Justice Marshall in *Marbury*).

331. *See id.* at 165-66 (Marshall, C.J.).

whether the United States was a party in drawing this distinction.[332] The involvement of the United States as a party later was found to be "a necessary but not sufficient means" of telling a "public rights" case from a "private rights" case.[333] Federal criminal cases, for example, always involve the United States, but Article III jurisdiction over them cannot be circumvented through the "public rights" doctrine.[334] More recently, the Supreme Court rejected the notion that the government is a necessary party in a "public rights" case.[335] In that case, the best explanation the Court would offer for a "public right" was that it was "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[336] Under this ambiguous standard, it is unclear whether there is any real limit on Congress' power to expand the "public rights" category at the expense of Article III by simply creating regulatory programs.[337] The Court's failure to find a workable standard demonstrates that "it is unintelligible and futile to try to maintain rigid distinctions between questions of private and public rights."[338]

When the "public rights" doctrine is viewed by looking at subjects that are committed to the political branches, rather than as creating a public-private right distinction, the doctrine is manageable. There are few categories where the Constitution provides such discretion, and those categories cannot be altered by Congress.[339] Within those categories, however, Congress can exercise its discretion to various degrees; for example, by deciding to broadly waive sovereign immunity or by not waiving sovereign immunity at all.[340] How Congress chooses to address such matters that are within its exclusive discretion is not a concern of Article III courts.

The most fundamental purpose of Article III is to make sure that the political branches operate within the discretion they are assigned by the

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332. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 49-51 (1932).

333. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.23 (1982).

334. *See id.* at 70 n.24.

335. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985).

336. *Id.* at 594.

337. *See, e.g.*, George D. Brown, *Article III as a Fundamental Value—The Demise of Northern Pipeline and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 71 (1988) ("The danger of tautology is obvious. Public rights cases are those which arise 'in the administration of federal regulatory programs,' and what administrative agencies may adjudicate is determined by the presence of public rights." (citation omitted)).

338. Bator, *supra* note 305, at 250.

339. *See id.*

340. *See id.*

Constitution.[341] The Constitution confers various degrees of discretion on the political branches under its provisions, and the "public rights" cases can be viewed as those where that discretion is at its pinnacle. Congress has similarly broad authority to consider whether money it spends is for the "general welfare" or whether the property that it takes is for "public use."[342] Likewise, the President has similarly broad authority to issue pardons.[343] Nevertheless, Article III courts are empowered to intervene when that discretion is abused. For example, it is doubtful that the courts would sustain Congress placing a bounty on the Chief Justice's head or the President's promise to pardon anyone who will assassinate his political opponent in an upcoming election. On the other end of the spectrum are those provisions that do not provide the political branches with any discretion at all. For example, Congress cannot make legislation effective without the vote of both houses of Congress[344] and the President cannot pick and choose which portions of a bill to veto or make law.[345]

Article III remains a buffer against encroachments upon individual liberty by the political branches even where "public rights" are involved. Although the "public rights" doctrine completely insulates the political branches for their refusal to act, Article III courts have the power to ensure that even discretionary actions that are taken comport with constitutional requirements.[346] In situations similar to *Murray's Lessee*, the Supreme Court repeatedly has recognized limits to the discretion of the political branches. For example, sovereign immunity may not require the political branches to establish a welfare program or to pay benefits at any particular level, but the government's failure to distribute any benefits that it authorizes consistent with due process is actionable judicially.[347]

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341. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 133-34 (1893).

342. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239-40 (1984) (explaining that the government's authority to exercise eminent domain for the public use is co-extensive with its police power).

343. U.S. CONST. art. II, § 2, cl. 7.

344. *See* INS v. Chadha, 462 U.S. 919, 954-55 (1983).

345. *See* Clinton v. City of New York, 524 U.S. 417, 440 (1998).

346. *See id.*

347. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Fallon, *supra* note 305, at 966-67 (noting that the "erosion, although not the evisceration, of the rights/privilege distinction" has expanded judicial review of agency decisions).

C. Territorial and Military Courts Are Consistent with the "Public Rights" Doctrine

The notion that the Constitution commits certain subjects to the discretion of the political branches also explains why territorial and military courts are consistent with Article III. In both categories, adjudication by non-Article III tribunals is allowed because the Constitution provides the political branch special powers in those contexts.

1. The Territorial Courts

Much of the confusion in the Article III jurisprudence can be attributed to Chief Justice Marshall's cryptic reasoning in upholding the authority of an Article I territorial court that decided an admiralty case in *American Insurance Co. v. Canter*.[348] In that case, it was argued that, because Article III requires that admiralty jurisdiction be vested in Article III courts, such jurisdiction could not be vested in courts created by a territorial legislature.[349] In refuting this argument, Chief Justice Marshall explained that because the judges of the territorial courts do not enjoy life tenure, their courts "are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it."[350] Marshall declared that the territorial courts are not Article III courts, but were instead "legislative Courts" created by Congress pursuant to its authority under Article IV to make "all needful rules and regulations" respecting the territories.[351] The authority of the territorial court was affirmed on this basis.

The statement in *Canter*, that the territorial court was "incapable of receiving" the judicial power of Article III, invited confusion because the case was no different from admiralty cases routinely decided by Article III courts.[352] The statement has been regarded by some as "a purely

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348. 26 U.S. (1 Pet.) 511 (1828).

349. *Id.* at 546.

350. *Id.*

351. *Id.* (referring to U.S. CONST. art. IV, § 3, cl. 2).

352. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (White, J., dissenting) (questioning how the territorial court in *Canter* could not have been exercising the judicial power of Article III); Glidden Co. v. Zdanok, 370 U.S. 530, 545 n.13 (1962) (Harlan, J.) ("Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so."); Redish, *supra* note 285, at 199 (noting the confusion caused by *Canter*).

metaphysical assertion"[353] and is criticized for producing "a doctrine of doubtful soundness."[354] It is argued that the doctrine is "perfectly circular" and allows Congress to sweep Article III "aside by the very fact of acting outside it."[355] According to some, another problem with this legislative court fiction is that it does not explain "[h]ow the same case can involve the judicial power of the United States when it reaches the Supreme Court, but not be within the judicial power when it is tried in the territorial court."[356] *Canter* has left scholars wondering what the territorial court was doing if it was not exercising the judicial power of Article III.[357]

Although Chief Justice Marshall could have done a much better job in elaborating his reasoning, it is doubtful that his analysis was as simplistic as his critics suggest. In *Marbury v. Madison*,[358] Marshall declared that "the whole judicial power of the United States" is vested in "one Supreme court"[359] and that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[360] There is no reason to believe that Marshall was retreating from the principles established by *Marbury* in deciding *Canter*.

Read consistently, Marshall's opinions in *Marbury* and *Canter* make it clear that the "whole judicial power" that is vested in Article III is concerned with who makes the ultimate determination of law. Understandably, Marshall was not concerned that the mechanics of the trial before the territorial court resembled the mechanics of other proceedings before Article III courts.[361] Marshall was well aware of the fact that, by constitutional design, Article III courts share the responsibility of deciding federal and constitutional questions with non-Article III state courts.[362] Territorial courts, like state courts and

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353. Bator, *supra* note 305, at 241.

354. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3528, at 250 (1984).

355. Bator, *supra* note 305, at 241; *see also* Fallon, *supra* note 305, at 972 (arguing that *Canter*'s rationale is "problematic" and that "if the issue arose today as one of first impression, a different outcome would be called for").

356. WRIGHT ET AL., *supra* note 354, § 3528, at 250-51.

357. *See* Bator, *supra* note 305, at 240.

358. 5 U.S. (1 Cranch) 137 (1803).

359. *Id.* at 173.

360. *Id.* at 177.

361. *See id.*

362. *See* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 413-22 (1821) (Marshall, C.J.) (holding that state and federal courts have concurrent jurisdiction to decide cases within Article III, unless Congress decides to vest Article III cases exclusively within the federal courts); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government*, 2

administrative agencies, may go through a decision-making process similar to the one that occurs in Article III courts, but they do not exercise the judicial power of Article III.[363] The power of Article III does not lie in the decision-making process that is used, but instead lies in the power to make the conclusive determination on questions of law.

As previously explained, the Executive Branch and its agencies frequently apply the law to the facts in the first instance. Congress certainly could declare that once a decision is made by an Executive Branch official, the decision is reviewable in the courts. This is not Congress' only option, however. There is no reason why an arguably erroneous decision made by a low-level Executive Branch official cannot be appealed to a superior or another entity within the Executive Branch before a final decision by the Executive Branch is made conclusive. Of course, it is true that the review of the initial decision's application of the law to the facts would look the same whether it is conducted by an Article III court or an Article I entity. Nevertheless, that similarity is meaningless to Article III. Regardless of the number of appeals that are available within the Executive Branch, Article III is satisfied if at the conclusion of the Executive Branch's decision, an Article III court is authorized to review those findings.[364]

That being said, Article III is not satisfied simply by providing appellate review to an Article III court. Advocates of this middle ground

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U. CHI. L. SCH. ROUNDTABLE 161, 212 (1995) (concluding that the Madisonian Compromise providing Congress explicit discretion in deciding whether to establish lower federal courts implicitly recognized a role for the states in adjudicating Article III cases); Bator, *supra* note 305, at 234 ("[I]t was explicitly contemplated in the design of the Constitution that some or all of these cases [listed in Article III] could and would continue to be adjudicated in the *state* courts.").

