Article III and the Process Due a Connecticut Yankee Before King Arthur's Court

Michael Edmund O'Neill

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
I. INTRODUCTION

In Mark Twain's *A Connecticut Yankee in King Arthur's Court*, Hank Morgan, a nineteenth-century American, awakens to find himself mysteriously transported to King Arthur's England. Morgan soon discovers that he is a prisoner of Sir Kay the Seneschal—knight of the Roundtable. Taken before Arthur's court, Morgan is summarily sentenced to die. Through a stroke of good fortune (Morgan's knowledge that an eclipse of the sun will take place immediately prior to his execution), Morgan is able to convince Arthur that he is a magician more powerful than the legendary Merlin, thus winning his freedom.

Not unlike Morgan's unfortunate experience with medieval justice, an American citizen's first encounter with a foreign country's judicial process can be daunting. Bereft of the protections afforded by the United States Constitution and Bill of Rights, the accused finds himself at the mercy of whatever criminal justice system the demanding country employs.¹

An extradition treaty enables a foreign jurisdiction to pluck the accused from the United States to return him for trial under that country's laws.

---

¹ Seldom do foreign governments grant criminal defendants the protections articulated in the United States Constitution. Indeed, when faced with the daunting prospect of criminal trial in a foreign land, many traditional constitutional protections are stripped away because "[w]hile our courts should guarantee that all persons on our soil receive due process under our laws, that power does not extend to overseeing the criminal justice system of other countries." In re Assarsson, 635 F.2d 1237, 1244 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981).
Arrest, followed by an extradition hearing, precedes the physical removal of the accused. In the extradition hearing, the presiding judicial officer must determine whether the country demanding extradition has proffered evidence sufficient to establish a prima facie case warranting commitment of the accused to the executive branch.\(^2\) Once the magistrate makes a determination, the accused is either released or delivered up to the Secretary of State.\(^3\) Title 18 U.S.C. section 3184 (1988) empowers a magistrate or a state court judge\(^4\) to conduct an extradition hearing. It does not, however, provide direct recourse to an Article III judge.

The sole means by which the accused may challenge the judicial officer's decision is through collateral attack by means of a petition for habeas relief. The principal judicial protection afforded the accused, then, occurs at the initial stages of the extradition process.\(^5\) This is problematic. Because the extradition proceeding will determine whether the accused may be lawfully removed to stand trial before a foreign court, confronting alien law and facing unfamiliar proceedings, denial of an Article III forum raises significant constitutional issues. When magistrates or state court judges preside in an extradition proceeding, they act with unappealable authority in deciding whether to permit the State Department to surrender an American citi-

\(^2\) 18 U.S.C. § 3184 (1988) provides:
Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.

\(^3\) Although significant liberty interests are at issue, the executive retains final authority to permit extradition. 18 U.S.C. §§ 3184, 3186 (1988); see also Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); Berenguer v. Vance, 473 F. Supp. 1195, 1199 (D.D.C. 1979). Generally, the Secretary of State acts in place of the President by delegation.

\(^4\) The question of whether a state court judge should be permitted to conduct an extradition hearing is a knotty problem implicating questions of federalism and judicial parity between state and federal judges. This Article will address the matter in a later section. For now, however, it is enough to note "[t]hat an executive order of surrender to a foreign government is purely a national act, [i]t is not open to controversy." In re Kaine, 55 U.S. 63, 66, 14 How. 103, 110 (1852) (emphasis added). For the international nature of extradition and the reasons set forth in this Article, it is a highly dubious proposition that state judges can possess the authority to conduct extradition hearings. See In re Mackin, 668 F.2d 122, 129-30 n.11 (2d Cir. 1981) (discussing nonexistence of state judges presiding in international extradition cases since the mid-nineteenth century).

\(^5\) No appeal lies from the decision of the executive branch to surrender the accused to the demanding jurisdiction.
ARTICLE III AND EXTRADITION PROCEEDINGS

Citizen to a foreign land. Magistrates, in making a determination, exercise judicial power inconsistent with Article III demands because they are acting without direct supervision by an Article III judge. The probable cause determination can involve sophisticated evidentiary issues, important questions of credibility, and often complicated determinations of foreign law. While not "final" in the sense that subsequent removal is not automatic but awaits the ultimate decision of the executive branch, an extradition proceeding is final with respect to both the judiciary and subsequent revision by the executive or legislative branches. Despite the availability of habeas relief, the absence of plenary review leaves the accused with severely limited access to an Article III tribunal.

In creating a judiciary separate from legislative and executive dominion and largely immune from popular sentiment, the Framers expected that federal courts would adjudicate cases according to the dictates of law. Extradition, because of its impact on international affairs and corresponding significance to the accused, is archetypal of the disputes for which the Framers intended Article III adjudication. This author advocates that the executive branch may not deliver a United States citizen to a foreign country for criminal trial without the benefit of hearing and decision by, or direct appeal to, an Article III judge. This position follows from an analysis of the structural and personal interests embodied within Article III and the guarantee of due process enshrined in the Fifth Amendment.

This Article discusses in Part II current extradition law and the process afforded an individual for whom an extradition request has been made (the extraditee). Part III addresses the role magistrates play in the extradition process. This author contends that magistrates, as non-Article III appointees, violate Article III requirements when they conduct extradition hearings without special appointment, consent of the parties, and in the absence of de novo review by an Article III court. Part IV provides a constitutional analysis of extradition. Shifting from federal to state courts, Part V argues that state court judges possess no inherent authority to conduct extradition hearings; nor, given the geopolitical nature of extradition, should state court judges be so authorized. Finally, Part VI concludes that extradition

6. If, on such hearing, the magistrate or state court judge:
[D]eems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention.


7. In this essay, "direct appeal" means review on appeal as of right or by statute.
proceedings call for the impartial judicial expertise afforded by an Article III decision maker.

II. BACKGROUND OF EXTRADITION PROCEEDINGS

The following discussion details the nature of the extradition hearing and examines the roles of the magistrate, the executive branch, and the Article III court.

A. The Nature of the Extradition Proceeding

The word extradition comes from the Latin “ex,” meaning “out,” plus “traditio,” meaning “surrender”; one who is extradited is literally “surrendered out.” Accordingly, extradition is the legal surrender of an alleged criminal to the jurisdiction of another country for trial. A person apprehended in the United States for a crime committed under the laws of a foreign nation is not prosecuted in the United States under foreign law; rather, that person is removed from the United States to the foreign country. Extradition, though more frequently invoked in the modern, interdependent world, where national borders no longer serve as substantial barriers to travel, is not a recent creation of international law. It is nearly as old as international relations themselves. The second-oldest known document in diplomatic history is a 1280 B.C. peace treaty negotiated between the fabled Ramses II of Egypt and the Hittite King Hatusili III. This treaty contains an article providing for the return of criminals from one country found in the territory of the other.8

Despite its antiquity, the nature of extradition has changed little from ancient times. Currently, it is defined as the process by which one sovereign nation relinquishes custody of a person accused of a crime under foreign law at the request of another sovereign nation. Sovereignty is an important element of the definition in that it prevents the demanding nation from violating the borders of the harboring nation to apprehend a fugitive, and it empowers the harboring nation to release a fugitive discovered within its borders to the nation wherein the crime was committed. Because sovereignty resides, in part, with the people of the United States, limitations on the government’s power to extradite exist. In other words, the national government may not act ultra vires in permitting extradition. While King Hatusili, no doubt, enjoyed uncontested power to extradite whomever he wished, legal, including constitutional, constraints provide certain guide-

lines that the United States government must observe before authorizing extradition.

Recognized limitations demand, for example, that the request be made pursuant to the existence of a treaty.9 Absent a formal extradition treaty, no presumed power to extradite exists.10 The crime the defendant is accused of committing must also be listed in the treaty11 and must be considered a criminal offense in both the harboring and requesting countries.12 Additionally, the requesting nation may try an extradited fugitive only for the crime for which the defendant was surrendered.13

Historically, the "non-judicial branches of the [g]overnment"14 have resolved the terms and conditions under which a fugitive may be extradited because courts construe extradition as an international—hence political—function. In particular, pursuant to the President's assumed (and seldom challenged) supremacy to direct foreign affairs, courts and Congress have been eager to situate extradition authority within the bosom of the executive. Congress, nonetheless, has not been entirely remiss in its obligation to legislate in this area. While there is no specific statute that deals explicitly with the substance of extradition law, Congress has enacted various statutes to regulate and oversee the extradition process. Title 18 U.S.C. section 3184, for example, expressly provides for an extradition hearing and further

11. See United States v. Rauscher, 119 U.S. 407, 430 (1886) ("[A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences [sic] described in that treaty.").
12. This principle is known as "double criminality." See Collins v. Loisel, 259 U.S. 309, 311 (1922) ("[A]n offense is extraditable only if the acts charged are criminal by the laws of both countries."). However, Banoff & Pyle observe that "[t]his double criminality standard is widely accepted in international extradition practice, but poses some problems when applied in the context of a federal system which leaves the task of defining most crimes to state legislators." Barbara Ann Banoff & Christopher H. Pyle, "To Surrender Political Offenders" The Political Offense Exception to Extradition in United States, 16 N.Y.U. J. INT'L L. & POL. 169, 177 (1984). The Sixth Circuit has concluded that the mere fact that "the specific offense charged is not a crime in the United States does not necessarily rule out extradition." Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) (noting, however, that "[t]here is a requirement of 'double criminality' in international extradition cases.").
13. This doctrine is known as the "specialty principle." See Johnson v. Browne, 205 U.S. 309, 321 (1907) (holding that a treaty should not be used "to obtain the extradition of a person for one offense and then punish him for another and different offense."); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 352-60 (1974). Of course, this is a protection that can be defeated fairly easily. Once on foreign soil, there is little to protect the accused from being tried for other crimes.
permits a magistrate or state judicial official to issue an arrest warrant for a fugitive and to preside over the fugitive’s subsequent hearing.

The purpose of the extradition hearing is to determine whether there exists “evidence sufficient to sustain the charge under the provisions of the proper treaty or convention.”15 The “extradition hearing is not the occasion for an adjudication of guilt or innocence.”16 Courts have regarded the extradition proceeding as a “preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.”17

Should the extraditing officer find that probable cause exists for extraditing the fugitive on the charges alleged in the warrant, the officer must certify that fact to the Secretary of State, and then issue a warrant for commitment of the accused until the executive branch either surrenders the fugitive to the foreign government or denies extradition altogether.18 Because the certificate of extraditability “signals the start, rather than the conclusion, of the adjudication of the fugitive’s guilt or innocence,”19 courts have historically considered it an interlocutory, nonfinal determination. As such, although the extraditee has no further recourse to an Article III tribunal, there are no direct appeals of the certificate of extraditability to an Article III court.20

At the close of the extradition proceedings (provided he is not released), the accused is entirely dependent upon the executive’s inclination. Thus, while the hearing is nonfinal in the sense that no adjudication of guilt occurs (at least within the United States), it is final in that further traditional criminal protections are denied. This procedural oddity places extradition on awkward footing, precluding future judicial participation in the extradition decision.

16. Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984) (quoting Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981)).
17. United States v. Kember, 685 F.2d 451, 455 (D.C. Cir.), cert. denied, 459 U.S. 832 (1982); see also Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir.), cert. denied, 439 U.S. 932 (1978) (noting that an extradition hearing is similar to a preliminary hearing on criminal charges).
18. 18 U.S.C. § 3184 (“[H]e shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.”); see also Hooker, 573 F.2d at 1367.
19. Hooker, 573 F.2d at 1367.
ARTICLE III AND EXTRADITION PROCEEDINGS

B. The Role of the Executive Branch in Extradition Proceedings

As with most matters touching international affairs, the President is presumed to have responsibility for extradition decisions.\(^{21}\) In recognition of this fact, Congress has expressly vested supervisory power over extradition proceedings in the executive branch.\(^{22}\) The final decision to extradite the accused, then, is not committed to the judiciary, but remains “within the exclusive purview of the Executive.”\(^{23}\) The textbook procedure for executive review envisions lawyers within the State Department screening all incoming requests for fairness and constitutional appropriateness and then turning those that appear to meet the criteria over to the Secretary of State for final review. Ideally, the Secretary of State then ponders each extradition request on its merits and makes an independent evaluation as to the appropriateness of extradition. The Secretary would then advise the President on whether to honor the request. In a perfect world, therefore, “the law gives to the party charged the double protection of a concurrence of views upon all questions affecting his guilt under the treaty by the magistrate and the Secretary before he is to be surrendered.”\(^{24}\)

What the law giveth, however, political pressures often taketh away. The review is seldom exhaustive; although the President may refuse extradition “for any reason whatsoever,”\(^{25}\) such refusals are rare because geopolitical concerns often tinge extradition requests. In commenting on the political offense exception to extradition,\(^{26}\) the Ninth Circuit has recognized that the initial judicial determination is important because “the executive could face undue pressure”\(^{27}\) to order extradition when public and international opposition to the activities of an unpopular group coalesce. Wright and Miller, commenting on the politically charged nature of extradition, have observed that:

\(^{21}\) United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (observing that the President is the “the sole organ of the nation in its external relations.” (quoting 6 ANNALS OF CONG. 613 (1800)).


\(^{23}\) Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), aff’d, 424 U.S. 614 (1976); see also Plaster v. United States, 720 F.2d 340, 349 (4th Cir. 1983).


\(^{25}\) Plaster, 720 F.2d at 349; see also United States v. Schultz, 713 F.2d 105, 109 (5th Cir. 1983); Eain v. Wilkes, 641 F.2d 504, 516 (7th Cir.), cert. denied, 454 U.S. 894 (1981); Collier v. Vaccaro, 51 F.2d 17, 20-21 (4th Cir. 1931).

\(^{26}\) Courts have authority to refuse extradition if the crime committed in the demanding nation was “political” in nature. For a discussion of this “political offense” exception, see CHRISTINE VAN DEN WINGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 3 (1980); Banoff & Pyle, supra note 12.

\(^{27}\) Quinn v. Robinson, 783 F.2d 776, 789 (9th Cir.), cert. denied, 479 U.S. 882 (1986).
"[O]ne of the purposes of the [Foreign Sovereign Immunities Act] was to remove some of the responsibility for decisions about immunity from the State Department and put these decisions in the courts, where judges are less likely to be influenced by political pressure. It was thought that moving the responsibility for these questions from the State Department to the courts would allow the decisions to be made on legal grounds, rather than on the basis of foreign policy concerns."\(^\text{228}\)

Thus, "[e]xtradition candidates can become unattractive pawns in global geopolitics."\(^\text{229}\) If the diplomatic interests of a particular administration conflict with the personal interests of the accused, there is little doubt who will surface victorious in a protracted legal and political battle—a battle largely unreviewable by the judiciary. If, for example, the President hopes to curry the favor of a strategically important nation or wants to obtain a fugitive he covets, it is not beyond belief that, when presented with a formal extradition request by that nation, the administration would strike a deal to mollify the demanding nation—even if it meant that extradition might compromise the accused's rights.

The former chief of the Justice Department's office in charge of extradition has admitted as much when he commented, "I've seen acute cases of 'clientitis' where the State Department bent over backwards to stroke the foreign country... . . . [e]very agency has its own parochial interests."\(^\text{30}\) This cynical view hardly serves to inspire confidence in the impartiality of executive review.