363. Legislative courts and administrative agencies are essentially the same. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.1, at 22 (4th ed. 1991) ("Article I tribunals are really akin to administrative agencies . . . ."); Redish, *supra* note 285, at 217-18 (same).

364. Recognizing that Article III is consistent with the discretion that Articles I and II provide the political branches alleviates the concern that administrative agencies are unconstitutional. Critics of Justice Brennan's description of the political discretion categories as "exceptions" to Article III were justifiably concerned that it would "lead to the conclusion that much of the work of most federal administrative agencies is unconstitutional." Redish, *supra* note 285, at 200; *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982) (White, J., dissenting) (arguing that administrative agencies would be jeopardized by separating Article I courts from Article III courts based on the work they do). If those categories are within the judicial power but excepted from Article III's requirements for some reason, the Court would have difficulty developing a principled basis for creating such exceptions. Recognizing that the judicial power is not threatened by allowing all applications of law to fact to occur before non-Article III tribunals and that some legal questions are committed to other branches, provides Congress considerable discretion to create administrative agencies.

appellate theory of Article III contend that it provides a justification for those categories of cases that have departed from the pure Article III model while simultaneously preserving the ultimate authority of Article III courts to decide what the law is.[365] Although the appellate theory of Article III provides a reasonable means of resolving these issues as a matter of policy, this is not the balance that was struck by the Framers of the Constitution.

Article III is explicit in declaring that the judicial power vests in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish."[366] A purely appellate theory of Article III would nullify this requirement. Congress may not have any obligation to create the lower federal courts, but Article III explicitly requires that if those courts are created, they must be created in accordance with Article III.[367]

Another problem with the appellate theory of Article III is that it is difficult to reconcile with the distinction between the Supreme Court's original and appellate jurisdiction. Of the nine categories of Article III cases, the Supreme Court's original jurisdiction is limited to those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."[368] The Supreme Court's jurisdiction over the remaining categories of cases is appellate.[369] If the Supreme Court is

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365. *See* Fallon, *supra* note 305, at 933-49 (advocating an appellate theory of Article III); *see also* Bator, *supra* note 305, at 267-68 (arguing that Article III is satisfied where the initial adjudication before a non-Article III body is necessary and proper to achieve a valid end, is consistent with procedural due process, provisions for judicial review satisfy due process, and where an Article III court has the ultimate power to decide questions of law).

366. U.S. CONST. art. III, § 1.

367. *See* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1047 (1998) (noting that it is difficult to square the appellate theory of Article III with this language from Article III).

368. U.S. CONST. art. III, § 2, cl. 2.

369. *Id.* The Supreme Court's appellate jurisdiction is subject to regulation and exception by Congress. *Id.* Although the scope of this authority is unclear, it could not under any circumstances be used to allow a federal non-Article III tribunal to make conclusive determinations on questions of federal law. This authority is limited to the Supreme Court's appellate jurisdiction and does not reach the rest of Article III. It appears likely that because the judicial power must vest somewhere in Article III, Congress can make exceptions to the Supreme Court's appellate jurisdiction over mandatory categories of cases within Article III only where jurisdiction is available in a lower Article III court. *See* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 213-14 (1985). Even if the Exceptions Clause is read broadly to allow Congress to prohibit appeals from state courts to any Article III court, there would be no reason to suppose that Congress could allow another branch of the federal government to make conclusive determinations on questions of federal law. A contrary conclusion would pose an unacceptable threat to the separation of powers by allowing the political branches to side-step any form of judicial review. *Id.* It also is likely that

the first court to review a matter that was initially assigned to a federal non-Article III tribunal, Congress would likely have violated the Constitution by attempting to expand the Supreme Court's original jurisdiction.[370] It is difficult to understand how the Supreme Court's jurisdiction over such a congressionally created tribunal could be appellate if the tribunal were not an inferior court within the meaning of Section 1 of Article III.[371]

The more difficult Article III question raised by the territorial cases is one that was avoided in *Canter*. In *Canter*, the validity of the territorial court's decision had been collaterally challenged before a lower Article III court and appealed to the Supreme Court.[372] The harder question is whether the Supreme Court has appellate jurisdiction over cases decided by territorial courts.

The Supreme Court routinely has held that it has appellate jurisdiction over the decisions of territorial courts, although that conclusion was by no means inevitable. In *Canter*, the Supreme Court explained that, in legislating for the territories, "Congress exercises the combined powers of the general, and of a state government."[373] Building on this rationale, the Supreme Court later explained that it had appellate jurisdiction over territorial courts because, despite being created by Congress (or territorial governments established by Congress), those courts were the functional equivalents of state courts for purposes of Article III.[374]

The Supreme Court also was careful to cabin this doctrine. In *Benner*, the Supreme Court explained that, once a territory becomes a state, the territorial courts lose their jurisdiction to decide the categories

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such a scheme would offend the Due Process Clause. *See, e.g.*, *N. Pipeline*, 458 U.S. at 117 (White, J., dissenting) (arguing that judicial process is a component of due process); Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (same). Any entity created by Congress that purports to have such authority would likely be viewed by the Supreme Court as an inferior court for purposes of Article III and entitled to the protection of that Article.

370. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1801) (holding that Congress cannot expand the Supreme Court's original jurisdiction).

371. *See* U.S. CONST. art. III, § 1.

372. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 541 (1828).

373. *Id.* at 546.

374. *See* Benner v. Porter, 50 U.S. (9 How.) 235, 242 (1850); *see also* Reynolds v. United States, 98 U.S. 145, 154 (1878) (noting that, despite the similarity in jurisdiction, territorial courts are not courts of the United States); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 656 (1873) ("[T]he jurisdiction of the Territorial courts is collectively coextensive with and correspondent to that of the State courts."); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1871) (noting that even though judges of the territorial courts are appointed by the President, those courts are not courts of the United States).

of cases that are listed in Article III.[375] *Benner* clarifies that Congress' authority to create territorial courts is dependent upon its ability to act as a state would within the territory and that Congress' power to establish legislative courts does not rest upon some broader principle.[376] With respect to Article III's requirements, *Benner* explained that "[t]here is no exception to this rule in the Constitution."[377]

As an inferior court that was created by Congress and not by any state, the Supreme Court arguably could have held that Section 1 of Article III mandated that territorial courts be Article III courts. The language of that section does not suggest a distinction where Congress creates an inferior court in lieu of a state government, as opposed to the more traditional circumstances for establishing courts. Nevertheless, the notion that Congress is acting more as a state in establishing a territorial court is not without merit. The Constitution plainly contemplated that Congress' control over the territories may be temporary, as many of the territories were expected to later become states.[378] The Supreme Court has long held that the United States holds its territories in trust for future states who will enter the Union on equal footing with the original states.[379] Under those circumstances, it would have made little sense to provide life tenure to judges who likely would be serving only a temporary assignment.

Whether or not they were correctly decided, the Supreme Court clearly believed that its territorial court cases were consistent with the pure vision of Article III, and not exceptions to it.[380] Consequently, to the extent that a re-examination of those cases leads to a conclusion that they are in conflict with Article III, the solution would be to overrule them rather than use those decisions as justifications for further eroding Article III's principles.

2. The Specialized Role of Court Martials

The authority of court martials to operate outside of Article III has long been recognized by the Supreme Court.[381] As with the territorial

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375. *See Benner*, 50 U.S. at 244.
376. *See id.*
377. *Id.*
378. *See* U.S. CONST. art. IV, § 3.
379. *See generally* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).
380. *See* Stern, *supra* note 367, at 1066-68 (arguing that *Canter* is consistent with Article III and should not be viewed as an exception to it).
381. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (upholding authority of a court martial).

courts, the Constitution provides the political branches "extraordinary control" over the subject of court martials.[382] Article I provides Congress with the special authority to establish court martials,[383] and Article II makes the President the "Commander in Chief" of the armed forces.[384] The Supreme Court has held that those constitutional provisions and Article III "are entirely independent of each other."[385] Military courts are viewed as "executive tribunals."[386] The courts do not exist to dispense justice, but to maintain discipline within the troops under the President's ultimate control.[387]

The Founders plainly envisioned a role for court martials. The Provisional Congress of Massachusetts Bay adopted the British court martial system in 1775,[388] and a virtually identical system was adopted by the Second Continental Congress later that year.[389] After the Constitution was ratified, the First Congress reenacted the existing court martial system without change.[390]

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382. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982) (Brennan, J., plurality opinion).

383. U.S. CONST. art. I, § 8, cl. 14 (conferring on Congress the power to "make Rules for the Government and Regulation of the land and naval Forces").

384. *Id.* art. II, § 2, cl. 1.

385. *Dynes*, 61 U.S. at 79.

386. Reid v. Covert, 354 U.S. 1, 36 (1957).

387. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 265 (1969) ("A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."), *overruled on other grounds by* Solorio v. United States, 483 U.S. 435 (1987); Major David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 154-55 (1980) (concluding that, historically, military courts were viewed as an instrument for maintaining discipline in the armed forces and were not considered courts in the sense that the term ordinarily is used).

388. *See* Captain Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 17 (1998) (summarizing the early history of the court martial system); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 12 & n.32 (2d ed. 1920) (noting that other colonial assemblies followed the Massachusetts Bay Colony's lead in adopting the British court martial system); Massachusetts Articles of War, *reprinted in* WINTHROP, *supra*, at 950.

389. *See* WINTHROP, *supra* note 388, at 22.

390. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96 (1789). The requirements were reenacted in 1790 "as far as the same may be applicable to the constitution of the United States." Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121 (1790); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 420 (1821) (explaining that enactments by the First Congress are probative of the Framers original intent); Currie, *supra* note 184, at 220 (arguing that the original understanding of the Constitution was forged more by the Legislative and Executive Branches than the courts in the Republic's early years). *But see* GOEBEL, *supra* note 149, at 507-08 (explaining, in the context of the Judiciary Act of 1789, that there was substantial disagreement in the First Congress).

With the adoption of the Bill of Rights, the Constitution continued to reflect that military tribunals would not operate like other courts. For example, the Fifth Amendment created an exception from the requirement of presentment or indictment by a grand jury in proceedings before military tribunals.[391]

Although the proceedings in military courts often implicate the same fundamental liberty interests that Article III was designed to protect, the Framers recognized that the political branches may require firmer control over such proceedings within the military context. Even within the military context, however, the Constitution established checks and balances against abuses by the Executive Branch. The Constitution provides Congress, and not the President, the authority to enact the rules and regulations governing the armed forces.[392] Arguably, Congress could choose to establish Article III courts to govern court martial proceedings.[393]

As with the territorial court cases, the Supreme Court has been careful to prevent the specialized role of military tribunals from

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391. U.S. CONST. amend. V.

392. *Id.* art. 1, § 8, cl. 14.

393. Professor Fallon argues that Article III requires that the Court of Military Appeals, which is an Article I court, be reconstituted as an Article III court "to satisfy appellate review theory's minimal requirements." Fallon, *supra* note 305, at 974. The problem under Fallon's appellate theory of Article III is that the Supreme Court's authority to review the Court of Military Appeals decisions is limited. 10 U.S.C. §§ 866-867 (1998). Although Professor Fallon's suggestion is appropriate, it is not required by Article III if the case is outside the judicial power. As the text above explains, court martials were not understood by the Framers to implicate the judicial power of Article III. Since the country's founding, however, this conclusion has become more complicated as the scope of court martial proceedings has expanded significantly and, at least in civilian cases, the availability of habeas corpus relief has expanded as well. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 8-9 (1958) (noting that early court martial proceedings were extremely limited to unique military offenses, such as desertion, that were not punishable by common law courts); PAUL M. BATOR ET AL., HART & WESCHLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1596 (3d ed. 1988) (noting that the expanded availability of habeas corpus relief in civil cases may be responsible for the recent expansion of habeas review of military proceedings). Therefore, it is possible that the expansion of court martial proceedings has encroached on Article III and/or that the scope of Article III has expanded via habeas corpus to further limit the ability of military courts to act outside Article III review. *Compare* Burns v. Wilson, 346 U.S. 137, 144 (1953) (finding a limited role for habeas corpus in reviewing legal errors in military proceedings), *with* Hiatt v. Brown, 339 U.S. 103, 111 (1950) (holding that habeas review of military proceedings existed only to determine the military tribunal's jurisdiction and does not exist to review other legal issues). Regardless of whether the fit between military courts and Article III is appropriate today, the country's early history shows that military courts could exist outside of Article III, at least at one time and in some limited form.

expanding to encroach on Article III.[394] Therefore, the military tribunal cases cannot be read as providing Congress a general power to make exceptions from Article III.[395]

V. CONTEMPORARY CONFUSION REGARDING ARTICLE I COURTS

The focus of the current Article III debate is not on the specialized circumstances of territorial courts or court martials, but on the more general authority of Congress to take a category of cases away from Article III courts and place those cases within the jurisdiction of Article I courts. The debate rests on whether Article III's requirement that the "judicial power" vested in Article III courts establishes a generally applicable legal principle or whether it simply requires some sort of rough parity between the judiciary and its co-equal branches that must be decided on an ad hoc basis.

The most recent Supreme Court case to thoroughly debate these issues was *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[396] In that case, the Supreme Court made a good faith effort to explain its Article III jurisprudence, but could not reach an agreement. Justice Rehnquist, joined by Justice O'Connor, concurred to create a majority decision striking down the delegation of Article III cases to Article I bankruptcy courts.[397] Their concurring opinion refused to decide which, if either, of the competing justices views of Article III case law was correct.[398] Instead, they rested their decision on the fact that the delegation of state law claims are at the core of Article III and cannot be decided by Article I courts.[399] They noted that Article III case law is full of "arcane distinctions and confusing precedents" and "do not admit of easy synthesis."[400] As they put it, they "need not decide whether these cases in fact support a general proposition and three tidy exceptions, as

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394. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 n.17 (1982) (Brennan, J., plurality opinion) ("[T]his Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'"); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); REDISH, *supra* note 305, at 48.

395. *See* Stern, *supra* note 367, at 1052 ("Conducting court-martial and deciding matters of public rights are matters of executive, not judicial, power. Consequently, Article III and its Section 1 security have nothing to do with them.").

396. 458 U.S. 50 (1982).

397. *See id.* at 91 (Rehnquist, J., concurring).

398. *See id.* (Rehnquist, J., concurring).

399. *See id.* at 89-92 (Rehnquist, J., concurring).

400. *Id.* at 90-91 (Rehnquist, J., concurring).

the plurality believes, or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as Justice White apparently believes them to be."[401]

The plurality decision by Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, attempts to place the language of the cases aside and group the cases by category.[402] According to the plurality, the requirement that the "judicial power" vest in Article III courts is absolute, unless it falls within three narrow categories: (1) "territorial courts," (2) court martials, and (3) "public rights" cases.[403]

In the dissent in *Northern Pipeline*, Justice White, joined by Chief Justice Burger and Justice Powell, rejected the plurality's characterization of the Article III case law as a "gross over simplification" of "one of the most confusing and controversial areas of constitutional law."[404] The dissent thought that the public rights/private rights distinction had been dealt a "death blow" by later cases.[405] The dissent agreed with some cases that had suggested that the true Article III test does not "depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Art. III court."[406] The dissent explained that the Article III cases were based on a balancing of the need for an Article III court, and recognized that this ad hoc test created a "complicated and contradictory history of the issue."[407] The dissent claimed that the plurality approach would require the Court "to overrule a large number of its precedents," and in a defeatist attitude exclaimed that "[i]t is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78-82."[408] The dissent would continue to adhere to the balancing approach that it believed had been followed in the past.

Only four members of the Court that decided *Northern Pipeline* remain on the Court today, and two of them expressed no opinion on the big picture Article III issues, so it is unclear how these issues would be resolved by the current Court. There appears to be a contingency on the Court that adheres to the views of the *Northern Pipeline* plurality. Justice

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401. *Id.* at 91 (Rehnquist, J., concurring).
402. *See id.* at 64-67 (Brennan, J., plurality opinion).
403. *Id.* (Brennan, J., plurality opinion)
404. *Id.* at 93 (White, J., dissenting).
405. *Id.* at 109 (White, J., dissenting).
406. *Id.* at 108 (White, J., dissenting).
407. *Id.* at 113 (White, J., dissenting).
408. *Id.* (White, J., dissenting).