Neither concrete standards nor procedural requirements limit the executive's prerogative to extradite. Similarly, the executive's discretion to withhold extradition under 18 U.S.C. section 3186 remains largely unfettered and is seldom exercised.\(^\text{31}\) Courts have commented that posthearing decisions refusing extradition occur even less frequently than outright presi-

\(^{28}\) CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1111, at 201-02 (1987).

\(^{29}\) John G. Kester, Some Myths of United States Extradition Law, 76 GEO. L.J. 1441, 1487 (1988); see also WINGAERT, supra note 26, at 100 ("[A]dministrative decisions with respect to extradition are much more likely to be influenced by political elements than the decisions of the courts.").


\(^{31}\) Quinn, 783 F.2d at 789 (noting that "the contours of executive branch discretion in this area [extradition] have never been expressly delineated.").
ARTICLE III AND EXTRADITION PROCEEDINGS

Accordingly, it is fruitless to place one's faith in the good graces of the executive branch.

Of fairly recent vintage, the strange odyssey of Joseph Doherty should give pause to anyone supposing that the executive branch provides an adequate second layer of protection for those individuals facing extradition. Doherty, an Irish citizen and former member of the Irish Republican Army, had been fighting extradition and deportation to Great Britain since 1980.

British authorities apprehended Doherty in Northern Ireland and subsequently tried him on charges of murdering a British commando captain stationed in Belfast. While awaiting a verdict in his trial, however, Doherty disguised himself as a policeman, escaped from prison, and went to America. Undaunted, British authorities pressed forward with their case and the court ultimately convicted Doherty in absentia of murder.

Unaware of his troubles in Northern Ireland, federal agents arrested Doherty, who was employed at an Irish pub in Manhattan, for unlawful entry into the United States. Doherty was imprisoned and his seemingly ordinary case roused little attention. Upon learning of Doherty's fate, however, Great Britain immediately requested extradition, but a district court ruled that Doherty's slaying of the British officer was a political act and therefore beyond the terms of the extradition treaty between the United States and Great Britain. The executive branch was adamant about ensuring Doherty's extradition or deportation, its vehemence at least in part motivated by the close relationship between the Reagan and Thatcher Administrations. The district court, in refusing to certify Doherty's extradition, plainly acknowledged that congressional commitment of the extradition hearings in the judiciary "reflects a congressional judgment that the decision not be made on the basis of what may be the current view of any one political administration."

The court, moved by Doherty's predicament and disgusted by the administration's political maneuvering, refused to compromise Doherty's rights.

34. Id. The political act doctrine provides a limited exception to the granting of an extradition request when the offense is of a political character.
35. Id. at 277 n.6.
Doherty successfully prevented his extradition or deportation for nearly a decade, losing only after a final appeal to the Supreme Court. The international circus surrounding Doherty's extradition and deportation fiascos prompted Senator Christopher J. Dodd to declare that "in the eyes of the Justice Department, he's politically expendable... [i]t's just throwing a political bone to" British Prime Minister Margaret Thatcher. Senator Dodd astutely summed up the distinction between the judicial and executive branches when he observed that "[e]very time Doherty goes before a court of law, he wins, ... [a]nd every time he goes before political authorities, he loses." So much for the protections afforded the accused by the executive branch.

Even so, neither a secretarial decision to refuse extradition nor a presidential pardon can cure an otherwise unconstitutional proceeding. If, for example, Wisconsin routinely denied criminal defendants timely jury trials, a gubernatorial pardon could not cure the constitutional error. While the result might be the same from the accused's point of view, the denial of a jury trial would remain unconstitutional and would require a remedy. Similarly, denial of an Article III forum in which to hold an extradition hearing violates the accused's rights under Article III and the Fifth Amendment.

C. The Role of Article III Courts in Reviewing Extradition Proceedings

Once the judicial officer has bound the accused over to the executive branch for an affirmation or denial of the extradition request, the courts have no further role to play in the extradition determination. Thus, judicial protections afforded the accused are front-loaded in that they must occur at the initial stages of the extradition process or not at all.

The extraditee may seek review of the certificate of extraditability exclusively by means of a petition for a writ of habeas corpus. Habeas review, however, is quite limited. It does not allow the reviewing court to reopen the merits of the case or to reexamine witnesses or evidence. The confines of habeas review force the reviewing court to impart substantial deference

38. Id. at A5.
41. In reviewing a petition for habeas corpus, precedent establishes that the reviewing court:
to the magistrate's initial determination. Consequently, habeas review is sorely lacking as a means to correct potential abuse or mistake. Attempts to expand habeas review have met with mixed results.\(^4\)

Nevertheless, the mere potential of habeas review cannot possibly justify the present refusal of a constitutional requirement. Collateral review on a writ of habeas corpus does not extend to a de novo review of the basic question of whether the evidence presented is sufficient to support the charges made.\(^3\) Justice Harlan has asserted that “postponement of a [constitutional] hearing . . . until such time as the petitioner is able to secure his release by a writ of habeas corpus . . . would, at the very least, cut against the grain of much that is fundamental to our constitutional tradition.”\(^3\)\(^4\)

Regardless of the breadth of habeas review, six Supreme Court Justices have agreed that even plenary, direct appeal to an Article III court is insufficient to rehabilitate the denial of an Article III judge at the initial stage of

---

\(^4\) In Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990), the Second Circuit chided the district court for attempting to expand its role in habeas review.

\(^3\) Fernandez, 268 U.S. at 312.

\(^2\) Oestereich v. Selective Serv. Sys., 393 U.S. 233, 244 n.6 (1968) (Harlan, J., concurring); see also PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 407 (3d ed. 1988) [hereinafter HART & WECHSLER] (“[T]o say that the existence of the remedy of habeas corpus saved the constitutionality of the prior procedure . . . turns an ultimate safeguard of law into an excuse for violation.”).
Moreover, the Court has consistently recognized that habeas review cannot be used as a substitute for direct appeal. Professors Hart and Wechsler echoed the Supreme Court in noting that "to say that the existence of the remedy of habeas corpus saved the constitutionality of the prior procedure [in this case, the extradition hearing conducted under the auspices of the magistrate] . . . turns an ultimate safeguard of law into an excuse for its violation." In those limited instances in which the Supreme Court has permitted magistrates to make initial decisions on certain selected issues in criminal matters, it has generally not only required appeal to an Article III judge, but also litigant consent and de novo review.

The traditional argument for rejecting appellate review by an Article III tribunal is that the determination is actually nonfinal because the decision to extradite is committed to the executive branch. This argument simply ignores the reality of the situation. Although it is true that the magistrate's decision will not result in automatic rendition of the accused, it is final with respect to extraditability. Once the magistrate certifies the accused's extraditability, the case is removed entirely from judicial scrutiny and placed

45. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 75 n.28, 86 n.39 (1982) (plurality opinion). In Northern Pipeline, the Court ruled that certain final judgments of the federal bankruptcy courts (Article I courts) were beyond the constitutional authority of non-Article III tribunals. The Court attempted to develop a principled interpretation of Article III that would resolve approximately 150 years of unintelligible and more often than not contradictory analysis. The Court, unfortunately, was unsuccessful in its attempt. Although the Court held unconstitutional the jurisdiction given to non-Article III judges under the Bankruptcy Act of 1970, 28 U.S.C. § 1471 (1988), the Court remained divided in its reasoning. The decision produced at least two competing visions of Article III, neither of which commanded a clear majority. Justice Brennan, writing for the plurality, established "three narrow situations" in which Article I courts can be used: territorial courts, courts martial, and courts adjudicating so-called "public" rights. Id. at 63-70 (plurality opinion). The concurrence rejected this analytical framework. Id. at 91 (Rehnquist, J., concurring). Justice White propounded the dissenting view. He argued for a balancing test weighing the policies of Article III against "competing constitutional values and legislative responsibilities." Id. at 113 (White, J., dissenting); see also Note, Federal Magistrates and the Principles of Article III, 97 HARV. L. REV. 1947 (1984) (discussing whether the adjudication of magistrates violates Article III).

46. McNamara v. Henkel, 226 U.S. 520, 525 (1913); Ex parte Harding, 120 U.S. 782, 784 (1887); Council v. Clemmer, 165 F.2d 249, 250 (D.C. Cir. 1947). Professor Fallon has concluded that "habeas corpus, which was intended as an ultimate constitutional safeguard, is not a constitutionally adequate substitute for the right to appeal." Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 971 (1988).

47. HART & WECHSLER, supra note 44, at 407.

within executive branch purview. All other comparable nonfinal orders are nonfinal in the sense that they are subject to future executive or legislative revision.

Moreover, Article III courts generally review such nonfinal orders. In ordinary civil litigation, for example, Article III judges grant de novo review to a magistrate’s findings on potentially dispositive matters. Consequently, the defendant receives Article III protection at some point during his journey through the civil justice system. In extradition proceedings, however, the final decision to extradite is in the hands of the executive branch.

Once committed to the executive branch, the defendant is entirely subject to the political demands permeating the executive branch. This includes the particular brand of politics one braves in the international arena, such as diplomatic pressure, the need to exchange international prisoners, and other incidents influencing foreign relations. No appeal to the judiciary lies from the executive decree. Therefore, it is especially important that the defendant receive the most independent scrutiny available regarding his extraditability before being handed over to the executive branch. Unlike a criminal case, wherein the accused remains in the United States for trial, the extradition hearing is the final opportunity for the judicial branch to involve itself in the accused’s subjection to extradition proceedings and the uncertainty of a foreign criminal prosecution.

III. Magistrates and Extradition

Although Article III courts, undoubtedly, have jurisdiction to conduct extradition proceedings, this author questions whether magistrates may share that authority.

A. Magistrates and Judicial Power: The Contours of Magistrate Adjudication

Before proceeding any further along the extradition path, this Article first must take a brief excursion into the realm of judicial power. Though at one time disputed, it is now universally accepted that magistrates exercise judicial power in certain circumstances. Article III, however, restricts this exercise of judicial power in several important respects.

49. See, e.g., Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1044 (7th Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 546 (9th Cir.), cert. denied, 469 U.S. 824 (1984).
The constitutional scope of a magistrate's jurisdiction and role within the judicial system has been the subject of continuing controversy. Although the Constitution makes no provision for their existence, magistrates have long been viewed as an important appendage to the judiciary.50 With a recognition of the private interests that inure in Article III, however, courts have questioned the authority of magistrates to render binding judgments.

As a consequence, courts have long sought to determine the proper role of magistrates within the federal judicial system. Proceeding from the statutory language of the Federal Magistrates Act,51 courts have labored to discern the parameters and contours of magistrate authority under Article III. In placing limits on the authority that can be delegated to magistrates, the courts have concluded that in dispositive judicial proceedings, Article III and the Fifth Amendment establish rights for litigants to have their cases heard and decided by Article III, as opposed to Article I, judges.

This article undertakes the task of weaving together recent decisions clarifying the parameters of magistrate jurisdiction. Those decisions, when read together, create a particular vision of the bounds within which a magistrate may exercise judicial power. Their overarching conclusion is that when important interests are at stake, and the nature of the judicial proceeding has a significant effect upon the rights and liberties of the accused, magistrates (or other non-Article III adjudicators) may preside in only two narrowly defined situations: (1) when specially appointed subject to ongoing supervision by Article III judges and (2) after obtaining the litigants' consent.

1. Necessity of On-Going Control and Supervision

The Supreme Court has held that a non-Article III official may preside when fulfilling a role "subject to the district judge's ongoing supervision and final decision."52 In this respect, the magistrate performs a limited advisory role in assisting the district court,53 and full de novo review ensures

53. Id.
that "the ultimate decision making authority . . . remain[s] with the district court."54

Gomez v. United States55 illustrates this principle. In Gomez, a unanimous Supreme Court held that the task of conducting voir dire examination and presiding at jury selection in a felony trial requires an Article III presence. Pursuant to local court rules, the district court judge in Gomez assigned a magistrate to direct jury voir dire. The magistrate subsequently conducted the voir dire examination and presided at jury selection for petitioners' trial on multiple felony counts.56 Petitioners contested the magistrate's appointment, but the district court judge overruled the objection. Sensitive to potential challenges, however, the judge explicitly offered to review any of the magistrate's rulings de novo. Despite this offer, the petitioners failed to challenge the selection of any specific juror. The trial proceeded and the jury convicted the petitioners. It was not until well after conviction that petitioners challenged the authority of the magistrate to supervise jury selection. Even then, however, petitioners made no specific claim of prejudice, nor did they allege that the magistrate failed properly to discharge his duties. On appeal, the Second Circuit affirmed their convictions, observing that such a delegation violated neither Article III nor the Due Process Clause of the Fifth Amendment.57 The petitioners then sought a writ of certiorari from the Supreme Court.

The Court granted the writ, and after reviewing petitioners' claim, noted that "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice."58 Although the Court specifically avoided the constitutional implications of permitting a magistrate to preside over jury selection in a felony criminal trial,59 it concluded that the right to have an Article III judge preside in such a consequential proceeding was so "basic [to] fair trial rights" that the harmless error doctrine could not apply.60 Citing the dis-

54. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 (1982) (plurality opinion). In proceedings wherein Article I officers are permitted to preside, the Supreme Court has ruled that, to the extent a district court permits magistrates to rule on pretrial matters or to conduct evidentiary hearings, 28 U.S.C. § 636(b)(1) specifies that all their actions are subject to de novo review by a district court. See Gomez, 490 U.S. at 874 n.27, 876 n.29.
56. Id. at 859.
58. Gomez, 490 U.S. at 873 (citations omitted).
59. The Court explained that "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Id. at 864.
60. Id. at 876.
strict judge’s lack of control over the magistrate’s determination, the Court reasoned that the Act did not empower magistrates to superintend jury selection in felony criminal cases.\textsuperscript{61}

This lack of ongoing control is the linchpin of the Court’s decision in \textit{Gomez}. Once counsel had completed the selection of the jury before the magistrate, the district court could exercise no further supervision. After the jury was empaneled, it became difficult for the reviewing court to repair possible error committed by the presiding magistrate. Consequently, the magistrate became the final arbiter of the jury selection process. The Supreme Court found this situation intolerable and refused to interpret the Federal Magistrates Act to permit magistrates to preside at jury selection.

This exploration of the foundation of a magistrate’s authority grew out of \textit{United States v. Raddatz},\textsuperscript{62} wherein a Supreme Court plurality decision upheld a magistrate’s submission to a district court judge of proposed findings and recommendations on a motion to suppress.\textsuperscript{63} In \textit{Raddatz}, the disputed statute provided that “[a] judge of the court shall make a de novo determination of . . . proposed . . . recommendations to which objection is made.”\textsuperscript{64} Petitioners challenged the statutory authority of the magistrate to make such recommendations to a district judge on a suppression motion. Relying heavily upon the legislative history of the Act, the Supreme Court rejected the petitioners’ assertion and concluded that the statute required no de novo hearing, simply a de novo determination. The Court thus held that although the district court could authorize the magistrate to submit recommendations on the motion, it was required to make a de novo determination on whether to grant the motion.\textsuperscript{65}

In upholding the magistrate’s ability to make proposed findings and recommendations, the Court emphasized that the entire proceeding “took] place under the district court’s total control and jurisdiction.”\textsuperscript{66} The statutory scheme at issue gave the district court “plenary discretion” to decide whether to authorize a magistrate hearing and automatically subjected the magistrate’s findings to de novo review by the district court. Accordingly, the Court concluded that the “delegation does not violate Art. III so long

\begin{itemize}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} 447 U.S. 667 (1980).
\item \textsuperscript{63} \textit{Id.} at 681.
\item \textsuperscript{64} 28 U.S.C. § 636(b)(1) (1988).
\item \textsuperscript{65} \textit{Raddatz}, 447 U.S. at 681-82.
\item \textsuperscript{66} \textit{Id.} at 681; cf. \textit{Home Ins. Co. v. Cooper \& Cooper, Ltd.}, 889 F.2d 746, 749 (7th Cir. 1989) (“bankruptcy judges make not decisions but recommendations to the district judge.”). The Court in \textit{Raddatz} further observed that the district judge could, if troubled by credibility determinations made by the magistrate during the suppression hearing, rehear any of the witnesses. \textit{Raddatz}, 447 U.S. at 681 n.7.
\end{itemize}
as the ultimate decision is made by the district court." The underlying principle the Court articulated is that in matters of significance, a magistrate should exercise judicial power only insofar as an Article III tribunal retains final decisionmaking authority. The common denominator underlying each of these cases is that the district judge, upon permitting the magistrate to exercise judicial power, retains "oversight . . . of the individual magistrates' [sic] handling of each case."  