Stevens, who joined the plurality, remains on the Court, and Justice Scalia emphatically embraced the *Northern Pipeline* plurality in his concurrence in *Granfinanciera, S.A. v. Nordberg*.[409]

In two cases authored by Justice O'Connor and joined by Chief Justice Rehnquist in the mid-1980s, *Thomas v. Union Carbide Agricultural Products Co*.[410] and *CFTC v. Schor*,[411] the Supreme Court retreated to the balancing approach. The opinion in *Thomas* appeared to reject the *Northern Pipeline* plurality. The Court explained that the public rights/private rights dichotomy endorsed by the *Northern Pipeline* plurality did not command a majority, and the Court rejected the notion that the government would have to be a party for a case to involve "public rights."[412] In apparent rejection of the *Northern Pipeline* plurality, the Court explained that the lesson of Article III cases is that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[413] The Court dismissed the public rights doctrine's use in creating a bright-line rule and recharacterized it as merely providing a "pragmatic understanding" of separation of powers issues.[414]

In *Thomas*, the Supreme Court approved of mandatory arbitration in resolving data compensation claims among private parties under the Federal Insecticide, Fungicide, Registration Act (FIFRA).[415] Without going into a full discussion of FIFRA's complicated regulatory scheme, it is important to understand that Congress established FIFRA to determine which pesticides can be registered for use.[416] Pesticide manufacturers must make their case to the government to obtain registration, and they can borrow one another's data in making their case to avoid duplicative research.[417] The Supreme Court found that FIFRA was a regulatory program like any other, except that Congress utilized a proceeding that resembled private litigation in deciding how costs associated with permitting would be shared.[418] Therefore, the Supreme Court held that although FIFRA data compensation looked like a private right dispute, it

409. 492 U.S. 33, 65-71 (1989) (Scalia, J., concurring).
410. 473 U.S. 568 (1985).
411. 478 U.S. 833 (1986).
412. 473 U.S. at 585-86.
413. *Id.* at 587.
414. *See id.* at 589.
415. *Id.* at 592.
416. *See id.* at 571.
417. *See id.* at 571-72.
418. *See id.* at 593-94.

was really a public right dispute.[419] Justices Brennan, Marshall, and Blackmun concurred, adhering to the plurality position in *Northern Pipeline* and concluded that this was a public right case.[420] Justice Stevens concurred solely on standing grounds because the plaintiffs had not established that they had been injured by arbitration.[421]

In *Schor*, the Supreme Court upheld the authority of the CFTC to hear state-law counterclaims using a balancing approach.[422] Justice O'Connor's opinion was joined by Chief Justice Rehnquist, and Justices Stevens and Blackmun, which is surprising because both Stevens and Blackmun were part of the *Northern Pipeline* plurality. *Schor* may very well be the worst separation of powers case ever decided.

The Court explained that Article III serves two purposes: protecting the separation of powers and safeguarding a litigant's right to an impartial hearing.[423] With little justification, the Supreme Court stated that the primary purpose of Article III was to provide an impartial hearing, rather than to provide a check against the Executive and Legislative Branches.[424] The Supreme Court held that it "has declined to adopt formalistic and unbending rules" and that Article III challenges will be evaluated by weighing "a number of factors, none of which have been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the judiciary."[425] The factors identified by the Court include whether Article III courts are reserved the essential attributes of judicial power, the extent to which non-Article III forums exercise a traditional Article III role, the origin and importance of the right at issue, and the concerns that drove Congress to create a non-Article III forum.[426]

Applying these factors, the Court acknowledged that the state law counterclaim was a "private right" at the core of Article III, but it rejected the notion that this fact is determinative.[427] What appeared to save the statute was that the parties had the choice of bringing the claims before the CFTC or before an Article III court. Although the parties could waive only their own interest in Article III, and not the structural

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419. *See id.* at 589-90.
420. *Id.* at 600 (Brennan, J., concurring).
421. *See id.* at 605 (Stevens, J., concurring).
422. CFTC v. Schor, 478 U.S. 833 (1986).
423. *Id.* at 850.
424. *Id.*
425. *Id.* at 851.
426. *Id.*
427. *See id.* at 852.

protections of Article III, the Court found the intrusion on the judiciary "*de minimis*."[428] The Court argued that there was no aggrandizement of legislative power at the expense of the judiciary because the power was given to an agency.[429] The Court also rejected the argument that Article III served federalism as "novel."[430] According to the Court, federalism was not implicated because federal courts often hear state law claims through ancillary jurisdiction, and the Court found no support for the argument that the states' assent to federal jurisdiction over state law matters depended upon them being heard by an Article III tribunal.[431]

Demonstrating the weakness of its own position, the Supreme Court noted that if Congress created "a phalanx of non-Article III tribunals" that did the same thing that it approved of there, but in more numerous contexts, the Supreme Court would put an end to it.[432] But, the Court refused to create "an absolute prohibition on such jurisdiction out of fear of where some hypothetical 'slippery slope' may deposit us."[433] Thus, the analysis is that what Congress did there is only a little unconstitutional because it only did it once, but if it repeats itself too many times it will become too unconstitutional and the Court will have to stop it.

Justices Brennan and Marshall were the lone dissenters. They continued to adhere to the plurality position in *Northern Pipeline*.[434] They correctly observed that the Court's approach was "radically different" from previous Article III cases in suggesting broad authority for casting inroads on Article III jurisdiction involving core Article III cases.[435] The dissent chastised the majority for its "the Court will tell you when enough is enough" approach to separation of powers and argued that the short-term convenience of non-Article III forums will always balance favorably against the long-term need for Article III until it is too late.[436]

Under the *Thomas* and *Schor* analyses, it is unclear how the Extradition Act would be judged. Weighing in favor of Article III jurisdiction is that extradition is quasi-criminal and would appear at the core of Article III. Unlike *Schor*, there is no issue of consent to jurisdiction, and the non-Article III court would be deciding an issue of

428. *See id.* at 856.
429. *See id.*
430. *Id.* at 858.
431. *See id.*
432. *Id.* at 855.
433. *Id.* at 852.
434. *See id.* at 857.
435. *See id.* (Brennan, J., dissenting).
436. *See id.* at 865-66 (Brennan, J., dissenting).

liberty, rather than property. Moreover, Congress has not offered any explanation for why extradition must be done by a non-Article III tribunal. In fact, Congress allows Article III judges to decide extradition cases now. In the early 1980s, the State Department and DOJ backed a legislative overhaul of the extradition system that would have placed all extradition decisions before Article III courts.[437] Magistrates and Article III judges are not part of a specialized forum in the same way that agencies have specialized expertise. Therefore, there does not appear to be any compelling reason to remove extradition from Article III.

Against this view is the fact that there is little threat to Article III where the non-Article III tribunal, the magistrate, is within the control of the Article III court. Article III courts can also shut magistrates out of the extradition process by withdrawing authorization under 18 U.S.C. § 3184, although this is not dispositive because it violates separation of powers for a branch to give away its own power. It also is not clear that Article III is undermined by having Article III judges act in an extra-judicial capacity because they do not get any special compensation as extradition judges. Moreover, the 150-year history of the system will undoubtedly give the scheme the appearance of credibility.

After *Thomas* and *Schor*, the *Northern Pipeline* plurality position appeared close to dead, but it was resurrected somewhat in *Granfinanciera, S.A. v. Nordberg* and cases that followed.[438] In *Granfinanciera*, Chief Justice Rehnquist and Justice Kennedy, joined Justices Brennan, Marshall, and Stevens, in upholding an Article III challenge where the Court believed a Seventh Amendment right to a jury was also required.[439] The Court based its analysis on the public right/private right distinction and emphasized that cases that typically received a jury trial involved private rights and could not be assigned to Article I tribunals.[440] Justice Scalia concurred, fully embracing the *Northern Pipeline* plurality opinion and suggesting that *Thomas* and *Schor* should both be overruled.[441]

Justice O'Connor, joined Justice Blackmun's dissent (note that Blackmun was part of the *Northern Pipeline* plurality). They employed a

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437. *See, e.g.*, 927 CONG. REC. 21,169 (daily ed. Sept. 18, 1981) (noting that S. 1639 was developed over "2 years in close cooperation with the Department of Justice and the Department of State") (statement of Sen. Thurman); *id.* at 21,178 (provisions of S. 1639 are directed solely to "courts" and not judges or magistrates).

438. *See* 492 U.S. 33 (1989).

439. *See generally id.*

440. *See id.* at 54.

441. *See id.* at 69-70.

balancing approach and concluded that Congress had come "treacherously close to the constitutional line" but had not crossed it.[442] The opinion expresses little analysis other than a practical concern with disturbing the bankruptcy system. They acknowledged the public right/private right distinction, but suggested that it could be construed somewhat liberally.[443] As in *Northern Pipeline* they acknowledged limits to what Congress could do, but here they did not suggest any bright-line rule. Justice White dissented separately.[444]

Opinions by justices in other recent cases also suggest that the *Northern Pipeline* plurality approach is again controlling. In 1991, in *Freytag v. Commissioner of Internal Revenue*, the Supreme Court upheld an Appointments Clause challenge to special trial judges that are appointed by an Article I court.[445] In dissent, Justice Scalia, joined by Justices O'Connor, Kennedy and Souter, set forth a theory of Article III that is very much like the *Northern Pipeline* plurality.[446] The dissent advocated the need for bright-line rules in Article III cases and embraced the traditional public rights/private rights dichotomy.[447] The dissent also cabined the territorial courts as justified by Congress' special constitutional authority over the territories.[448]

In 1992, in *Lujan v. Defenders of Wildlife*, the Supreme Court noted that Article III courts exist to hear cases involving "individual rights," but added that for purposes of Article III "individual rights" does "not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public."[449] This language appears to be resurrecting the public rights/private rights distinction. Under this framework, it is difficult to conceive of the Extradition Act as conferring on every individual a right to be extradited.