In contrast, oversight is sorely lacking in an extradition proceeding. Once the magistrate has concluded the extradition hearing, the district court's role is limited. The court possesses only perfunctory habeas corpus review and is unable to address the merits of the magistrate's determination. In a domestic criminal case, a magistrate may decide whether probable cause exists to make an arrest, and the accused will ultimately be tried before an Article III judge and will enjoy the protections conferred by the Constitution and Bill of Rights. In an extradition proceeding, however, once probable cause is found, the magistrate binds the extraditee over to the State Department. The judiciary has no ongoing role in the extradition proceeding. An Article III tribunal, then, no longer renders the ultimate decision.

Even more significantly, the accused may be extradited to a foreign jurisdiction to face trial in a system that furnishes few, if any, of the protections enjoyed by a criminal defendant in the United States. It is therefore erroneous to compare an extradition hearing to an ordinary domestic preliminary criminal proceeding. Like the finality that comes with the selection of a jury, once the extradition hearing is complete, the judiciary's oversight of the procedures involving the extraditee ends.

2. Authorization and Consent

The second category of cases in which the Court has determined that magistrates may preside is in misdemeanor offenses and civil matters. Under these circumstances, a magistrate may preside only upon the special

67. Raddatz, 447 U.S. at 683.
69. While trial before a magistrate may occur, the magistrate must be appointed by the district court, is subject to the consent of the litigants, and may face de novo review of the decision.
70. [A] preliminary criminal hearing is truly preliminary, to be followed by other careful judicial steps which are designed to safeguard the substantive and procedural rights of the accused. But, if the right of appeal were denied, a valid extradition hearing would be the last and only such judicial proceeding available in this country. Habeas corpus proceedings provide little assistance in this regard. . . .

designation of the district court and, correspondingly, with the express consent of the parties.\textsuperscript{71} Even if the parties consent to magistrate adjudication, however, the district court may, sua sponte, remove the proceeding from the magistrate and order trial to proceed in district court.\textsuperscript{72} In contrast, the parties involved in an extradition proceeding are powerless to refuse to participate in a magistrate hearing.

Consent is the linchpin of magistrate adjudication. The Supreme Court, in preserving the magistrate's role, declared that, absent consent, trial of a civil case before a magistrate would constitute a per se violation of Article III.\textsuperscript{73} And in a Ninth Circuit en banc opinion, Judge Kennedy observed that "[a] mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants."\textsuperscript{74}

Mirroring this observation, the Seventh Circuit in \textit{Olympia Hotels Corp. v. Johnson Wax Development Corp.}\textsuperscript{75} held that the Federal Magistrates Act does not empower magistrates to preside without consent at voir dire in civil cases, and suggested that the statute might violate Article III if so construed.\textsuperscript{76} The court of appeals explained that parties "cannot be forced to try a dispute that is subject to federal jurisdiction only by virtue of Article III before a judge who is not authorized to exercise the power conferred by that article."\textsuperscript{77} Although the court avoided the constitutional questions

\textsuperscript{72} 18 U.S.C. § 3401(f).
\textsuperscript{74} Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 542 (9th Cir. 1984) (en banc), \textit{cert. denied}, 469 U.S. 824 (1985). In Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir.), \textit{withdrawn and reh'g granted}, 718 F.2d 971 (9th Cir. 1983), \textit{rev'd}, 725 F.2d 537 (9th Cir. 1984) (en banc), a panel of the Ninth Circuit decided that \textit{Northern Pipeline} was dispositive and that a civil trial conducted by a magistrate was unconstitutional. Upon reconsideration, the Ninth Circuit sitting en banc withdrew this panel decision and reversed the holding. \textit{Pacemaker}, 725 F.2d at 547. The new majority concluded that careful district court supervision of the magistrate trial and the requirement of litigant consent overcame constitutional objections. \textit{Id.} at 544-46. The Ninth Circuit's en banc decision closely resembles those of the First, Second, and Third Circuits, all of which have upheld the constitutionality of magistrate civil trials on the grounds of close district court supervision, which preserves the interests of Article III, and litigant consent, which protects the due process rights of the parties. \textit{See} Collins v. Foreman, 729 F.2d 108 (2d Cir.), \textit{cert. denied}, 469 U.S. 870 (1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), \textit{cert. denied}, 469 U.S. 852 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).
\textsuperscript{75} 908 F.2d 1363 (7th Cir. 1990).
\textsuperscript{76} \textit{Id.} at 1368-69.
\textsuperscript{77} \textit{Id.} (citations omitted).
present, it did suggest that such a crucial stage of trial should receive the protections afforded by Article III judges. 78

Consent is the principle implicated in each of these cases. 79 Although mandatory civil trial by a magistrate would violate the litigant’s constitutional rights, a consensual agreement between the parties to have their case tried before a magistrate would not. 80 This understanding compares favorably to the Court’s treatment of waiver in obtaining criminal confessions. The accused has an absolute right to remain silent, 81 but with his express, voluntary consent, he may waive that right. 82 Whether in the area of civil trial or criminal confession, voluntary consent is a necessary predicate to lawful waiver. Absent consent, the accused’s rights are deemed threatened.

Consent, however, is not a factor in deciding whether a magistrate will preside in an extradition hearing. Extradition hearings, therefore, do not fall within the second category of cases in which the Court has permitted magistrates to preside.

B. Whether Extradition Proceedings Partake of Judicial Power

Part of the refusal to permit potential extraditees Article III adjudication or review is based upon a refusal to recognize that magistrates, when conducting extradition proceedings, exercise judicial power.

1. Defining Judicial Power

Article III defines the contours of the federal judiciary. It grants certain powers to the judiciary and specifies the manner in which those powers may

78. Id. at 1368. In United States v. Lake, 910 F.2d 414, 417 (7th Cir. 1990), the Seventh Circuit held that if the parties gave their consent, a magistrate could conduct voir dire. Id. at 416. Once again, consent is important. The parties may not be forced to use a magistrate against their wishes. Additionally, in Clark v. Poulton, 914 F.2d 1426, 1428 (10th Cir. 1990), the Tenth Circuit held that magistrates lack jurisdiction to conduct an evidentiary hearing and make recommended findings (absent consent) in a suit under 28 U.S.C. § 636 (1988). Although neither of these cases represents magistratical orders in extradition hearings, each involves functions similar to those a magistrate performs in conducting an evidentiary hearing. In each of these cases, magistrates may not proceed without the express consent of the parties—and even if consent is given, the magistrate’s decision is subject to de novo review by the district court.

79. 28 U.S.C. § 636(b)(1) (1988) provides that without consent, a magistrate may not: hear or decide a motion for an injunction; hear a motion for summary judgment; hear or decide a motion to dismiss an indictment; hear or decide a motion to suppress evidence in a criminal case; or hear or decide a contested motion to dismiss in a civil action. To the extent § 636 permits a magistrate to rule on pretrial matters or to conduct evidentiary hearings, § 636(b)(1) specifies that these actions are subject to de novo review by a district court.

80. Consent, however, is problematic in that it preserves only one component of the Article III and due process interests implicated in an extradition proceeding.

81. U.S. Const. amend. V.

be exercised. The text of Article III informs as to what cases the judicial power should be extended, but nowhere does it define the concept of judicial power itself. Although Article III purports to establish a discrete category of governmental power, a power distinct from the legislative or executive powers, it provides no understanding of the nature of the power federal courts are to wield.

Judicial power is derived principally from the Constitution, federal statutes, and those inherent (a slippery term) powers that any judiciary possesses. In expounding on the troublesome term “judicial power,” Justice Frankfurter wrote:

In endowing this Court with “judicial Power” the Constitution presupposed an historic content for that phrase and relied on [an] assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . . Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted “Cases” or “Controversies.”

The Supreme Court has explained that “judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”

This definition is inadequate. It fails to proffer a substantive exegesis enabling us to conclude definitively whether a tribunal exercises judicial power when conducting a specific proceeding. Indeed, for all that has been said of, and written about, judicial power, finding a concrete definition of the term remains elusive.

In light of the amorphous definition of the term, one scholar has observed that “the judicial power is one of which, as St. Augustine wrote of time, If you ask not what it is, I know; but if you ask, then I know not.” Accordingly, it is more constructive for us to determine what is not judicial power and, conversely, to learn whether the power we are considering is more or less like something that we universally recognize as judicial

power. In this context, this article will endeavor to address the arguments advanced against interpreting the power exercised in extradition proceedings as judicial power.

2. Objections

a) The "Advisory Opinion" Objection

The first significant objection to the treatment of the extradition hearing as an exercise in judicial power is that the extradition hearing is akin to an advisory opinion.

The constitutional case or controversy requirement prohibits Article III courts from deciding "abstract, hypothetical or contingent questions." The Supreme Court has declared that no Article III tribunal will "give opinions in the nature of advice concerning legislative [or executive] action." The federal courts, for example, may overturn a particular law setting regulatory recovery rates as confiscatory, but they are without authority to prescribe rates "because it is not [a function] within the judicial power conferred upon them by the Constitution." The general prohibition on advisory opinions traces its origin from the Supreme Court's refusal to advise President George Washington on questions relating to the neutral status of the United States in the European War of 1793. The Court similarly rebuffed Congress's attempts to obtain extrajudicial advice on pension applications.

The Court's view of the separation of powers doctrine laid the groundwork for those early refusals to grant advisory opinions. By rendering an advisory opinion, the Court explained, it would be encroaching upon the

86. It is well established in modern precedent that magistrates do exercise judicial power by delegation. For example, magistrates exercise the powers of district court judges during civil or criminal trials at which they preside. 28 U.S.C. § 636(c) (1988). A magistrate's decision is a final decision of the district court. See, e.g., Sinclair v. Wainwright, 814 F.2d 1516, 1519 (11th Cir. 1987); Gairola v. Virginia Dept. of Gen. Servs., 753 F.2d 1281, 1284-85 (4th Cir. 1985); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1044 (7th Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 922, 927-30 (3d Cir. 1983). A magistrate's decision may bind future litigants as precedent. Geras, 742 F.2d at 1051. Note that nothing in the Federal Magistrates Act prevents magistrates' decisions from being used as precedent. The question I wish to address is not whether magistrates exercise judicial power in general, but the more particularized question of whether they exercise it when conducting an extradition hearing.


91. Hayburn's Case, 2 U.S. 8, 9 n.1, 2 Dall. 409, 410 n.1 (1792).
other branches' authority and would be compromising its own power should the case upon which advice was given ever ascend to the Court for review. More recent cases, however, have justified the proscription on advisory opinions as an understanding of the judicial function. In United States v. Fruehauf,92 for example, the Supreme Court refused to provide what it deemed to be an advisory opinion in a matter of statutory construction, concluding that:

Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give.93

The Court's reasoning here is related first to the concreteness of the case and second to the adversarial process that tends to give form and substance to otherwise hypothetical arguments.

Extradition cases, however, fulfill each of these criteria. In conducting an extradition hearing, the presiding judicial authority has an actual party posing a genuine case. Attorneys on each side of the dispute advance arguments for their respective clients. Indeed, nothing is left to the imagination or for hypothetical argument. The presence of counsel serves to present the issues clearly and crisply, thereby avoiding the unfocused or vague problems advisory opinions present.

Moreover, it is now a matter of settled law that parties may obtain congressionally authorized declaratory judgments94 in federal court, provided the case meets other justiciability requirements. "Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged," the Court has acknowledged that "the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."95 This is exactly what the extradition hearing endeavors to do: to provide an immediate and definite determination of the legal rights of the extraditee (and the rights of a foreign state against an extraditee). The advisory opinion objection is thus without merit.

93. Id. at 157.
b) The Lack of Finality Objection

The second issue taken with extradition hearings involves finality. It is argued that the extradition hearing is not final because the executive retains the ultimate authority to surrender the accused to the demanding nation. In conducting the extradition hearing, then, the magistrate does not exercise judicial power. This argument reflects a misunderstanding of the nature of the extradition hearing.

Black's Law Dictionary defines judicial power as the "power to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before [court] for decision" and says it is a "[p]ower that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes and applies the law."96 Courts often make a distinction between judicial power and judicial process. The exercise of judicial power enjoys finality, the argument goes, while the judicial process is simply a means used to arrive at a judgment or a conclusion.

A key component of finality is that "[i]t is also employed . . . in reference to judicial action not subject to subsequent revisory executive or legis- lative action."97 While it is true that courts do not deliver the accused to the demanding jurisdiction, the extradition hearing is a final determination in two respects. First, it is final with respect to the United States government. In other words, the determination made at the end of the hearing is not subject to further modification by the legislative or executive branch. Once a magistrate certifies the accused as extraditable, Congress cannot reverse, or otherwise modify, the decision.98

The executive branch cannot revise the magistrate's decision either. If the magistrate determines that the accused should be released because the facts alleged by the demanding government do not warrant extradition, the accused is released.99 The executive may not, upon a contrary determina-
tion by the magistrate, surrender the accused to the foreign government. The decision not to certify extraditability is therefore binding upon the executive.100

The fact that a positive determination certifying the accused as extraditable will not result in automatic extradition does not necessarily mitigate against the finality of the judicial officer's decision. The executive may choose to act on the officer's decision and deliver the accused to the demanding nation or it may elect to refuse the extradition request. This does not affect the magistrate's determination and differs little from a presidential decision to pardon one convicted of a crime. Although the pardon nullifies the conviction, the judicial determination is not without substance and finality. In like manner, although the President may refuse to extradite the accused, the judicial determination of extraditability remains unaffected, and the President may always decide to surrender the accused at a later date. Similarly, the executive may choose to cease prosecution in a criminal case, but this does not make the judicial determination of probable cause merely advisory.

It is also final with respect to the judiciary. The only decision made by an Article III judge is whether to refer a particular case to a magistrate.101 After delegation, the judge's role becomes entirely passive, limited to an exercise of habeas review. Once this decision is made, the accused citizen is stripped of a number of significant rights, most notably the right to remain in this country, and his case is removed from further review or supervision by the American judiciary.

Second, the extradition hearing is final with respect to the parties. The accused is either released or delivered into executive branch custody. To the extent that the accused forfeits his liberty or retains his freedom, it is

100. However, the requesting jurisdiction may refile the extradition request. Collins v. Loisel, 262 U.S. 426, 429 (1923). The Court's rationale in Collins was that the provision of the Fifth Amendment barring double jeopardy does not prevent a subsequent extradition request because the prohibition attaches only after trial. Id. The Court further remarked that "a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as res judicata. But the judgment is res judicata only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result." Id. at 430 (footnote omitted). The question of when res judicata comes into action remains somewhat hazy. Both the Second and Ninth Circuits have acknowledged, however, that the application of res judicata is inappropriate in extradition proceedings and the only limitation on the number of extradition requests is that each request must be based on a good faith determination that extradition is warranted. See United States v. Doherty, 786 F.2d 491, 501-02 (2d Cir. 1986); Hooker v. Klein, 573 F.2d 1360, 1366 (9th Cir.), cert. denied, 439 U.S. 932 (1978).

101. The judge's role may be even more limited if a standing order for reference of extradition hearings has been issued to a magistrate or if the local rules provide for automatic referral to a magistrate.
final. The demanding jurisdiction is likewise bound by the magistrate's decision. The foreign nation may refile an extradition request, but as to the original determination, there is nothing more the country seeking extradition can do.

**c) The Authority Exercising Judicial Power**

Early judicial decisions made a distinction modern jurists have abandoned: defining judicial power in terms of the authority exercising it. In *In re Metzger*, the Supreme Court was asked to review an extradition request. In declining to take jurisdiction, the Court termed the power exercised by the district court in conducting an extradition hearing a special authority. The Court never denied that the authority was an exercise of judicial power; rather, the Court merely determined that it was a special authority over which the Court could exercise neither jurisdiction nor review. Specifically, the Court explained that because the power exercised was not part of the Court's original jurisdiction, nor did a statute provide for its appellate jurisdiction, no appeal could lie.

It was not until 1852, in *In re Kaine*, that the Court formally declared that the power exercised by a commissioner presiding at an extradition hearing was not, in fact, a judicial power as conferred by the Constitution. The Court, however, advanced only two rather tenuous grounds for this assertion—grounds that simply do not withstand careful analysis.

First, the Court asserted that "strictly speaking, he [the commissioner] does not exercise any part of the judicial power of the United States." Why does the commissioner exercise no judicial power? The Court answered by explaining that "[the judicial] 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." Accord-

102. 46 U.S. 348, 5 How. 176 (1847).

This would seem to be a very clear declaration that the judicial power, as defined in the following section of Article III, can only be conferred on courts where the judges enjoy tenure for good behavior, and assurance against diminution of salary, protections that the Framers, and all succeeding generations, have thought of vital importance in preserving judicial independence. . . . The historical development, however, has been much more complicated than these seemingly obvious propositions would suggest.

*Id.* (footnote omitted). Professor Wright concludes that from the early nineteenth century to the present, the state of the law has been conflicting and contradictory. *Id.*

104. *Id.* (citing U.S. CONST. art. III, § 1) (emphasis added).
105. 55 U.S. 14, 14 How. 103 (1852).
106. *Kaine*, 55 U.S. at 76, 14 How. at 120.
107. *Id.* (citing U.S. CONST. art. III, § 1) (emphasis added).
ing to the Court’s reasoning, because the commissioner was not an Article III judge, he simply could not exercise a power that was judicial. Thus, the Court’s first assertion is grounded in a faulty definition of judicial power, a definition that would lead one to conclude that if an Article III judge exercises the power, it is by definition judicial, but if a non-Article III judge exercises the power, it is not judicial. To accept this definition of judicial power would be to accept, by implication, that when magistrates try a civil jury case or a misdemeanor criminal charge, they do not exercise judicial power.

The modern conception of judicial power rejects the rigid position of In re Kaine and holds that a magistrate shares judicial power, exercising it by delegation, subject to the control of the district court. Accordingly, the first reason asserted by the Court proves inadequate.

For its second ground, the Court relies on its earlier decision in United States v. Ferreira. The Kaine Court cites the following language from Ferreira to conclude that the magistrate exercises no judicial power:

108. Congress has empowered magistrates to preside at and enter final judgments in civil trials, including those tried before a jury. See 28 U.S.C. § 636(c) (1988).

109. Congress has also authorized magistrates to try misdemeanor criminal cases either as a bench trial or before a jury. 18 U.S.C. § 3401(b) (1988).

110. Indeed, the magistrate’s trial jurisdiction can be exercised only upon special designation of the district court, and it is subject to judicial review. 28 U.S.C. § 636(c)(1), 18 U.S.C. § 3401(a) (1988). Moreover, “[d]efendants charged with misdemeanors can refuse to consent to a magistrate and thus effect the same removal.” S. REP. No. 74, 96th Cong., 1st Sess. 7 (1979), reprinted in 1979 U.S.C.C.A.N. 1479.


In Palmore v. United States, 411 U.S. 389 (1973), the Supreme Court upheld the appointment of Article I judges for the District of Columbia court system. This case is quite different from magistrate adjudication. “The District of Columbia is constitutionally distinct.” Id. at 395. Because of its status as a unique federal enclave, Articles I and IV grant Congress “plenary” authority that encompasses legislative, executive, and judicial power, thus enabling Congress to create the District judiciary without reference to Article III. Id. at 407-08. Moreover, there is a considerable difference in both the appointment procedure and tenure between a judge of the District court system and a magistrate. Compare D.C. CODE ANN. §§ 11-1502, 11-1521 to 11-1527 (1981) with 28 U.S.C. § 631 (1988). D.C. judges are treated much the same as state judges, who also have no Article III protection. The district courts also enjoy direct appellate review by an Article III court available on certiorari. 28 U.S.C. § 1257(a) (1988).

111. 54 U.S. 373, 13 How. 40 (1851).
The powers conferred by Congress upon the Judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is not judicial, in either case, in the sense in which judicial power is granted by the Constitution to the Courts of the United States.\footnote{112}

The Kaine Court, however, omits from its quotation of Ferreira two important sentences that shed some illumination on the Ferreira decision. Situated between the sentences "[f]or judgment and discretion . . . by both of them," and "[b]ut it is not judicial . . . of the United States," are two sentences in Ferreira that read: "But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned"; and "[a] power of this description may constitutionally be conferred on a secretary as well as on a commissioner."\footnote{113}

Of what power is the Ferreira Court speaking? To understand, one must be familiar with the facts before the Court in Ferreira. There, the Court had before it the Treaty of 1819 by which Spain ceded Florida to the United States. The Treaty provided that: "The United States [shall] cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."\footnote{114} The provision was adopted to enable Spanish citizens to receive reparations made necessary by damages inflicted by the United States Army. Pursuant to the injunction to cause satisfaction to be made, Congress enacted a statute to carry into execution this article of the Treaty. The process of law accorded Spanish citizens was that judges of the superior courts would receive and adjust all claims reported to them:

In all cases where the judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged.\footnote{115}


114. Id. at 373, 13 How. at 45 (citing Treaty with Spain Feb. 22, 1819, U.S.-Spain, art. IV, 8 Stat. 252 (1819)).

115. Id. (quoting ch. 35, § 2 Stat. 768 (1823)).}
The Secretary of State, however, if not "satisfied that the same is joint and equitable," could revise the superior court judge's decision.

With Florida's admission to the Union in 1849, federal district judges replaced the former territorial officers (superior court judges). After this change, Ferreira presented his claim to a district court, which subsequently ruled in his favor. The United States Attorney appealed the court's ruling, and the Supreme Court took up the question of whether it had jurisdiction to decide the case.

Relying upon the Act's legislative purpose, the Court concluded that Congress had not intended to invest the claim tribunals with judicial power; therefore, although a district court judge inherited the authority to make the determination, he inherited "the same duty that had been conferred and imposed on the territorial judges before Florida became a state." In particular, the court could not claim "absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal." The essence of the Court's decision, therefore, was that the judge exercised no judicial power because his decision "was subject to the revision of a Secretary and of Congress." In other words, because the executive and legislative branches wielded absolute authority to amend or to overturn the judicial determination, the court's decision was not final and, consequently, could not be an exercise of judicial power. Like the power given to a claims commissioner, the power granted here was subject to revision by the legislative or executive departments.

This returns us full circle to our earlier discussion of the finality of the extradition proceeding. Unlike the adjustment and settlement of the claims of an alien, extradition apprehends the liberty interests of an American citizen. The judicial determination in an extradition proceeding is not subject to revision by the Secretary of State or Congress. Unlike an adverse decision in a claim against the government, a determination that the accused is not extraditable cannot be overturned by the executive branch no matter how much it might want to extradite the accused. Even if the President refuses to extradite the accused, his independent decision does not alter or amend the judicial determination that the accused is, in fact, extraditable. The executive cannot deny the certificate of extraditability; rather, he can

116. Id.
117. Id. at 377, 13 How. at 49.
118. Id. at 376, 13 How. at 48.
119. Id. at 379, 13 How. at 50.
simply refuse to surrender an otherwise extraditable individual to a demanding jurisdiction. Accordingly, the decision of the district court acting as a claims adviser is inapposite to the court deciding whether an accused is extraditable.

\[d\) Lack of a Case\]

Some courts have regarded extradition hearings as little more than administrative proceedings because they precede the formal introduction of criminal proceedings within the demanding jurisdiction. These courts consider an extradition hearing, then, as simply a part of the process the executive uses in deciding if he will surrender the accused.

John Marshall made precisely this argument when defending John Adams's handling of the Robbins affair. Essentially, Marshall, then a Congressman, attempted to prove that Robbins's extradition fell outside the scope of Article III. To support his argument, Marshall observed that Article III power extends to "all cases in law and equity" arising under the various constitutionally recognized sources of law.\[^{120}\] Marshall then asserted that extradition does not constitute a "case," but instead is merely an administrative procedure similar to the binding over of the accused for domestic trial.

Marshall asserted that "a case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken shape for judicial decision. . . . [T]o come within this description, a question must assume a legal form for forensic litigation and judicial decision."\[^{121}\]

Marshall's own choice of words, however, reveals a flaw in his argument. He defines the term "case" as a "controversy." The Constitution, however, makes a distinction in Article III, Section 2, extending the federal judicial power to "all Cases" and to "Controversies," specifically those occurring "between a State, or the Citizens thereof, and foreign States" and to "Controversies to which the United States shall be a Party."\[^{122}\] Thus, this binding over to face trial in a foreign land is not the equivalent of holding someone for domestic trial. It is a controversy between a citizen of this nation and a foreign state. To controversies of this type, the judicial power must extend. Unlike the domestic probable cause determination, which will result in trial in this nation, pursuant to the protections and guarantees of the Constitution and Bill of Rights, the extradition hearing will result in

\[^{120}\] 10 ANNALS OF CONG. 606 (1800).
\[^{121}\] Id.
\[^{122}\] U.S. CONST. art. III, § 2.
possible removal of a citizen to face trial in a foreign land. This is no mere administrative proceeding as Marshall attempted to argue; it necessitates the exercise of judicial power.

IV. A CONSTITUTIONAL ANALYSIS OF EXTRADITION PROCEEDINGS

Thus far, this author has examined the conditions under which magistrates may exercise judicial power and has argued that extradition proceedings involve the exercise of judicial power. At this point, it would do well to examine the constitutional interests affected by extradition.

Although the Constitution and Bill of Rights provide no absolute, textual protection from extradition, it is the contention of this Article that certain constitutional requirements must be satisfied before the accused can be removed from the United States. The Supreme Court and various courts of appeals have uniformly determined that Article III and the protections embodied in the Fifth Amendment establish rights for individuals in significant judicial proceedings to have their cases heard and decided by judges enjoying Article III privileges. The following discussion will help ascertain whether the accused has any claim upon adjudication by Article III courts.

A. Article III Requirements

Article III, Section 1 of the Constitution provides that the "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." It further provides that such courts shall be staffed by judges holding office during "good behavior" (life tenure for most), and whose compensation shall not be diminished during their tenure in office. The independence of the federal judiciary has long been considered a corner-

124. The "good behavior" terminology was adopted from the various state constitutions. "Upon the whole, there can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration." THE FEDERALIST No. 78, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
For this reason, Article III judges, and only Article III judges, should be permitted to conduct extradition proceedings.\textsuperscript{126}

1. Core Article III Authority

This author contends that extradition cases rest at the core of judicial authority and as such implicate Article III interests. Of foremost concern is the fact that the extradition hearing will result in the deprivation of the accused's liberty. Once the magistrate certifies the accused as extraditable, the accused no longer retains his freedom. As risk of flight is a valid consideration in extradition cases, courts seldom grant bail. The accused therefore faces incarceration until the executive decides whether to surrender him to the demanding jurisdiction. Once extradited, the accused will be imprisoned, arraigned, and tried for criminal charges.

The Supreme Court has recognized that:

[w]hat clearly remains subject to Art. III are . . . all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III [b]ranch, these matters lay at what they perceived to be the protected core of that power.\textsuperscript{127}

\textsuperscript{125} Alexander Hamilton remarked that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution" and further agreed with the celebrated Montesquieu that "there is no liberty if the power of judging be not separated from the legislative and executive powers." \textit{The Federalist} No. 78 at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting CHARLES MONTEESQUIEU, SPIRIT OF LAWS 4 (1768) (discussing the necessity of the independent judiciary in the protection against despotism)). James Wilson, speaking in the Pennsylvania Convention observed: "To secure to the judges this independence [from the legislature], it is ordered that they shall receive for their services a compensation which shall not be diminished during their continuance in office." \textit{The Federalist} No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{126} It has been an unfortunate occurrence that the federal judiciary has refused to take a plain meaning (or absolutist) view of Article III. Many of the legal contortions exhibited by courts in construing Article III could be eliminated if the Supreme Court read Article III for what it means. The author's personal view, though certainly subject to modification provided the appropriate arguments are set forth, is that no "judicial appendage," such as an Article I judge or magistrate, should exercise Article III judicial power without the requisite Article III protections bestowed upon federal judges. For a contrasting view, see Fallon, \textit{supra} note 46.

Consistent with this understanding, the Court has resolved that extradition proceedings involve "cases of a criminal nature." The extradition hearing, then, is properly considered as touching upon "criminal" matters. The hearing is the first step, if you will, in the accused's journey through a foreign criminal prosecution.

2. The Article III Interest Explored

Surprisingly, the Supreme Court has encountered rough going in interpreting its Article of creation. Like the creation attempting to apprehend its creator, the Court has conceded that Article III jurisprudence is an area in which "[our precedents] do not admit of easy synthesis." An analysis of the Supreme Court's tangled Article III jurisprudence reveals two primary interests. Reflecting on the judiciary's role in preserving liberty, the Court has determined that Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.'" Building upon this bifurcation of Article III interests, the Court in Commodity Futures Trading Commission v. Schor adopted a balancing test for determining the constitutionality of non-Article III adjudication. First, relying upon the framework originally suggested by Justice White's


129. Northern Pipeline, 458 U.S. at 91. The "frequently arcane distinctions and confusing precedents" of cases involving Article III courts led Justice Rehnquist to analogize the law in this area to "a judicial 'darkling plain' where ignorant armies have clashed by night." Id. at 90-91 (Rehnquist, J., concurring). This allusion to Matthew Arnold's poem Dover Beach suggests the Court's confusion regarding the limits on Article III in general and on federal magistrates' exercise of judicial power in particular.