In 1995, in *Celotex Corp. v. Edwards*, a bankruptcy case where the majority declined to consider an Article III issue, Justices Stevens and Ginsburg dissented on Article III grounds.[450] The dissent appears to embrace the *Northern Pipeline* plurality opinion and to use it to find that

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442. *Id.* at 94 (Blackmun, J., dissenting).
443. *See id.* at 92-93 (Blackmun, J., dissenting).
444. *See id.* at 71 (White, J., dissenting).
445. 501 U.S. 868 (1991).
446. *See id.* at 908-14 (Scalia, J., concurring in part and concurring in judgment).
447. *See id.* at 909-11 (Scalia, J., concurring in part and concurring in judgment).
448. *Id.* at 913 (Scalia, J., concurring in part and concurring in judgment) (quoting Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828)).
449. 504 U.S. 555, 577-78 (1992).
450. 514 U.S. 300 (1995).

the exercise of jurisdiction by an Article I bankruptcy judge under the reformed statute was a violation of Article III.[451]

In view of the confused state of Article III jurisprudence, it is difficult to anticipate which constitutional theory of Article III a court would apply to the Extradition Act or any other legislation. While it is clear that the Extradition Act violates Article III as understood by the *Northern Pipeline* plurality approach, it also appears likely that the statute violates even the ad hoc balancing approach for considering Article III issues.

VI. THE EXTRADITION ACT VIOLATES ARTICLE III

The Extradition Act produces a maze of constitutional issues by allowing both Article I magistrates and Article III judges to sit as extradition judges, and then by giving the Executive Branch the ability to refuse extradition even after it is approved by the extradition judges. If extradition judges are exercising the "judicial power" of Article III, then that power cannot be given to or exercised by an Article I magistrate. Conversely, if extradition is not an exercise of the judicial power, the rule in *Hayburn's Case* establishes that Article III judges cannot be compelled to accept the responsibility for making an extradition decision, although they may choose to accept this responsibility. The constitutional difficulty that would arise in such circumstances is that Article III judges have not been separately appointed to sit as extradition judges, which poses the important question of whether such an assignment violates the Appointments Clause.[452] If extradition does involve the exercise of the

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451. *See id.* at 320-23 (Stevens, J., dissenting).

452. The Appointments Clause poses an important challenge to current extradition practice, but the issue is largely beyond the scope of this Article. Under Article II, § 2, cl. 2 of the Constitution, principal officers of the United States must be appointed by the President and confirmed by the Senate. If extradition is not part of the "judicial power" of Article III, Article III judges cannot be required to act as extradition judges. Lo Duca v. United States, 93 F.3d 1100, 1109 (2d Cir. 1996) (relying upon *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792)). Nevertheless, Article III judges can be separately appointed to concurrently serve as principal officers in a nonjudicial capacity. United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1851). In circumstances where Article III judges have accepted nonjudicial positions, they have accepted separate appointments. Mistretta v. United States, 488 U.S. 361, 399 (1989). Arguably, an Article III judge would need a separate appointment to act as an extradition judge if extradition is beyond the judicial power of Article III. *But see Lo Duca*, 93 F.3d at 1109 (reaching the dubious conclusion that extradition is not part of the judicial power of Article III, yet so germane to the Article III role the judge was appointed to serve that no separate appointment is necessary). Similarly, if extradition is not part of the judicial power of Article III, the Appointments Clause may require magistrates to be appointed by the President and confirmed by the Senate. Although magistrates ordinarily are considered inferior officers, not subject to the more rigorous

judicial power of Article III, there is a question of whether the Executive Branch's authority to refuse extradition after approval by an Article III judge would violate Article III by allowing the Executive Branch to revise a judicial decision.[453]

Based upon the detailed history of extradition provided above, there should be no doubt that extradition involves the exercise of the judicial power of Article III. At one time the United States actually argued that very position, but it no longer does so.[454] In defending the Extradition Act today, the United States attempts to walk a constitutional tightrope where an extradition judge does not exercise the authority of any branch of government.

This Part will examine the litigating position of the United States in recent cases involving constitutional challenges to extradition and the decisions of the courts in those cases. It concludes that the United States' argument that extradition judges do not exercise the judicial power of the United States is patently wrong, and that the extradition judge must be an Article III judge. In addition, this section agrees with the United States that the Executive Branch's ability to refuse extradition, even after it has been approved judicially, does not violate separation of powers principles. Consequently, the statutory path that utilizes an Article III judge is constitutional, but the path that utilizes a magistrate is not.

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requirements of the Appointments Clause, Go-Bart Importing Co. v. United States, 282 U.S. 344, 352 (1931), that is unlikely to be the situation in the extradition context. Magistrates are viewed as inferior officers in the usual context because their decisions are subject to the review of an Article III judge; they are essentially adjuncts to the Article III judge. *Id.* at 354; United States v. Raddatz, 447 U.S. 667, 686 (1980) (Blackmun, J., concurring) (explaining the inferior status of magistrates because "the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors"); *see also* Edmond v. United States, 520 U.S. 651, 665 (1997) (holding that judges of the Military Court of Criminal Appeals, an Article I court, were inferior officers because they "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers"). Under the Extradition Act, however, the magistrate acting as an extradition judge makes the final decision without the aid or supervision of an Article III judge. Because the magistrate acts as a judge in these instances, the magistrate appears to be acting as a principal officer—a capacity that can only be assigned through appointment by the President and confirmation by the Senate. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (noting that inferior judges are principal officers) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 456 n.1 (1833)).

453. *See* Lobue v. Christopher, 893 F. Supp. 65, 75 (D.D.C. 1995).

454. *See infra* notes 467-471 and accompanying text (describing the United States' litigating position in *Lobue*).

A. Lobue v. Christopher*: The First Attack*

In *Lobue v. Christopher*, Judge Lamberth declared the Extradition Act unconstitutional and enjoined its enforcement.[455] The plaintiffs argued that the judiciary was being asked to issue an advisory opinion that is subject to review by the Executive Branch.[456] Judge Lamberth noted that "the parties agree that federal extradition judges act in their official judicial capacities," but nevertheless commented that any argument that they acted in any hypothetical "interstitial space within the Constitution" would be "utterly fanciful."[457] Judge Lamberth then held that extradition decisions were not final because, if extradition was denied, the government could refile its extradition request because there is no res judicata effect. If extradition is allowed, the Executive could refuse to extradite for any reason.[458] The fact that the Executive could reject the decision of the Judiciary led Judge Lamberth to hold that the Extradition Act violated the rule in *Hayburn's Case* and its progeny.[459]

Although the United States changed its litigating position on appeal and in subsequent cases, it is useful to look at the government's powerful argument that extradition judges exercise the judicial power of Article III. The United States acknowledged that "magistrates, unlike federal judges, are *not* Article III officers."[460] The United States also emphasized that the extradition statute "does not authorize extradition judges to act in an 'executive' capacity; his duty is purely judicial."[461] Indeed, the United States argued that "the extradition judge in fact is called upon to engage in a judicial function."[462]

The United States also drew upon the Fourth Amendment to demonstrate that extradition judges exercise the judicial power of Article III. The United States explained that "[e]xtradition proceedings . . . are quasi-criminal rather than civil"[463] and that the arrest provision of the extradition statute "parallels the authority granted judicial officers in

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455. 893 F. Supp. 65 (D.D.C. 1995).
456. *See id.* at 75.
457. *Id.*
458. *See id.*
459. *See id.*
460. Supplemental Brief for the Appellants at 7, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).
461. Brief of the United States in Reply to Plaintiffs' Opposition to Motion to Dismiss at 8, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995) (No. 95-1097).
462. *Id.* at 13 n.9.
463. Supplemental Brief for the Appellants at 11, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

other Fourth Amendment contexts."[464] According to the United States, the "extradition judge carries out 'the judicial duties of arrest and hearing,'" and that the extradition judge's issuance of a certificate for extradition is "solely judicial (but not executive)."[465] The United States stated that "Section 3184 functionally grants the extradition judge exactly the same judicial power that a judicial officer exercises with respect to authorizing an arrest or making a preliminary determination of probable cause."[466] "[T]he extradition judge does not exercise 'executive' authority as that concept is used in connection with separation of powers."[467] Rather, the United States argued that "the extradition statute assigns judicial duties to judicial officers, who exercise judicial powers in their execution. These judicial powers, moreover, are recognized as the same judicial powers exercised in authorizing arrests and finding probable cause."[468]

One portion of the United States' brief in *Lobue* is worth repeating in its entirety:

> Plaintiffs' proposition [citation omitted] that "the extradition judge does not exercise any part of the judicial power of the United States" is flawed. First, the sources upon which plaintiffs rely state that the extraditing judge's actions are not "part of what is *technically considered* the judicial power of the United States." E.g., *In re Mackin*, 668 F.2d at 127 [2d Cir. 1981], quoting 10 Op. Att'y Gen. 501, 506 (1863); 6 Op. Att'y Gen. 91, 96 (1853) (emphasis added) [footnote omitted]. These same powers, however, are intrinsically exercises of judgment; as such, they are "judicial in their nature." *United States v. Ferreira*, 54 U.S. (13 How.) 39, 48 (1852) [footnote omitted]. It is clear that Section 3184 authorizes judges or magistrates at extradition hearings to be, at a minimum, "quasi-judicial officers "empowered to act judicially . . . .
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> . . . The extradition judge's certification follows an adversary proceeding; narrowly drawn and concrete issues, deemed essential to the invocation of judicial power, are plainly present . . . . In short, the extradition judge exercises the "'judicial power' . . . 'to decide and pronounce a judgment and carry it into effect between persons and parties

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464. Brief of the United States in Reply to Plaintiffs' Opposition to Motion to Dismiss at 12, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995) (No. 95-1097).