131. Schor, 478 U.S. 833 (1986). In Schor, the Court addressed the question of whether the Commodity Futures Trading Commission (CFTC) could adjudicate common law reparations claims. Congress vested the CFTC with, among other things, the administration of reparations procedures by which the customers of professional commodities brokers could seek redress for their brokers' violation of the Commodity Exchange Act or CFTC regulations adopted pursuant to the Act. Schor averred that Article III prevented Congress from delegating the initial adjudication of such claims to the CFTC, whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III. Id. at 847. The Supreme Court, however, determined that because the agency exercised only limited jurisdiction and the parties expressly waived their claim to adjudication by an Article III court, the agency's adjudication of claims was not violative of Article III. Id. at 857.
Northern Pipeline dissent, the Court established that Article III protects a structural interest, which serves as a constitutional barrier to encroachment upon "the constitutionally assigned role of the federal judiciary." Second, in United States v. Will, the Court identified a personal Article III interest that preserves to litigants the "right to have claims decided by judges who are free from potential domination by other branches of government."

The structural interest requires that certain proceedings be conducted only by tribunals exercising "[t]he judicial power of the United States," while the personal interest demands that the power be exercised by courts having the attributes described in Article III. Each of these interests merits protection, and neither can be ignored, or sacrificed for the benefit of the other, when deciding an Article III claim.

The Court has clarified that whenever a given case implicates either of these interests, resolution of the Article III claim "cannot turn on conclusory reference to the language of Article III." Instead, the reviewing court must assess each such claim "by reference to the purposes underlying the requirements of Article III." This assessment "in turn is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"
The Court's refusal to espouse a more formalized, rational means of assessing Article III claims requires that courts engage in an ad hoc balancing exercise to determine the validity of such claims.

---

132. Justice White advocated that Article III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities." Northern Pipeline, 458 U.S. at 113 (White, J., dissenting).
133. Schor, 478 U.S. at 851.
135. Id. at 218.
136. Northern Pipeline, 458 U.S. at 59.
137. Id. Those attributes of which the Court speaks are generally recognized as including presidential nomination, Senate confirmation, life tenure, and protection from diminution of compensation. Id. at 59-60. The Framers recognized these precautions as necessary to ensure the judiciary's existence as an independent, co-equal branch of government. Id. at 60 n.1.
138. Schor, 478 U.S. at 847. Indeed, because the protections afforded by Article III are so central to American jurisprudence, in United States v. Martinez-Torres, 912 F.2d 1552 (1st Cir. 1990) (en banc), vacated, 944 F.2d 51 (1st Cir. 1991), the First Circuit held that because magistrates lack jurisdiction to preside at voir dire in criminal cases, reversal is required even if no contemporaneous objection was made. Thus, the right to Article III protection may be preserved even without formal objection by counsel. Id. at 1555-56.
139. Schor, 478 U.S. at 847.
140. Id. at 847-48 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985)).
The discussion that follows will analyze the interplay between Article III requirements and the authority of a magistrate to preside at an extradition hearing in terms of the structural and personal interest framework. The Schor balancing test thus may be applied to determine the constitutionality of the delegation of extradition authority to magistrates.

3. The Structural Article III Interest

With respect to the structural interest, Article III, Section 1 serves to protect "the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."141 In determining whether a particular delegation of Article III power to a non-Article III tribunal "impermissibly threatens the institutional integrity of the Judicial Branch," the Court "has declined to adopt formalistic and unbending rules."142 Instead, the Court has designed to explore the following factors:

[1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to depart from the requirements of Article III.143

In upholding the administrative jurisdiction in Schor, the Court emphasized that no single factor could be deemed determinative. Thus, Schor provides minimal guidance in determining separation of powers questions. It essentially enshrines a case-by-case determination into the law.

While the standards Schor provides are uncertain, they offer the most concrete set of balancing considerations the Court has thus far provided. With an eye toward the Schor framework, this author will attempt to analyze the extradition hearing with respect to each of these factors. By weighing the relevant factors, it should be possible to determine whether structural interests are impermissibly threatened when a magistrate conducts an extradition hearing.

141. Id. at 850 (alteration in the original) (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).
142. Id. at 851 (citation omitted).
143. Id. (citation omitted).
4. Magisterial Exercise of the Essential Attributes of Judicial Power

In deciding whether a particular judicial proceeding implicates a structural interest, the initial factor Schor cites is "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts."144

It has been asserted that because the district court need not delegate the extradition hearing to the magistrate, magistrate adjudication implicates no structural interest. The emasculation of judicial authority, it is supposed, comes when the executive or legislative departments attempt to aggrandize power at the judiciary's expense. Pursuant to this view, the structural interest is intended solely to fend off encroachments on judicial authority by the other two branches.145 But by having the district court direct the appointment and removal of magistrates, it is argued, any such separation of powers violations are thwarted. The institutional controls inuring in the district court defeat any such judicial emasculation.

There is, however, a second control factor we must assess. Magistrate adjudication may violate separation of powers concerns because the Constitution prevents Article III judges from delegating certain authority to non-Article III tribunals without retaining control over the non-Article III tribunals' decisions.146 In other words, then, the reviewing court must look to whether the magistrate exercises power that impinges upon traditional judicial authority. The court must examine the nature of the decision rendered, and, correspondingly, whether an Article III tribunal retains the last word in the proceeding. The failure of an Article III judge to retain ongoing control over the magistrate's decisions may make such a delegation impermissible.

Relying upon this control factor, the United States Court of Appeals for the District of Columbia Circuit upheld in Fields v. Washington Metropolitan Area Transit Authority147 provisions of the Federal Magistrates Act that permit magistrates, upon consent of the parties, to conduct a jury trial with the option of a direct appeal to the court of appeals. Rejecting the Article III challenge, Fields dismissed concerns that such a broad delegation of judicial power to a non-Article III tribunal amounted to a threat to the institutional integrity of the Judicial Branch. The court explained:

144. Id.
145. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," wrote Madison, is "the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
146. The Seventh Circuit has observed that "a radical shift to trial by magistrate could easily result in a finding of unconstitutionality" as the reality of judicial control over magistrate authority declines. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984).
147. 743 F.2d 890 (D.C. Cir. 1984).
The degree to which magistrates are controlled by the Article III judiciary—both institutionally through appointment and general supervision, and more particularly through oversight by the district court judge of the individual magistrates' handling of each case—avoids any violation of the separation-of-powers principles that underly the Article III protections designed to ensure an independent judiciary.148

The court focused on institutional controls and direct judicial oversight,149 particularly emphasizing the importance of the oversight by the district court.150 Given that such a broad delegation of judicial power to magistrates was found not to threaten the institutional integrity of the judiciary, it seems to follow that those same interests are not threatened when a magistrate conducts an extradition hearing. After all, the Article III judiciary's institutional controls over the magistrate are the same, regardless of whether the magistrate conducts a trial by consent of the parties or an extradition hearing without the litigants' consent.151

The difference between these cases (laying aside the problem of litigant consent for now) is revealed in terms of ongoing control. Final magistrate orders generally enjoy direct, de novo appeal to a district court. Nonfinal orders, although generally subject only to collateral attack, ultimately place the defendant in an Article III court for trial, thus affording the defendant Article III protection at some point in his case. In contrast, the district court reviewing an extradition hearing is significantly limited in the scope and manner of its review of the magistrate's decision.

No direct Article III supervision exists when a magistrate holds extradition proceedings. When conducting an extradition hearing, the magistrate must render judgment as to the extraditability of the accused. The magistrate acts after conducting a full-fledged adversarial hearing and must apply foreign law, hear and decide evidentiary motions, and ultimately make a final determination as to whether extradition is warranted. The extraditing

148. Id. at 894 (citations omitted).
149. Consent alone cannot cure the constitutional defect. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (“To the extent that this structural principal is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on the federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2.”).
150. Fields, 743 F.2d at 894; see also United States v. Raddatz, 447 U.S. 667 (1980) (requiring de novo review of magistrate's recommendation); Agosto v. INS, 436 U.S. 748, 753 (1978) (“[T]he Constitution requires that there be some provision for de novo judicial determination of claims to American citizenship in deportation proceedings.”).
151. In this regard, it is important to note that under 18 U.S.C. § 3184 (1988), a magistrate may conduct an extradition hearing only when “authorized so to do by a court of the United States.”
magistrate acts and decides independently, without direct supervision by the district court, and unencumbered by the possibility of de novo review by a higher authority. This raises serious separation of powers concerns.

The necessity of control is further reinforced by the Supreme Court's decision in *Raddatz*.

There, the Court approved of a magistrate submitting to a district judge proposed findings and recommendations on a motion to suppress. The statute at issue required the district court to make a de novo determination in order that "the district court judge *alone* acts as the ultimate decisionmaker." Explaining that the proceeding was "constantly subject to the [district] court's control," the Court concluded that the "delegation does not violate Art. III so long as the ultimate decision is made by the district court." Once again, the institutional controls were of secondary importance to the ongoing control. Although the institutional control remained the same, the decision of whether Article III was violated was determined by who had the final say.

The authority exercised by a magistrate in conducting an extradition proceeding, however, bypasses traditional aspects of continuing control in two ways. First, it is unsupervised. Second, it is largely immune from appeal. In contrast, in the limited categories of cases in which magistrates are empowered to render binding decisions, the district court specially appoints the magistrate, consent of the parties must be obtained, and the magistrate's decision is subject to direct appellate review. The extraditing magistrate enjoys greater unappealable power to act than she does sitting in a civil action, a criminal trial, or in a preliminary hearing. The exercise of this power violates the separation of powers doctrine.
While it is true that the magistrate's decision in an extradition proceeding is not dispositive in the sense that extradition is automatic once the determination has been made, it is dispositive in that it is virtually unreviewable and entirely removes the accused from the American judicial system. In analogous criminal proceedings, the accused is tried in the United States and therefore benefits from the protections afforded by the Constitution and the Bill of Rights. In contrast, once the magistrate finds that probable cause for extradition exists, the accused is bound over to the executive branch and will have no further recourse to the judiciary. The accused is therefore subject solely to the whims of the executive, and, ultimately, to whatever judicial process the foreign jurisdiction provides.

5. The Nature of the Judicial Duties Performed

The "extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"160 is the second factor to look to in making a determination.

Magistrates routinely conduct preliminary criminal proceedings. Considering this fact, one might argue that the nature of the duties performed by a magistrate conducting an extradition hearing are not vested exclusively in Article III courts.

On closer examination, however, the duties performed by a magistrate conducting an extradition hearing are neither similar to those when conducting a preliminary hearing, nor do they fall within the range of responsibilities magistrates commonly perform. An extradition hearing places special burdens upon the magistrate that reach well beyond the traditional problems any full-fledged evidentiary hearing will present. Indeed, in con-

BRA authorizes the district court, as the court of original jurisdiction, to hear the appeal from the magistrate and the court may, at its own discretion, independently review the magistrate's order and conduct any necessary evidentiary hearings or receive additional affidavits. The district court can change or amend the magisterial order as if it were amending its own order.

The BRA does not, however, specify the scope of review the district court is to accord a magistrate's determination. Although the statute is silent on the standard of review, the five circuits that have addressed the issue have uniformly held that the district court should conduct a de novo review of the magistrate's determination. See, e.g., United States v. Maull, 773 F.2d 1479 (8th Cir. 1985) (de novo review extending to district court ordering detention even if no such motion was presented to magistrate); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985) (de novo review based upon evidence presented before magistrate and any additional evidence presented before district court); United States v. Leon, 766 F.2d 77 (2d Cir. 1985) (holding that the district court should reach its own conclusions independently); United States v. Delker, 757 F.2d 1390 (3d Cir. 1985) (de novo review but within discretion of district judge to conduct evidentiary hearing).

ducting an extradition hearing, a magistrate carries out duties that Article III judges themselves seldom perform.

Pursuant to 18 U.S.C. section 3184, the magistrate must hear and consider the evidence against the foreign government's charges "under the provisions of the proper treaty or convention." Accordingly, the magistrate must interpret the extradition treaty. Treaty construction is considerably different from statutory interpretation, wherein the magistrate is likely familiar with the statute at issue and may be guided by previous interpretations.

Moreover, the magistrate may be required to rule on disputed issues of law, including state and foreign law. Magistrates are rarely called upon to construe foreign law. This necessarily includes making factual determinations pursuant to foreign law standards. The interpretation of law, particularly where that interpretation may be one of first impression, is a function normally reserved for Article III courts.

The magistrate may also be placed in the unusual position of having to decide whether the offense alleged is "political" in nature. Given the geopolitical maelstrom inevitably surrounding the decision to extradite, international events may place special pressure upon the magistrate to decide the case. Extraordinary cases of this sort, especially those in which political (both international and domestic) pressures may be brought to bear on the individual making the decision, are those vested traditionally within the jurisdiction of Article III tribunals. The Framers endowed Article III judges with life tenure expressly to free them from such political pressures.

A magistrate presiding over an extradition proceeding bears other burdens as well. The magistrate must, for example, conduct evidentiary hearings, which include the hearing of live testimony and the examination of documentary proofs, and then rule on the admissibility of evidence. The magistrate may also be called upon to issue subpoenas for documentary or testimonial evidence to third parties, who may then seek to protect, or

---

164. See, e.g., Quinn v. Robinson, 783 F.2d 776, 787-88 (9th Cir.), cert. denied, 479 U.S. 882 (1986); In re Mackin, 668 F.2d 122, 132-37 (2d Cir. 1981).
otherwise contest, privileged information.\textsuperscript{170} In addition, "[t]he credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate."\textsuperscript{171}

The Supreme Court has refused to let magistrates superintend jury voir dire or even to conduct a simple civil trial without the consent of the parties. The extradition hearing has potentially greater consequences than those of a jury voir dire or of a common civil trial; hence it is difficult, if not impossible, to conclude that Article III structural interests could allow a magistrate to hear all preliminary motions, rule on all evidentiary, factual, and legal motions, interpret and construe foreign law and international treaties, resolve any legal or factual disputes, and make all credibility determinations without direct recourse to an Article III tribunal.

6. The Importance of the Adjudicated Right

In assessing whether a structural interest is implicated under Article III, the Court also examines the origins and the significance of the right to be adjudicated.\textsuperscript{172} Judicial proceedings that affect an accused's basic rights touch structural concerns because the Framers ordained a separate judiciary with special protections in order to provide a buffer against popular oppression and elective tyranny. The Framers hoped to ensure that judges conducting such proceedings would not be swayed by external pressure. The more crucial the right, the greater the need for Article III adjudication. Commitment of an important proceeding to non-Article III adjudication would, in this fashion, defeat the very purpose for which the Framers created an independent judiciary.

The extradition hearing is the final judicial assessment of whether the accused should be turned over to the executive for extradition. The rights affected by the certificate of extradition include the individual's liberty and concurrent right to remain in the United States, as well as the right to enjoy the protection of this nation's laws and constitutional precepts.\textsuperscript{173}

\textsuperscript{171} Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir.), cert. denied, 479 U.S. 882 (1986).
\textsuperscript{173} In a concurring opinion, Judge Brown eloquently described the awesome reality of extradition:

Repeated often in the cases is the loose generality that the extradition hearing is not a judicial proceeding. It may not be when measured by the usual indicia of a formal judgment of commitment, appeal, and the like. But the very essence of 18 U.S.C.A. § 3184 is a reflection of the fundamental concept among civilized nations that there shall be a non-partisan, unbiased, objective hearing by a judicial officer acting solely because of his judi-
Confronting a state's prosecutorial forces is an awesome experience. Incarceration, public exposure, and separation from family and friends are all attendant to the commencement of criminal proceedings against the individual. Added to these regular burdens, however, are the additional burdens that arise when the accused is removed to a foreign land to face prosecution under alien law and proceedings. Likely bereft of the constitutional protections enjoyed by the criminal defendant in the United States, the accused is bound by whatever safeguards the foreign jurisdiction may, or may not grant.

The Kaine court recognized that:

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.\(^{174}\)

This observation retains continued vitality today.

**B. Congressional Intent**

The dark shroud of a nearly forgotten history veils in obscurity the "concerns that drove Congress to depart from the requirements of Article III"\(^ {175}\) in authorizing magistrates to conduct extradition proceedings. Given the antiquity of the enabling statute, it is difficult to divine the intent of Congress in permitting magistrates and state court judges to preside at extradition hearings.

---

\(^{174}\) *In re Kaine*, 55 U.S. 63, 69, 14 How. 103, 113 (1852).

\(^{175}\) *Schor*, 478 U.S. at 851.
Congress enacted the first extradition statute in 1848.\(^\text{176}\) The legislative history surrounding the statute is, unfortunately, barren. It is even inconclusive whether Congress originally intended extradition to apply to U.S. citizens or whether Congress presumed that extradition would apply exclusively to aliens who had committed crimes elsewhere and then fled to the United States for anonymity.

To assess the first extradition statute in its historical context, we must turn to events preceding its enactment. The existence of extradition as a formal judicial procedure was virtually unknown at the time the Constitution was ratified.\(^\text{177}\) Few formal extradition treaties existed and people throughout the world viewed the United States as a safe haven, as a place where one could receive asylum and then be free to begin life anew without having the threat of foreign prosecution hanging over one’s head.\(^\text{178}\) Colonial Americans, especially those having recently immigrated to this land, were keenly aware of the dangers of foreign prosecution. Perhaps for this reason, one of the complaints the insurgent colonists articulated in the Declaration of Independence against the King of England was “[f]or transporting us beyond Seas to be tried for pretended offences [sic].”\(^\text{179}\)

In 1794, the United States and Great Britain ratified the Jay Treaty,\(^\text{180}\) which settled disputes remaining from the Revolutionary War. This was

---


177. Pursuant to Section 33 of the 1789 Judiciary Act, any federal judge, or state justice of the peace or magistrate, could arrest and imprison or bail offenders, but only “for trial before [a] court of the United States” and for a “crime or offence against the United States.” See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 91 (establishment of U.S. Judicial Courts).

178. The Supreme Court recognized this in *Kaine:*

This country is open to all men who wish to come to it. No question, or demand of a passport, meets them at the border. He who flees from crimes committed in other countries, like all others, is admitted; nor can the common thief be reclaimed by any foreign power.

*In re Kaine,* 55 U.S. at 70, 14 How. at 114.


His Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive.
the first extradition treaty entered into by the United States after their recently achieved status as independent, sovereign nation-states. Among the disputes addressed by the treaty was that of the extradition of "all persons, who, being charged with" crimes committed in one country "shall seek asylum within" the other. This limited extradition article comprised the first attempt by the former colonies to address questions of international extradition.

One of the first extraditions under the Jay Treaty occurred in 1799 when Jonathan Robbins (also known variously as Thomas Robbins and Thomas Nash), a sailor charged with murder during a mutiny on board the British naval vessel Hermione, was arrested and imprisoned without a judicial hearing. Robbins had been illegally impressed into the British navy and had allegedly committed murder either while participating in a mutiny on, or while attempting to escape from, the British frigate.

The British Minister approached Secretary of State Timothy Pickering and requested the extradition of Robbins. Pickering advised President John Adams that the arresting judge, District Judge Thomas Bee of South Carolina, "should be directed to deliver up the offender in question, on the demand of the British Government by its Minister." Accordingly, President Adams, in a move destined to bring him into popular disrepute, requested that Robbins be delivered to the British pursuant to the terms of the Jay Treaty. President Adams arranged for Robbins's surrender by instructing Judge Bee to deliver the accused to the British Minister.

Robbins, however, claimed to be an American citizen and sought a judicial determination of his claim via a writ of habeas corpus. Invoking jurisdiction over Robbins's claims, the district court first determined that the British demand was within the terms of the Jay Treaty. The court then concluded that Robbins's citizenship was inconsequential because the terms of the treaty demanded extradition of anyone ("all persons"), regardless of citizenship or national allegiance. The court therefore delivered the sailor to the British for prosecution.

8 Stat. at 129.

181. The plural pronoun is used purposely to reflect the independent nature of the original 13 states.


184. Id. at 289 (quoting Letter from Timothy Pickering to John Adams (May 15, 1799)).

185. Id. at 294-99.

186. Id. at 299-308.
Robbins's plight immediately captured the public's attention. Fueled by lingering anti-British sentiment, public outcry was enormous. Adams was pilloried in the popular press and at the dinner table. Adams's opponents seized upon Robbins's cause in the 1800 presidential election, bent on using the incident to fan the populist sentiment against Adams. The House of Representatives even passed resolutions officially criticizing the President's action in the matter. Thomas Jefferson, writing about his defeat of Adams in 1800, observed that (referring to the Robbins incident): "I think no one circumstance since the establishment of our government has affected the popular mind more." The popular anger against President Adams's action was due in part to a fear that the executive could undermine the independence of the judiciary by ordering a federal judge to surrender Robbins, and in part by the perception that although it was generally conceded that Robbins had committed a murder, a murder committed by a citizen fleeing from illegal impressment should not be extraditable.

In response to the unpopularity of the Robbins incident, the United States allowed the Jay Treaty to lapse in 1807 and granted no further extraditions for nearly fifty years. After the ratification of new extradition treaties in 1842 and 1843, with Great Britain and France, respectively, the process of extradition again resumed.

The Supreme Court had the opportunity to review one of the first extradition claims that arose under the new French treaty, when France sought

187. Id. at 323-25. The unfortunate Mr. Robbins did not fare well under English justice. Within five days of the commencement of his trial, "Robbins had been executed and hung in chains." Id. at 304.

188. Professor Wedgwood observes that Adams "was privy to no claim that Robbins was an American. He was surprisingly delicate concerning the Executive's relation to a judge." Id. at 290. Thus, Wedgwood asserts, Adams was unjustifiably lambasted by history. To make matters worse, Robbins never attempted to prove that he was an American, and while on trial, confessed to being an Irish citizen. Id. at 304-05.


190. 10 ANNALS OF CONG. 613 (1800).


the extradition of Nicholas Lucien Metzger. Upon official receipt of the request, President Polk, remembering John Adams's misfortune, referred the matter to a United States district court judge. The judge held a hearing and subsequently authorized extradition. Metzger subsequently filed a petition for a writ of habeas corpus in the Supreme Court. The Court denied the writ, but approved President Polk's referral of the case to a federal judge. The Court observed that:

The mode adopted by the executive in the present case seems to be the proper one . . . . Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly, as we suppose, referred it to the judgement of a judicial officer.193

In the wake of Metzger, Congress enacted the first statutorily prescribed extradition procedure. Essentially, Congress wrote into law the procedure President Polk had followed when faced with France's extradition request. The statute, which is substantially the same as its modern counterpart, 18 U.S.C. section 3184, authorized conduct of extradition proceedings whenever a proper extradition treaty existed by "any of the justices of the Supreme Court or judges of the several District Courts of the United States—and the judges of the several State courts, and the commissioners authorized so to do by any of the courts of the United States."194

Although the legislative history surrounding the enactment of the original statute is not particularly helpful, Congress apparently sought a "judicial proceeding . . . intended to be independent of executive control."195

Congress may have intended its legislation to apply exclusively to foreign nationals, however, and not U.S. citizens. Though inconclusive, it is interesting to note that the House of Representatives, while debating the bill, had before it the example of a "fugitive" who "came to this country."196 Thus, the example of an alien seeking refuge in this country from foreign prosecution framed the House's debate.

Evidence exists that the Senate similarly deemed extradition chiefly a matter touching alien concerns. The Senate debate is specifically reported under the caption "Foreign Criminals." While little can be surmised from this title alone, after the bill was reported to the Senate, one senator ex-

196. CONG. GLOBE, 30th Cong., 1st Sess. 868 (1848). It is not unusual for a nation to extradite resident aliens, but to refuse to extradite its own citizens.
pressed concern that extradition would be forced on United States citizens. The sponsor of the legislation, Senator Dayton, gave assurances that "no act we could pass would take away from American citizens the constitutional right of a trial by jury." Consequently, it is unclear whether the Senate assumed extradition would not be applied to American citizens or whether it believed the extradition process would not abrogate the protections afforded U.S. citizens by the Constitution and Bill of Rights. At minimum, it seems that Congress inferred that a citizen could not be surrendered to a foreign jurisdiction absent a jury trial.

This position makes some sense because Americans generally considered jury trial a prerequisite to incarceration. The various Indian tribes, for example, had treaties with the United States concerning fugitive offenders when the Judiciary Act of 1789 was passed. Those treaties, however, forbade extradition of American citizens to tribal courts because, among other reasons, those courts had no right to jury trial. Although Indians accused of capital crimes against the United States or its citizens were to be surrendered to the jurisdiction of U.S. courts, citizens of the United States who committed crimes against Indians were to be tried within the domestic jurisdiction of U.S. courts.

As for the inclusion of commissioners and state judges by the statute, this tactic could reflect, in the former, the need for some judicial presence for an alien apprehended in the frontier where few federal judges were available, and in the latter, the recognition of the comity that existed between state and federal judges before the Civil War. This hypothesis is given some credence by Representative Ingersoll, who, in outlining Congress's intentions in enacting the bill, declared that the legislation was designed "to enlarge the facilities to comply with our obligations" under the various extradition treaties.

It often happened that an individual came to this country... but there were no such officers in the part of the country where the fugitive was found... to take on themselves the burden and weighty
ARTICLE III AND EXTRADITION PROCEEDINGS

responsibility of issuing a warrant to arrest and to take the preliminary proceedings towards handing over the individual to the properly authorized officer.\textsuperscript{202}

Accordingly, the bill "authorized the courts of the United States to appoint commissioners to take the preliminary steps . . . to deliver up fugitives to foreign countries" to comply with treaty requirements.\textsuperscript{203}

Attention to certain provisions of the Act, however, refutes the notion that commissioners could preside in extradition hearings absent special authorization. The first section of the Act confers the exercise of the power under an extradition treaty upon the judges of the state and federal courts and upon any commissioner authorized by the courts. The sixth section provides further:

That it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner or commissioners under the provisions of this act; and the doings of such person or persons so authorized . . . shall be good and available to all intents and purposes whatsoever.\textsuperscript{204}

Reading these two provisions together, it appears clear that a commissioner, otherwise competent to act in the matter, must be specially appointed by the courts. Thus appointed, the commissioner is subject to the district court's direct control.

Despite this plain meaning reading of the article's language,\textsuperscript{205} the Supreme Court came to a different conclusion when it first examined the authority of commissioners to conduct extradition hearings in \textit{In re Kaine}.\textsuperscript{206} In \textit{Kaine}, the British Counsel filed suit in New York for the extradition of Thomas Kaine to answer for charges of attempted murder in Ireland. Kaine was arrested and brought before Joseph Bridgham, a United States Commissioner. Commissioner Bridgham heard the case, determined that Kaine was extraditable, and ordered him "committed to abide the order of the President of the United States."\textsuperscript{207}

Kaine challenged the commissioner's order to commit him for extradition by means of a habeas writ. Kaine argued that absent special appointment, the commissioner had no power to hear an extradition request.

\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.
\textsuperscript{205} In modern law, there is a well settled canon of statutory interpretation that when language is clear and unambiguous, it must be held to mean what it plainly expresses. \textit{See}, e.g., North Dakota v. United States, 460 U.S. 300 (1983); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).
\textsuperscript{206} 55 U.S. 63, 14 How. 103 (1852).
\textsuperscript{207} \textit{Kaine}, 55 U.S. at 73, 14 How. at 117.
Flatly rejecting Kaine’s legal argument, the Supreme Court’s seriatim opinion upheld the authority of the commissioner to conduct the hearing without special appointment. Despite the obvious strength of the plain language reading, the Court remarked merely that “commissioners . . . have executed the Act of 1848, without any one supposing they wanted power, until now.” This cursory declaration virtually ignored Kaine’s legal argument. This opinion is hardly a ringing endorsement of magistrate adjudication; at best, it simply acquiesces to past practice.


In 1968, the Federal Magistrates Act amended the extradition statute to substitute the word “magistrate” for the former term “commissioner” in two places in Section 3184. Pursuant to section 101 of the Act, “[e]ach United States magistrate serving under this chapter shall have . . . all powers and duties conferred or imposed upon United States commissioners by law.” Finally, a single provision allowing for the filing of a complaint and issuance of a warrant for the extradition of persons whose whereabouts were unknown was added to Section 3184 in 1988.

Congress, in enacting the Federal Magistrates Act, did not engage in a reasoned consideration of the magistrates’ statutorily authorized duties; it merely followed past practice in permitting magistrates to hear extradition cases. Accordingly, no clear purpose exists for Congress’s decision to

208. *Id.* at 77, 14 How. at 121.
209. *Id.* at 71, 14 How. at 115; see also Benson v. McMahon, 127 U.S. 457 (1887).
214. *See Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7087, 102 Stat. 4395, 4409 (1988) (“Such complaint may be filed before and such warrant may be issued by a Judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known.”).*
215. The Federal Magistrates Act was simply a general assumption of commissioners’ previous duties. The Act itself entitled this section “Technical Amendments” to Title 18, which provided that the title should be amended by “striking out the word ‘Commissioners’ wherever it
allow magistrates to preside at extradition hearings. The only discernable purpose, the need for additional judges in remote areas of the country, has evaporated with the disappearance of the American frontier.

C. Personal Article III Interest

In addition to protecting the institutional integrity of the judicial branch, Article III, Section 1 preserves for individual litigants their personal interest in an impartial and independent judiciary. Although Article III does not provide litigants an "absolute right to the plenary consideration of every nature of claim by an Article III court,"\textsuperscript{216} the Supreme Court has interpreted the Article III guarantee of independent and impartial adjudication "to protect primarily personal, rather than structural interests."\textsuperscript{217} This personal component assures that the individual, when accused of a crime, will have access to an impartial, independent tribunal composed of the finest judges the Constitution has to offer. The severity of extradition demands that when the personal liberty to remain in the United States is at stake, a litigant should be entitled to have his case heard by an independent arbiter.

Courts have characterized extradition proceedings as "preliminary examination[s]"\textsuperscript{218} because the extradition hearing's purpose is to determine whether there is "evidence sufficient to sustain the charge under the provisions of the proper treaty or convention."\textsuperscript{219} Thus, it may be argued that because an extradition hearing is akin to a preliminary examination, it does not follow that a litigant's personal interest in an impartial and independent judiciary is vindicated if and only if an Article III judge conducts the proceeding.

As in an extradition hearing, the presiding judicial officer, often a magistrate, conducts a hearing in a preliminary criminal examination to deter-
mine whether "there is probable cause to believe that an offense has been committed and that the defendant committed it." In such a hearing, the defendant is permitted to "cross-examine adverse witnesses and may introduce evidence." Upon a finding of probable cause, the magistrate is required to "hold the defendant to answer in district court."