465. *Id.* at 17.

466. Brief in Support of the United States Motion to Dismiss, or, in the Alternative, for Summary Judgment, at 20, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995) (No. 95-1097).

467. *Id.*

468. *Id.* at 21.

> who bring a case before it to decision.'" *Muskrat*, *supra*, 219 U.S. at 356, internal citations omitted.[469]

The United States even questioned the "technically speaking" language of *Mackin* in a footnote, claiming that "the Second Circuit's *en banc* decision in *In re McMullen*, 989 F.2d 603, 613 (1993) ('Congress has conferred jurisdiction upon the federal courts to conduct extradition proceedings'). . . would call into question the *Mackin* statement."[470]

Before the D.C. Circuit, the government's position shifted to argue that "it is doubtful that the judicial role under Section 3184 involves the 'judicial power of the United States' in the Article III sense."[471] The United States relied heavily on Justice Curtis' opinion in *Kaine* that "strictly speaking" the extradition judge does not exercise Article III power.[472] The United States claims that Justice Curtis "clearly understood that Congress could empower Article III judges to exercise a 'special authority' to make probable cause determinations in extradition matters."[473]

This same position had been expressed in an Attorney General Opinion from 1853: the extradition judge "acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States."[474] In 1863, the Attorney General reiterated that view.[475] The Attorney General explained that

> under our Constitution the United States courts of justice are coordinate with, but in their proper sphere of action independent of, the other departments of the Government. . . .
>
> It thus appears by the terms of the treaty that the question of the sufficiency of the evidence in cases of this kind is purely judicial; and, under the treaty and the acts of Congress, the jurisdiction of the judge having attached, all questions arising in the case are to be decided according to his uncontrolled judicial discretion. That discretion in these cases is precisely the same as in ordinary cases in law and equity arising under the Constitution and laws of the United States . . . . [T]he President

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469. *Id.* at 23-24.

470. *Id.* at 23 n.10.

471. Brief for the Appellants at 16, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

472. *See id.* at 33 n.11.

473. *Id.*

474. 6 Op. Atty. Gen 91, 96 (Aug. 31, 1853).

475. *See* 10 Op. Atty. Gen. 501 (July 6, 1863).

> . . . has no control over the exercise of judicial power within the sphere of its lawful jurisdiction . . . .[476]

Nevertheless, the Attorney General explained that the extradition judge "acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States."[477]

The United States will justify the role of the Executive in extradition matters under the foreign relations power. It has not argued the position twice stated by the Supreme Court that extradition is like a "public right," which implies that it could be vested in the President exclusively.[478] As explained above, the United States is wise to abandon the argument because it is clearly wrong, but without it they have no argument. What explanation is there for a magistrate to exercise a "special authority" over extradition? That language came from *Metzger*, which was decided before the 1848 act, so the "special authority" that was addressed did not come from Congress. Where would Congress get the power to dispense this "special authority?" If not for this "public rights" argument, why wouldn't extradition decisions that the United States concedes are exactly like Article III decisions, "strictly speaking," be Article III decisions? The only answer is a tautology: they are not Article III cases because Congress did not grant jurisdiction over them to Article III courts. Of course, Article III offers no protection against the aggrandizement of power over the Judicial Branch if the other branches can define the scope of Article III.

The United States seeks to deflect attention from the source of power through some arguments that are clearly red herrings. The United States argues that magistrates do the same types of things that they do every day in civil and criminal proceedings. Therefore, if their actions are unconstitutional in the extradition context, they are unconstitutional in the those contexts as well. This is incorrect. Under the Federal Magistrates Act, the Article III judge makes all delegations to magistrates and makes all final decisions on those matters. It is only because of this total control over the magistrates by Article III courts, and the consent of the parties, that the magistrate system is constitutional.[479] By contrast, the

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476. *Id.* at 504-05.

477. *Id.* at 506 (citing Justice Curtis' opinion in *Kaine*).

478. *See id.*

479. *See* Peretz v. United States, 501 U.S. 923, 936-39 (1991); Gomez v. United States, 490 U.S. 858, 869 (1989); United States v. Raddatz, 447 U.S. 667, 681 (1980).

United States acknowledges that "it simply is not the case that extradition powers are 'delegated' by federal courts to magistrates under Section 3184 . . . the statute assigns extradition powers directly to individual judicial officers."[480] The magistrate's extradition decision is final and is not subject to control by the district court.

Before the district court in *Lobue*, but not before the court of appeals, the United States also claimed, in reliance on Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[481] that extradition was a "twilight area" in separation of powers terms, where the distinctions between the separate branches merge.[482] This is entirely unconvincing. Although the line between Congress' war power and the President's command of the military may be blurry at times, that is not the case with legal proceedings initiated by the Executive Branch through the courts. As the United States itself explains, extradition is like a criminal probable cause hearing: the Executive initiates a request to the Judiciary, and if the Judiciary determines that there is probable cause, the Executive can conduct the search or make the arrest but retains discretion not to do so.[483] It is doubtful that the whole field of federal criminal law falls into such a narrow "twilight area."

B. The Judicial Aftermath of Lobue

Judge Lamberth's decision was vacated by the D.C. Circuit on jurisdictional grounds, and his arguments have been rejected by every other court to have considered them.[484] The Second Circuit was the first court of appeals to consider the issue after *Lobue*. In *Lo Duca v. United States*, the Second Circuit held that extradition judges do not exercise the Article III "judicial power" and that Article III judges could either accept or refuse to sit as extradition judges.[485]

Lo Duca's holding that extradition judges do not exercise Article III power is based upon the Second Circuit's previous decision in *Austin v.*

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480. Supplemental Brief for the Appellants at 9 n.4, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

481. 343 U.S. 579, 635 (1952).

482. *See* Brief for the Appellants at 15, Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996) (Nos. 95-5293, 95-5315).

483. *See id.* at 17-18.

484. *See* Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996).

485. 93 F.3d 1100 (2d Cir. 1996); *see id.* at 1106-07.

Healey.[486] *Austin* simply restates the conclusion of previous cases that extradition judges are not exercising the judicial power without explaining why.[487] In *Lo Duca*, the court clarified its view that *Metzger's* statement that extradition judges exercise a "'special authority' implies that their adjudicatory powers do not derive from Article III."[488]

Lo Duca's reading of *Metzger* is completely backwards. What was "special" about the extradition judge's authority in *Metzger* was that the authority was implied from the extradition treaty and from Article III because Congress had not conferred jurisdiction on the courts to decide extradition matters by statute. The Court believed that the treaty was self-executing and that Article III required that the courts implement it, even though judicial authority over the matter was not made explicit by the treaty or Congress' conferral of jurisdiction on the courts by statute.[489]

The Second Circuit also claimed that the absence of the possibility of appeal, as in *Metzger*, "strongly indicates that such officers do not exercise Article III power."[490] Again, this is false because *Metzger's* holding on the lack of appealability was based on the absence of statutory jurisdiction to review a judge's decision that was made in chambers. Moreover, the fact that there is no direct appeal in extradition cases is hardly dispositive of the Article III issues. Federal criminal cases are clearly Article III cases, but for most of this country's history there was no appeal from a criminal conviction either; as with extradition, review was only available through habeas.[491]

The *Lo Duca* court was further reassured that extradition decisions are not Article III decisions because it concluded that those decisions are subject to executive revision.[492] The court explained that executive

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486. 5 F.3d 598 (2d Cir. 1993). The Second Circuit evidently views the mere citation of its decisions in *Lo Duca* and *Healey* as sufficient to answer Article III challenges to extradition. Murphy v. United States, 199 F.3d 599, 603 (2d Cir. 1999).

487. *See Austin*, 5 F.3d at 603.

488. *Lo Duca*, 93 F.3d at 1105.

489. *See id.*

490. *Id.* The Second Circuit had imputed a similar view on the majority in *Kaine* in an earlier case. *In re* Mackin, 668 F.2d 122, 126 n.8 (2d Cir. 1981).

491. Unlike extradition cases, federal criminal cases originate in Article III courts. Congress' ability to limit appellate review in criminal cases to habeas review may implicate Congress' ability to create exceptions or otherwise regulate the Supreme Court's appellate jurisdiction. U.S. CONST. art. III, § 2. Nevertheless, the fact that criminal cases originate within Article III satisfies the requirement that the judicial power vest somewhere within Article III. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 363, at 37 (noting that the restrictions on appeal upheld in *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), did not relieve Article III of jurisdiction because review was available in the lower federal courts).