As previously observed, however, the defendant is held to answer in district court, not in the executive branch or in a foreign tribunal. In such a case, the defendant generally enjoys direct appeal to an Article III court. The defendant's interest in an Article III tribunal adheres in the trial phase of the proceeding and is further protected by Article III supervision of the magistrate's determination. Arguably, then, the accused's interest in an Article III judge to preside in the preliminary phase of a criminal proceeding resulting in trial under U.S. jurisdiction is not as great as his interest in Article III judicial involvement in an extradition proceeding. This is because in the former instance, he will enjoy trial by jury, conducted by an Article III judge and subject to direct appeal to an Article III court.

In the latter case, however, no such Article III protections attach. Instead, the magistrate hears all the evidence, decides all issues of law, hears and rules on all motions, hears all witnesses, resolves any questions of credibility, and, if she deems it appropriate, commits a U.S. citizen to a foreign country for criminal proceedings—all without direct appeal. Upon certification of extraditability, the magistrate then delivers the case to the State Department. The judiciary lacks jurisdiction to review the executive branch's decision. Once bound over to the executive branch, the accused may become a bargaining chip for the diplomatic needs of the administration.

The sole protection a U.S. citizen receives from an Article III court is a limited habeas review. The accused's interest in Article III adjudication, then, is much more significant in an extradition proceeding than in a standard preliminary criminal proceeding. This claim is buttressed by the accused's statutorily created right to an extradition hearing, whereas if the government chooses to proceed by indictment in a domestic case, the accused has no comparable right to a preliminary examination. Because the ultimate decision to extradite a fugitive is committed to the executive,

221. Id.
222. Id.
the initial certificate of extraditability requires an independent decisionmaker to resist urgings to decide contested issues on the basis of international politics and diplomatic pressure.

D. Fifth Amendment Requirements

The guarantees of due process call for a "hearing appropriate to the nature of the case."226 The Supreme Court has long recognized that due process of law requires Article III adjudication before infliction of "the drastic deprivations that may follow when a resident of this country is compelled by our government to forsake all the bonds formed here and go to a foreign land."227 Other courts have specifically recognized that the Fifth Amendment protects a defendant's "due process rights to an Article III forum."228

In assessing "whether the flexible concepts of due process have been satisfied,"229 the Supreme Court has advised that three factors should be considered: "(a) The private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve."230 In addition, a fourth concern—systemic due process—should also be considered. A brief examination of these factors lends decisive proof that, in the context of extradition hearings, due process concerns are implicated when an accused is denied adjudication by, or direct appeal to, an Article III tribunal.

1. The Private Interests Implicated

The private interests implicated by extradition are enormous. Besides the obvious hardships of imprisonment, separation from family and friends, potential language difficulties, and the disorientating aspects of facing trial and incarceration in a foreign jurisdiction, a number of other legal realities must be considered. First, the procedural protections enjoyed by a criminal defendant in the United States may not be recognized in the foreign jurisdiction. The Court of Appeals for the District of Columbia has noted that "[a] surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign jud-

230. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
cial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials.

This absence may include the denial of rights as basic as trial by jury, the guarantee of counsel, and the privilege against self-incrimination. The prospect of facing criminal trial in the American legal system is daunting—yet it is even a far more serious proposition to face trial in a foreign system where the accused may be wholly unfamiliar with the intricacies of the foreign jurisdiction's legal system, as well as the threatening possibility of language and cultural differences.

Second, a United States citizen possesses a basic right to remain in this country—a right that is guaranteed by due process protections. Comparing extradition proceedings with the protections afforded aliens faced with the prospect of deportation, Justice Stevens wrote that “[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government’s power to regulate the conduct of its own citizenry.”

The Supreme Court has observed that “[a] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.” With respect to aliens, “Congress regularly makes rules that would be unacceptable if applied to citizens.”

Despite this difference in status, courts have held for many years that a person claiming to be a United States citizen may not be deported without a hearing before an Article III judge. In Ng Fung Ho v. White, the Supreme Court concluded that a person claiming to be a United States citizen may not be deported without a full adversarial hearing to decide the merits of his claim. Justice Brandeis, writing for the Court, noted:

---


234. Id. at 78.

235. Mathews, 426 U.S. at 80; see also United States v. Verdugo-Urquidez, 494 U.S. 1092 (1990) (holding that Fourth Amendment protections accorded U.S. citizens do not apply to aliens abroad); Ex parte Mantia, 206 F. Supp. 330, 332 (S.D.N.Y. 1913) (holding that Sixth Amendment right to confrontation “appl[ies] to criminal prosecutions tried here, and not to persons extradited [sic] for trial under treaties with foreign countries whose laws may be entirely different.”).


237. 259 U.S. 276.

238. Id. at 284-85.
To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. 239

The Supreme Court has expressly held that persons claiming to be U.S. citizens are entitled to a judicial determination of those claims. 240 Although Ng Fung Ho does not state precisely that an Article III judge is necessary for the "judicial determination," it does remark that "[t]he practice indicated in Chin Yow v. United States, and approved in Kwok Jan Fat v. White, . . . should be pursued." 241 In Chin Yow, 242 the appellant left the United States to visit China. Upon his return, the appellant was excluded from re-entering the United States and denied the opportunity to try his case before the appropriate commission. The practice approved in Chin Yow was to grant the writ of habeas corpus and, if necessary, hold "a trial of the merits before the judge." 243 The "judge" referred to was to be a district court judge. Thus, under an extraordinary writ of habeas corpus review, the Supreme Court afforded the appellant Article III relief.

Deportation, moreover, while a serious proceeding, simply results in the removal of a foreign national to his country of origin. 244 The deported alien must then confront the prospect of reapplying for admission into the United States. Recognizing the ill-effects of the deportation of an individual who is, in reality, an American citizen, the Supreme Court has mandated a formal hearing to decide the individual's claims to citizenship.

If an alien claiming to be a citizen is afforded an Article III forum, then an undisputed citizen who is subject to extradition should be accorded the same treatment. After all, the person is without doubt a U.S. citizen and is subject not merely to deportation to another country, but to prosecution by a foreign tribunal under foreign laws. Extradition, then, may directly affect the liberty interest of an undisputed citizen, and may place him in the posi-
tion of suffering confinement, trial, and perhaps even punishment in a for-
exchange country. While the Constitution "cannot limit the power of a foreign
sovereign to prescribe procedures for the trial and punishment of crimes
committed within its territory," and, therefore, cannot guarantee the safe-
guards the accused will be provided, "it does govern the manner in which
the United States may join the effort." 245

Consequently, appropriate procedures must exist to ensure that due pro-
cess requirements are satisfied while the accused remains under American
jurisdiction. There is no dispute that extradition places serious personal
rights in jeopardy—Article III adjudication is therefore crucial to secure
the protection of those rights.

2. Balancing the Risk of an Erroneous Determination Against the
Probable Value of Additional Safeguards

Because the risks inherent in extradition are substantial, the need for
Article III adjudication is equally great. If rights are "incorporated into the
[C]onstitution, independent tribunals of justice will consider themselves in a
peculiar manner the guardians of those rights; they will be an impenetrable
bulwark against every assumption of power in the legislative or executive
[branches]." 246 In acting as that bulwark, it has been observed that "[b]y
assigning the initial determination of when the exception applies to the im-
partial judiciary . . . Congress has substantially lessened the risk that
majoritarian consensus or favor due or not due to the country seeking extra-
dition will interfere with individual liberty." 247 Accordingly, "the appellant
cannot be extradited except upon the order of a judge of a court of the
United States." 248 In addition, at least one Justice of the Supreme Court
has remarked that "an extradition without an unbiased hearing before an
Independent judiciary, [was] highly dangerous to liberty, and ought never
to be allowed in this country." 249

Balanced against the need for Article III adjudication is Peroff v. Hyl-
ton, 250 wherein the Fourth Circuit concluded that the requirements of pro-
cedural due process were satisfied by the hearing provided under 18 U.S.C.
section 3184 (even if conducted by a magistrate) coupled with the ability of
the petitioner to seek habeas corpus review. 251 In Peroff, the petitioner, a

246. 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789).
250. 563 F.2d 1099 (4th Cir. 1977).
251. Id. at 1102.
U.S. citizen, claimed that he was entitled, as a matter of due process, to a hearing before the Secretary of State on the propriety of his extradition.\textsuperscript{252} The Fourth Circuit concluded that no such hearing was needed because the magistrate hearing and availability of habeas corpus review fulfilled any due process concerns.\textsuperscript{253}

Why is there the need for an Article III judge, then? What is so special about Article III adjudication that makes it significantly different from adjudication by an Article I judge or magistrate? Is an Article III judge even necessary to satisfy due process?

For the Framers, the answer came in one word: independence. The judiciary's independence is premised on the basic political idea that legislative, executive, and judicial power should be divided among three separate, yet equal, departments.\textsuperscript{254} The Framers deemed it imperative that the federal judiciary would neither defer to, nor yield to manipulation by, those branches exercising legislative or executive power. Independence could be assured, Alexander Hamilton explained, only if the salary and tenure of federal judges were insulated from congressional or executive control.\textsuperscript{255} Cloaked with these protections, Article III judges would remain independent of the other branches of the federal government,\textsuperscript{256} of the state governments, and of influential private citizens and corporations. This external independence breeds not only impartiality, but also free development in legal thought.\textsuperscript{257}

\textsuperscript{252} Id.

\textsuperscript{253} Id. at 1102-03; see also Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir.) (agreeing with the Fourth Circuit's view), \textit{cert. denied}, 449 U.S. 1036 (1980), and \textit{cert. denied}, 450 U.S. 922 (1981); Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969) (holding that Due Process rights are satisfied by either a "statutorily required hearing" or a "full habeas corpus hearing.").

\textsuperscript{254} Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."); \textit{The Federalist} No. 47 (James Madison); Gordon S. Wood, \textit{The Creation of the American Republic,} 1776-1787, at 549-53 (1969).

\textsuperscript{255} \textit{The Federalist} No. 78 (Alexander Hamilton); \textit{The Federalist} No. 79, at 531-32 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the Constitution's salary provision). The Supreme Court has stated emphatically that the "primary purpose" of the salary protections is "to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich." Evans v. Gore, 253 U.S. 245, 253 (1920).

\textsuperscript{256} "[C]ontrol over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government" and "free from potential domination by other branches of government." United States v. Will, 449 U.S. 200, 218 (1980).

\textsuperscript{257} During the debates of the Virginia state convention of 1829-30, Chief Justice John Marshall asked, "Is it not, to the last degree important, that he [the judge] should be rendered per-
Independence of judges from one another was considered almost equally important because undue influence from within the judicial branch could constitute a serious obstacle to unbiased adjudication. Because magistrates are appointed by those who would review their decisions, it is entirely possible that their independence in thought, especially in a politically sensitive case, could be tainted. Internal independence was thus assured through life tenure.

fectly and completely independent, with nothing to influence or control him but God and his conscience?” O’Donoghue v. United States, 289 U.S. 516, 532 (1933) (alteration in original); see also Irving R. Kaufman, Chilling Judicial Independence, 88 YALE L.J. 681, 714 (1979).

258. Judge Kaufman observed:

The separation of powers is not the exclusive cause and guarantee of judicial independence. Of course, it is vital to protect the entire third branch from the others. What may be less apparent, but is no less true, is that it is equally essential to protect the independence of the individual judge, even from incursions by other judges.

259. The Supreme Court has generally considered cases involving legislative encroachment on judicial power; hence, most of its discussions on the independence provisions of Article III have focused on separation of powers issues. The Court has, however, expressly considered the question of judicial interference in the independence of a federal judge in at least one case, Chandler v. Judicial Council, 398 U.S. 74 (1970). In Chandler, the Court considered whether the Judicial Council of the Tenth Circuit could deprive a district court judge of the authority to decide cases filed in the district court on which he served. The Court intimated that the issue raised Article III concerns, id. at 84, but ultimately declined to resolve the issue. Id. at 87-89.

In dissent, however, Justice Douglas implied and Justice Black emphatically declared that the Framers intended Article III to preserve the independence of the judge from interference by other Article III judges. Id. at 136-37 (Douglas, J., dissenting); id. at 141-42 (Black, J., dissenting). Justice Brennan, in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), echoed this view when he noted that “[t]he guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism.” 458 U.S. 50, 59 n.10 (1982) (plurality opinion) (emphasis added).

This position finds at least some support in Article II of the Constitution. Article II grants the Senate the power to impeach a judge for “high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. The question whether the Constitution requires that judges of the “inferior courts” should be removable solely by impeachment has been the subject of considerable academic debate. Compare Raoul Berger, Impeachment: The Constitutional Problems 122-80 (1973) with Philip B. Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. CHI. L. REV. 665, 667 (1969). This debate is largely academic, however. The Supreme Court has consistently adhered to the view that federal judges can be removed only by impeachment. See Northern Pipeline, 458 U.S. at 59; Chandler, 398 U.S. at 141-43 (Black, J., dissenting); United States ex rel Toth v. Quarles, 350 U.S. 11, 16 (1955). Neither the Senate nor the executive has sought to profess otherwise.

260. Justice Douglas voiced his concerns about non-Article III adjudication when he remarked:

[J]udges . . . who do not enjoy constitutional tenure and whose salaries are not constitutionally protected against diminution during their term of office cannot be Article III judges. . . . Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body...
Although the judiciary controls the appointment, tenure, dockets, and, to some extent, the salary of magistrates,\(^{261}\) magistrates nevertheless do not enjoy the same protections and privileges of Article III judges. Congress limits the Judicial Conference's power to appoint magistrates\(^ {262}\) and constrains its ability to remove them.\(^ {263}\) The extradition hearing, because of its seriousness, requires a judge with "maximum freedom from possible coercion or influence by the executive or legislative branches of the Government,"\(^ {264}\) not a magistrate or any other Article I judge.

There is yet another dimension of independence that is unexamined: Independence is not only crucial for judicial impartiality, but also serves to attract well-qualified jurists to the bench.\(^ {265}\) Magistrates do not undergo the scrutiny given prospective Article III jurists; they undergo neither the presidential investigation precedent to nomination nor the searching congressional interrogation prior to appointment. They also never stand before the court of public opinion that modern nominees must face.

Competent, able jurists are vital to ensuring fair extradition proceedings because extradition proceedings often involve issues of major international importance:

---

of the Constitution... were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Glidden Co. v. Zdanok, 370 U.S. 530, 606 (1962) (Douglas, J., dissenting). At least one federal judge, concerned that magistrates exercise judicial power without attendant Article III protections, has recommended that magistrates "should be awarded Article III protections commensurate with the Article III work that they now so commendably perform." Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 555 (9th Cir.) (Pregerson, J., dissenting), cert. denied, 469 U.S. 824 (1984).


265. Northern Pipeline, 458 U.S. at n.10. ("These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations... The security that they provide to members of the Judicial Branch helps to attract well-qualified persons to the federal bench... The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism."). This insight is not original, but finds its roots in THE FEDERALIST NO. 78 (Alexander Hamilton).
[T]he cases we request of foreign countries and that foreign countries request of us are generally some of the most important cases which the countries deal in. You do not normally request extradition in a routine case. . . . The cases we deal with are generally the ones you read about when you are reading [the papers].

Able jurists are therefore vital to the extradition process.