492. *Lo Duca*, 93 F.3d at 1105.

revision confirms that Article III judges are acting in an extra-judicial capacity because otherwise it would violate Article III.[493]

The Second Circuit's decision created a dangerous tautology. The court is essentially saying that because the Executive Branch can extinguish the decisions of the extradition judge, extradition must not be a judicial decision. Obviously, this analysis cannot be used to decide whether something should be vested in Article III because it contains no limiting principle. Surely, Congress cannot strip all cases from Article III courts by granting the President the power to veto the decisions from those courts.

In *Lo Duca*, the Second Circuit never articulated any rationale for why Article III would not require adjudication by an Article III judge. Interestingly, the *Lo Duca* court dropped a footnote stating that "[i]n the absence of section 3184, the Executive Branch would retain plenary authority to extradite" and then quoted *Fong Yue Ting*.[494] The court never attempted to develop Congressman Marshall's theory of executive discretion any further.

In *Austin*, the Second Circuit commented that it did not view the authorization of magistrates to conduct extradition as a threat to the judiciary because the magistrates "conduct extradition proceedings at the direction of an Article III court."[495] It is true that the separation of powers threat is minimized because magistrates can be removed by Article III judges and because magistrates hear extradition matters only because local court rules authorize them to do so.[496] Nevertheless, this explanation does not address the Article III interest of litigants to impartiality by the court.[497] Moreover, this explanation does not address the fact that the separation of powers is violated when the powers of one branch are taken or given away.[498]

In *DeSilva v. DiLeonardi*,[499] the Seventh Circuit rejected *Lobue*, but for much different reasons than *Lo Duca*. The argument before the

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493. *See id.*

494. *Id.* at 1103 n.2.

495. Austin v. Healey, 5 F.3d 598, 602 (2d Cir. 1993).

496. *See id.* at 604.

497. *See* CFTC v. Schor, 478 U.S. 833, 848 (1986) (holding that Article III's guarantee of "independent and impartial adjudication by the federal judiciary . . . serves to protect primarily personal, rather than structural, interests").

498. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 880 (1991) ("Neither Congress nor the Executive can agree to waive [the Appointment Clause's] structural protection."); INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (noting the President's "assent" to a bill that authorizes a legislative veto does not cure the separation of powers violation).

499. 125 F.3d 1110 (7th Cir. 1997).

Seventh Circuit was whether separation of powers was violated by allowing the Executive Branch to revise the decisions of the Judicial Branch.[500] No argument was made that Article III required that the extradition judge be an Article III judge. The Seventh Circuit easily dismissed the separation of powers argument, as it was framed in that case, because the extradition judge was a magistrate and no revision of an Article III court could have occurred.[501] As an alternative ground for rejecting the challenge, the Seventh Circuit rejected *Lo Duca's* conclusion that executive revision was taking place.[502] The Seventh Circuit explained that if the magistrate judge ruled against extradition, the order must be obeyed and the relator goes free.[503] Plainly, there is no revision in those circumstances. If extradition is allowed, the Seventh Circuit said that there was no executive revision in a subsequent decision by the Executive not to extradite.[504] The court explained that police can change their mind after being given a search warrant, the Attorney General can decide not to deport after being given approval to do so, and the President can stop a prosecution through the pardon power.[505] The Seventh Circuit viewed the situation with extradition in the same manner.[506]

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500. *Id.* at 1113.
501. *Id.*
502. *See id.*
503. *See id.*
504. *See id.*
505. *Id.*
506. *See id.* A different means of dismissing *Lobue*'s holding on Executive revision was used by District Judge Rafeedie in *In re* Lang, 905 F. Supp. 1385 (C.D. Cal. 1995). Judge Rafeedie held that a relator lacked standing to challenge Executive revision because it could only work in his favor and therefore could not cause an injury. *Id.* at 1399. *Lang* incorrectly assumed that the magistrate's findings were subject to de novo review as they would be under the Federal Magistrates Act, but this is incorrect. *Id.* at 1396 n.19. Consequently, the injury to the relator of having his extradition decided by a magistrate lacking the independence secured by Article III presents a sufficient injury for standing purposes. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) ("[I]t is sufficient for purposes of a claim under Article III challenging a tribunal's jurisdiction that the claimant demonstrate it has been or inevitably will be subjected to an exercise of such unconstitutional jurisdiction."); *see also* CFTC v. Schor, 478 U.S. 833, 848 (1986) (explaining that Article III, § 1's "guarantee serves to protect primarily personal, rather than structural, interests"). If an Article III judge decides the extradition matter, the standing question is more difficult because the review by the Executive after the judicial process is complete and merely gives the relator a second bite at the apple. Review by the Executive occurs only after an extradition judge has approved the extradition, so the relator can only benefit from such review. Nevertheless, courts do not always apply the requirements of injury for standing strictly in these types of separation of powers cases because no party may otherwise have standing to correct such a distortion of the balance of power. *See, e.g.*, Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 824 (D.C. Cir. 1993); Comm. for Monetary Reform v.

On various occasions, and without citing more than Justice Curtis' opinion in *In re Kaine*, the Ninth Circuit has agreed with *Lo Duca* that extradition judges do not exercise the judicial power of Article III.[507] The Ninth Circuit also has agreed with *De Silva* that, if extradition judges were acting in an Article III capacity, their decisions are not subject to executive revision (a principle that is in tension with one of the justifications for the result in *Lo Duca*).[508]

These decisions by the Ninth Circuit are on a collision course with the Ninth Circuit's growing recognition that constitutional rights are implicated in extradition proceedings. In a panel decision that was later withdrawn on other grounds, the Ninth Circuit held that the Fourth Amendment imposed a probable cause standard on the arrest of a relator; and the Fifth Amendment Due Process Clause requires a bail hearing in extradition proceedings.[509] If it is accepted that a relator's constitutional rights are at stake in these early stages of the extradition process, it is difficult to conceive how those rights can be finally adjudicated before an Article I tribunal.

Before *Lobue* was decided, the D.C. Circuit and the Eleventh Circuit had issued relevant opinions concerning the relationship between extradition and Article III. In *Ward v. Rutherford*, then-Circuit Judge Ruth Bader Ginsburg upheld the Extradition Act against a constitutional challenge.[510] Judge Ginsburg emphasized that the threat to the judiciary is minimized when a magistrate acts as an extradition judge because magistrates are within the judicial branch.[511] Therefore, magistrates are under the general supervision of the judicial branch and decide extradition matters pursuant to a rule of the court.[512]

Judge Ginsburg followed *Schor* in using a balancing test in assessing the alleged Article III violation.[513] Judge Ginsburg stated that

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Bd. of Governors, 766 F.2d 538, 543-44 (D.C. Cir. 1985); Andrade v. Lauer, 729 F.2d 1475, 1494-96 (D.C. Cir. 1984).

507. *See In re* Artt, 158 F.3d 462, 469 (9th Cir. 1998); Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) (summarily stating, "We agree with the conclusion of the Second Circuit, that the extradition statutes do not violate separation of powers"); *In re* Kirby, 106 F.3d 855, 864 n.11 (9th Cir. 1997).

508. *See In re Artt*, 158 F.3d at 469.

509. *See* Parretti v. United States, 122 F.3d 758, 767, 773 (9th Cir. 1997), *withdrawn on other grounds*, 143 F.3d 508 (9th Cir. 1998). In a much earlier opinion, the Second Circuit strongly implied that the Fourth Amendment probable cause standard is applicable. Caltagirone v. Grant, 629 F.2d 739, 748 (2d Cir. 1980).

510. 921 F.2d 286 (D.C. Cir. 1990).

511. *Id.* at 287.

512. *See id.*

513. *See id.* at 288.

extradition is similar to a preliminary hearing, which is not normally vested exclusively in Article III courts.[514] It is unclear whether Judge Ginsburg is referring to state courts, which do not implicate Article III concerns, or to magistrates, who conduct such hearings with the consent of the parties and under direct supervision of the Article III judge. In either case, the point does not serve the argument well.

Judge Ginsburg then cites *Palmore*, a territorial rights case, for the proposition that even a criminal defendant is not entitled to an Article III court proceeding in all instances.[515] A solid majority of the Supreme Court appears to recognize, however, that the adjudication of criminal matters by non-Article III courts is limited strictly to territorial courts.[516]

Finally, Judge Ginsburg argued that the availability of habeas review ensured adequate control of extradition by Article III judges.[517] This argument may be relevant under the balancing approach to Article III, but this argument is even weaker than the appellate theory of Article III that was rejected by a majority of the Supreme Court in *Northern Pipeline*.[518] Although some courts recently have begun to expand the scope of review in extradition-related habeas proceedings,[519] the scope of review traditionally has been much more limited than is generally available by appeal.[520] More importantly, as Henry Hart warned in his famous

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514. *See id.*

515. *See id.*

516. The *Northern Pipeline* plurality noted that "[o]f course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party." 458 U.S. 50, 70 n.24 (1982). The Supreme Court had implicitly reached the same conclusion in *United States* ex rel. *Toth v. Quarles*, 350 U.S. 11 (1955), when the Court refused to allow trial by court-martial of a criminal matter involving an ex-serviceman on Article III grounds. *Id.* at 23. These cases would appear to confirm that *Palmore* should be limited to territories. *See* Palmore v. United States, 411 U.S. 389, 409-10 (1978) (noting that Congress acts as a state legislature in regulating the District of Columbia); Keller v. Potomac Elec. Co., 261 U.S. 428, 442-43 (1923) (same); *see also* REDISH, *supra* note 305, at 48 (noting that "the strongest argument in support of the *Palmore* decision—and the most limiting—is that in establishing courts to handle local affairs of the District of Columbia, Congress acts in a manner analogous to a state legislature").

517. *Ward*, 921 F.2d at 288.

518. 458 U.S. at 86 n.39 (plurality opinion) ("The exercise of the judicial power must be met at all stages of adjudication, and not only on appeal."); *id.* at 91 (Rehnquist, J., concurring) (same).

519. *See, e.g.*, *In re* Burt, 737 F.2d 1477, 1484 (7th Cir. 1984).

520. *See, e.g.*, Fernandez v. Phillips, 268 U.S. 311, 312 (1925). Of course, if Article III courts construe their habeas jurisdiction to be as broad as the review available in direct review proceedings, Article III's requirements would be satisfied. In effect, direct review would be masquerading as "habeas" jurisdiction. Whether habeas jurisdiction could be stretched that far raises difficult questions. Cases like *Fay v. Noia*, 372 U.S. 391, 401-24 (1963), define the writ of habeas corpus broadly enough to support such a construction, but others have viewed the writ much more narrowly. *See, e.g.*, *id.* at 450-61 (Harlan, J., dissenting). All agree that habeas is

Dialectic, stripping Article III courts of all jurisdiction except for habeas corpus would turn "an ultimate safeguard of law into an excuse for its violation."[521]

Judge Ginsburg's opinion also is disturbing in that there is a footnote claiming that this case is "hardly analogous to *Ng Fung Ho*" because it is "scarcely aimed at stripping" the relator of his status as a citizen.[522] Judge Ginsburg misread the injury being complained of in *Ng Fung Ho* as being the loss of citizenship. The case involved a deportation, not a denaturalization proceeding. *Ng Fung Ho* made it clear that the importance that it was attaching to citizenship in that case related to the liberty interest that citizenship conferred regarding the right to stay in the country. That same liberty interest is implicated in extradition.

One of the more interesting things about *Ward* is that the court never intimated that extradition was not part of the "judicial power" of the United States. The court's analysis appears to suggest that it is part of

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available to review constitutional issues and challenges to jurisdiction, but whether and the extent to which courts can reach other issues lies in the "fog." *See* DAVID CURRIE, FEDERAL COURTS: CASES AND MATERIALS 874 (3d ed. 1982). Generally, however, even "erroneous" decisions are allowed to withstand the limited scope of habeas review, *see, e.g.*, *Ex parte* Watkins, 28 (3 Pet.) 193 (1830), and that has been the case for extradition proceedings in particular. *See, e.g.*, *Fernandez*, 268 U.S. at 312. A narrow construction of the writ would, in effect, allow non-Article III judges to make the conclusive decision on matters within the case and this would be an unconstitutional exercise of the judicial power of Article III. *See* Crowell v. Benson, 285 U.S. 22, 56-57 (1932) (holding that Congress cannot "sap the judicial power" in a purely civil dispute by allowing the Executive Branch to decide questions of fact with finality, if doing so would jeopardize "fundamental rights."). Moreover, the fact that it would deny the Supreme Court appellate jurisdiction over all questions of "Law and Fact," would raise questions concerning the scope of Congress' authority to create "Exceptions" to the Supreme Court's jurisdiction. U.S. CONST. art. III, § 2. As no federal court would have complete jurisdiction over extradition proceedings, it is doubtful that Congress could create such an exception. *See, e.g.*, McNamara v. Henkel, 226 U.S. 520, 525 (1913) (refusing to consider questions concerning the sufficiency of the evidence because "the writ of habeas corpus does not operate as a writ of error and mere errors are not the subject of review").

521. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1382 (1953); *see also* Oestereich v. Selective Serv. Sys., 393 U.S. 233, 244 n.6 (1968) (Harlan, J., concurring) (arguing that limiting a prisoner's access to an Article III court to habeas corpus jurisdiction "would, at the very least, cut against the grain of much that is fundamental to our constitutional tradition"); Fallon, *supra* note 305, at 971 ("[H]abeas corpus, which was intended as an ultimate constitutional safeguard, is not a constitutionally adequate substitute for the right to appeal."). At least one Department of Justice attorney, speaking for himself and not the Department, agrees that "the mere potential of habeas review cannot possibly justify the present refusal of a constitutional requirement. Collateral review . . . does not extend to a de novo review of the basic question of whether the evidence presented is sufficient to support the charges made." O'Neill, *supra* note 41, at 11.

522. *Ward*, 921 F.2d at 288 n.4.

the judicial power, but that it could be placed in Article I hands under the balancing approach to Article III.

The Eleventh Circuit's decision in *Martin v. Warden* addressed the nature of the extradition system in dicta that is plainly wrong.[523] The court explained that "[h]istorically, the judiciary played no role in extradition. Between 1794 and 1842, 'the Executive exercised complete control over extradition without reference to the courts.'"[524] The court quoted Congressman Marshall's speech that "'the power to extradite pursuant to treaty rests in the executive branch as part of its power to conduct foreign affairs.'"[525] The Eleventh Circuit explained that "[e]xtradition is an executive, not a judicial, function. The power . . . derives from the President's power to conduct foreign affairs."[526] The lengthy summary of the history of extradition and extradition law provided above should demonstrate conclusively that the Eleventh Circuit is wrong.

C. The Extradition Act Violates Article III

A more careful review of the Extradition Act and the history of extradition in this country demonstrates that the *ipse dixit* found in so many cases that extradition does not involve an exercise of the "judicial power" of Article III is mistaken. Consequently, the Extradition Act violates Article III by allowing non-Article III federal magistrates to exercise this judicial power.

By contrast, the Extradition Act is consistent with Article III where the extradition judge is an Article III judge. The concern that the Executive Branch has been given the authority to review the extradition court's determination was proven incorrect by the Seventh Circuit's decision in *DeSilva*.[527] As the *DeSilva* case recognized, an extradition court's decision to release a relator is always binding on the Executive Branch.[528] Although the Executive Branch has the authority to decline extradition after it is approved by an extradition judge, the existence of such a decision does not revise a decision by the court. A court's finding that the Executive Branch is authorized to extradite, like a finding authorizing a search or an arrest, is not a command that it do so. Indeed,

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523. 993 F.2d 824 (11th Cir. 1993).
524. *Id.* at 828 n.6 (quoting Eain v. Wilkes, 641 F.2d 504, 513 n.13 (7th Cir. 1981)).
525. *Id.* at 828 n.5 (citation omitted).
526. *Id.* at 828.
527. 125 F.3d 1110 (7th Cir. 1997).
528. *See id.* at 1113.

such a command would violate the separation of powers by stripping the Executive Branch of its discretion in law enforcement.

VII. CONCLUSION

Misunderstandings about the historical relationship between extradition and Article III courts have distorted both extradition practice and the courts' construction of Article III itself. Without appreciating the historical context in which extradition law developed in this country, it is easy to view Justice Curtis' statement in *Murray's Lessee* that extradition is a "public right," as opposed to a "private right," as creating an unprincipled distinction. Few today would question the fact that the forcible removal of a person from his own country to stand trial abroad implicates "private" interests. Consequently, the use of the public right—private right dichotomy for deciding when an Article III court is constitutionally required has been difficult to apply because the distinctions between the categories have not appeared clearly.

By viewing Justice Curtis' statement in its appropriate context, the distinction between public and private rights that he attempted to make becomes understandable. Justice Curtis was following Congressman Marshall's reasoning that no Article III court is necessary to decide matters that are essentially political questions that could be left to the political branches to decide at their discretion, but that Article III courts are constitutionally required in cases concerning private rights. This point was obscured, however, by Justice Curtis repeating Congressman Marshall's mistake of putting extradition in the wrong category. As a result, Justice Curtis' analysis appears contradictory. Recognizing the error in *Murray's Lessee*, that extradition was placed in the wrong category, allows us to make sense of Justice Curtis' reasoning and leaves us with a coherent theory of Article III.

At the same time, recognizing that extradition involves the exercise of the "judicial power" of Article III necessitates the use of Article III judges. Consequently, the Extradition Act is unconstitutional to the extent that it allows non-Article III magistrates to act as extradition judges.