The necessity of Article III adjudication becomes further apparent when one considers that extradition cases often demand rulings on such sensitive issues as whether an offense is one of a political nature. An independent judiciary is necessary to protect individual rights. The constitutional rights endangered by extradition transcend the political compromises of the day; hence, only judges insulated from the formal political processes can preserve those rights against popular causes or international needs.

Since "[t]he 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," it is important that the criminally accused receive the most independent adjudicator the Constitution provides at the initial stages of the proceeding.

And because "[t]he surrender is founded upon an alleged crime, and the judiciary is the appropriate tribunal to inquire into the charge."

3. The Public Interest and Administrative Burdens

Although the Federal Magistrates Act is "intended to ease the burden on district courts, it is not intended to permit the court to abdicate its obligations." There is little need to permit magistrates to preside in extradition proceedings. Unlike administrative agencies and legislative courts, magistrates bring no particular expertise to extradition proceedings. The only governmental interest that possibly exists in allowing magistrates to


269. Id.


conduct extradition proceedings is to remove the burden of conducting those proceedings from the federal judges.

The burden, however, is virtually nonexistent. First, in the majority of federal districts, Article III judges preside at extradition hearings. Second, there are comparatively few extradition requests. For example, in 1987 the Department of Justice handled only 186 requests for extradition. Of those, some requests never reach the federal courts because the fugitives are not ultimately apprehended in the United States. Even when the fugitives are captured here, many requests go uncontested. Thus, even if every request were contested, each federal judicial district would have no more than two or three additional cases per year. While it may be the case that some districts are more heavily burdened by extradition hearings than others, that is no reason to deny a defendant's access to an Article III tribunal.

4. Fundamental Fairness and Systemic Due Process

This Article's analysis has thus far focused on the individual's right to due process. There is, however, a second component of due process in need of consideration; systemic due process or fundamental fairness.

In criminal proceedings, fundamental fairness implies a concern for both the individual litigant's right to a fair trial and the justice system's interest in assuring a fair trial. The justice system itself has an interest in fair trials because the system's integrity, which encompasses the public's respect for, and reliance on, the judiciary, erodes unless it can ensure fundamental fairness in all judicial proceedings. Hence, not even the consent of the parties can cure a violation of systemic due process. A comparison of

---

272. In 1989, magistrates were assigned to preside at extradition hearings in only 37 of the 94 federal districts.


274. The total number of fugitives arrested in the United States on international extradition requests is as follows:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL ARRESTED</th>
<th>U.S. CITIZENS ARRESTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>45</td>
<td>12</td>
</tr>
<tr>
<td>1981</td>
<td>53</td>
<td>16</td>
</tr>
<tr>
<td>1982</td>
<td>51</td>
<td>18</td>
</tr>
</tbody>
</table>


275. See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (noting that erosion of protective criminal procedures "breeds contempt for law .... [t]o declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution."). _overruled by Berger v. N.Y., 388 U.S. 41 (1967)._
The systemic due process right to Article III adjudication is similar to a criminal defendant's right to remain silent. Both rights are personal to the defendant and are capable of being waived. Each of these rights serves to protect both individual and systemic due process. The right to remain silent protects the individual from being a witness against himself. It eliminates the possibility of coerced confessions. At the same time, it assures the community that no statements taken involuntarily from the defendant can be used against him, thus ensuring the reliability of statements introduced at trial. If the police could simply beat a confession out of the defendant, and use that confession against him at trial, the criminal justice system would be seriously undermined. Such a situation would present the problem of unfair trials and resultant unreliable judgments. Accordingly, systemic due process would break down because respect for the system would collapse.

The extradition proceeding could be undermined in a similar manner by magistrate proceedings. If magistrates do not enjoy the complete impartiality and independence of Article III judges, which they do not, public confidence in the process could erode.276 Even if the parties, by consent, chose magistrate adjudication, the systemic interests would remain unprotected.

V. STATE COURTS AND EXTRADITION: WHETHER STATE COURTS SHOULD PRESIDE IN EXTRADITION HEARINGS

Up to this point, this Article has discussed extradition with respect to the federal judiciary. State judges, however, also possess the authority to conduct extradition proceedings. This Article asserts that state judges should not become involved in international extradition proceedings. Extradition clearly invokes national concerns because a foreign nation makes an official diplomatic request upon the President to surrender an individual residing within the United States.277 The following discussion will argue that state judges have no role to play in extradition.

Whether state courts should preside in extradition proceedings raises three portentous questions: 1) Do states have jurisdiction to preside?—a

276. See Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 GEO. L.J. 185, 202 (1983) (“American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes.”).

277. Though, admittedly, serious questions of comity and federalism remain, we should nevertheless briefly examine the role of state courts in extradition proceedings and determine if vesting jurisdiction in such courts is problematic.
purely legal question; 2) Should they preside?—a question of policy; and, 3) Provided jurisdiction exists, do they now preside?—a question of tradition.

A. Publius and the Uncertain Historical Foundations of State Court Jurisdiction in Extradition Matters

Jurisdiction encompasses the power of a court to decide a controversy. It is the legal right by which courts exercise their authority. Sensitive to state courts and their preconstitutional jurisdiction, the Framers took great pains to delineate the jurisdiction of federal courts with respect to the jurisdiction of state courts.

In discussing the relative authority of federal and state tribunals, Publius informs us that "the States will retain all pre-existing authorities, which may not be exclusively delegated to the federal head." This "exclusive delegation," Publius explains:

[c]an only exist in one of three cases: [1] Where an exclusive authority is, in express terms, granted to the Union; or [2] where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or [3] where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible.

Publius recognizes that the state and federal courts will operate both exclusively and concurrently. Consequently, states will exercise exclusive jurisdiction over a discrete class of cases, as will the federal government. In certain instances, however, state and federal jurisdictions will overlap. This doctrine of concurrent jurisdiction is, however, "only clearly applicable to those descriptions of causes of which the State courts have previous cognizance." Accordingly, Publius was able to "lay it down as a rule that the State courts will retain the jurisdiction they now have"—with one important caveat; "unless it appears to be taken away in one of the enumerated

---

278. Publius, meaning "the public," is the pseudonym used by Alexander Hamilton, John Jay, and James Madison in writing The Federalist Papers, a series of articles written in defense of the Constitution.


280. Id. The Constitution provides no "express grant" to the Union of the authority to extradite, nor does it specifically deny that power to the states. The Constitution does, however, appoint the President to "receive Ambassadors and other public Ministers," and to "make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, §§ 2, 3. It likewise prohibits the states from "enter[ing] into any Agreement or Compact . . . with a foreign Power." U.S. CONST. art. I, § 10.

modes”282 or where the concurrent exercise of jurisdiction by the state tribunal “would be utterly incompatible.”283

State courts did not conduct international284 extradition proceedings before the adoption of the Constitution. Prior to the Revolutionary War, scant evidence of international extradition exists. A treaty negotiated between Henry II and William the Lion of Scotland contains the earliest mention in English history of the extradition of criminals. This treaty provided that those charged with a felony in England and fleeing to Scotland would be surrendered to the English authorities, or tried for their crimes in Scotland, and vice versa.285 Later English extradition agreements include those negotiated by Charles II with Denmark in 1661 and with the States General in 1662.

In the post-Revolutionary colonies, extradition acquired a new significance. Independence from the British Crown meant independence from British international obligations. The colonists likely took offense to foreign extradition. One of the complaints the rebellious colonists listed against the King of England in the Declaration of Independence was “[f]or transporting us beyond seas to be tried for pretended offences [sic].”286 This was not literally foreign trial because the prosecutions were conducted in English courts, which arguably retained some sort of jurisdiction over the colonies. Matters of venue and resultant peerage of the jury deeply concerned the colonists. They believed that Americans could not obtain fair trials in British courts. The colonists thus sought trial in colonial courts; given this understanding, it is likely that the colonists generally opposed extradition.287

Although the colonies possessed no power to authorize international extradition, rendition among the colonies existed. Prior to the Revolutionary War, colonial authorities arrested fugitive criminals and returned them for trial to the colonies wherein they had committed their crimes.288 Connecticut, for example, enacted a law in 1620 for the rendition of fugitives from

282. Id. at 492.
283. Id.
284. In this context, the term “international” refers to nations outside the original 13 colonies and their attendant territories.
285. MOORE, supra note 189, at 10.
286. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).
287. The complaint also concerned American colonists who committed crimes in the colonies, only to be delivered back to England for trial.
justice.\footnote{289} The New England Confederation of 1643 followed suit with an agreement providing for the extradition of criminals within that region. Such criminals were to be surrendered to the person pursuing them, on a warrant issued by the "two magistrates of the jurisdiction where [the fugitive] escaped from."\footnote{290}

The colonies were themselves sovereign entities following the Revolutionary War, so some type of extradition process was adopted in the individual state constitutions and in the Articles of Confederation to deal with interstate rendition.\footnote{291} Connecticut, relying on its 1620 rendition statute, established laws in 1784 and 1786 for the rendition of interstate fugitives.\footnote{292} A Virginia extradition law of 1779 tracked the rendition clause contained in the Articles of Confederation,\footnote{293} while Pennsylvania, New Jersey, Maryland, and Delaware negotiated an arrangement whereby offenders were returned for trial.\footnote{294}

With the virtual collapse of the Articles, the Framers sought new arrangements. Consequently, in the Philadelphia Convention, the Framers addressed the need for providing for the extradition of criminals from one state to another. The New Jersey Plan, for example, contained an arrangement for the punishment of criminals fleeing into other states.\footnote{295} The Committee of Detail adopted this provision and reported it to the Convention.\footnote{296}

The Framers ultimately based the Constitution's interstate rendition clause on the same clause found in the Articles of Confederation,\footnote{297} which

\footnote{289. Moore, \textit{supra} note 189, at 822.}
\footnote{291. Note that interstate extradition is considerably different from international extradition, even under the Articles of Confederation. The Articles of Confederation, like the Constitution, provided that "[f]ull faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." \textit{The Articles of Confederation} art. IV (U.S. 1781). The People, then, acquiesced to government by the Articles, and as a result decided that they would respect other states' courts. This was no mere treaty or act of Congress.}
\footnote{292. Moore, \textit{supra} note 189, at 824.}
\footnote{293. 10 \textit{The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619}, at 130 (William W. Hening ed., photo reprint 1969) (Richmond, George Cochran 1822).}
\footnote{294. Moore, \textit{supra} note 189, at 824.}
\footnote{296. Id. at 123, 381.}
\footnote{297. \textit{The Articles of Confederation} art. IX (U.S. 1781).}
the Drafters of the Articles of Confederation originally introduced in Congress on November 11, 1777. The Constitutional Committee of Detail lifted the clause's wording largely intact from Article IV of the Articles of Confederation. In the Articles, the language contained the phrase "high misdemeanor," which the Framers deleted on August 28, inserting the words "other crime" for the purpose of including all "proper cases," the idea being that the term "high misdemeanor" had a technical meaning that was too limited for the purposes of the new Constitution.

Neither the Articles, nor the Constitution, however, provided expressly for international extradition. The earliest international agreement touching upon extradition was a consular convention with France that authorized the rendition of sailors deserting from French ships to their captains. This limited convention demanded that the facts be proved in a judicial proceeding prior to surrender and applied exclusively to sailors legally impressed into French naval or maritime service. Presumably then, the states, as colonies or sovereign entities under the Articles of Confederation, exercised no foreign extradition power. Because the states exercised no pre-existing authority to extradite, Publicus would have us conclude that neither did the Constitution grant such an authority.

B. National Supremacy in International Relations

If no pre-existing authority to extradite inured in the states, why should they not now exercise it as a concurrent power with the federal judiciary? To answer this question, we need ask whether Publicus's final exhortation applies: "where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible."

In determining whether extradition proceedings should be committed to state courts, one must have an understanding of the nationalist sentiment

---

299. Article IV provides, in pertinent part:
If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

THE ARTICLES OF CONFEDERATION art. IV (U.S. 1781).

300. 5 ELLIOT'S DEBATES, supra note 295, at 487.
301. Convention for the Purpose of Defining and Establishing the Functions and Privileges of Consuls and Vice-Consuls, Nov. 14, 1788, U.S.-Fr., art. 9, 8 Stat. 106, 112. This convention was abrogated in 1798. Act of July 7, 1798, ch. 67, 1 Stat. 578; see also United States v. Lawrence, 3 U.S. 83, 3 Dall. 42 (1795) (denying mandamus).

underpinning the Constitution. With the ratification of the Constitution, the states surrendered, at least in part, the sovereign authority recognized in the Articles of Confederation.

Article III, Section 2 of the Constitution expressly provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to all Cases . . . between a State, or the Citizens thereof, and foreign States." 303

It is unquestioned that extradition represents a case or controversy arising from a treaty, and that it normally will involve a dispute between a citizen of a state and a foreign state. Moreover, that "an executive order of surrender to a foreign government is purely a national act, is not open to controversy." 304 When vesting international authority under the auspices of the national government, Congress sought to avoid the problems rampant under the Articles of Confederation, in which each state attempted to conduct its own foreign affairs. The available historical evidence suggests that the Framers committed international affairs to the federal government because they were distressed by the states' disregard for treaty demands, and Congress's utter helplessness under the Articles of Confederation to secure the performance of a treaty and to prevent the individual states from violating it.

Speaking in the Pennsylvania Convention for the ratification of the Constitution, James Wilson explained that:

It is highly proper that this regulation should be made; for the truth is—and I am sorry to say it—that, in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too, by the express laws of several States in the Union. Pennsylvania to her honor be it spoken—has hitherto done no act of this kind; but it is acknowledged on all sides that many states in the Union have infringed the treaty; and it is well known that, when the minister of the United States made a demand of Lord Carmarthen of a surrender of the western posts, he told the minister, with truth and justice, 'The treaty under which you claim these possessions has not been performed on your part; until that is done, those possessions will not be delivered up.' This clause, Sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States

will be enabled to carry it into effect, let the legislatures of the different States do what they may.\textsuperscript{305}

James Madison echoed Wilson's sentiments when he declared that if uniformity was necessary anywhere, it was in the exposition of treaties, and this could only be secured by establishing "one revisionary superintending power,"\textsuperscript{306} and giving the Supreme Court authority to decide all controversies regarding the construction of treaties.

Additional support for this proposition exists. The Report on Trade and Revenue of August 14, 1786, provided for an appeal from the state courts to the federal judicial court "in all causes wherein questions shall arise on the meaning and construction of treaties entered into by the United States with any foreign power."\textsuperscript{307} The principle of national supremacy in foreign affairs, and even the phraseology of this earlier report, is found in identical laws Congress delivered to the States in April 1787. Congress legislated "that the courts of Law and Equity in all causes and Questions cognizable by them respectively, and arising from or touching the said Treaty, shall decide and adjudge according to the true intent and meaning of the same."\textsuperscript{308} Congress determined, therefore, that the national courts would decide all cases in law and equity arising under treaties. The Framers applied this principle in the Constitution for the purpose of securing uniformity in treaty interpretation and enforcement. Under the Articles, Congress could simply recommend action in the case of a broken treaty. The newly ratified Constitution, however, expressly delegated to Congress the power to enforce treaty obligations by means of the federal judiciary.

The purpose underlying the shift from state to federal courts was to secure uniformity in interpretation and decision. The "mere necessity of uniformity in the interpretation of the national laws," Alexander Hamilton pointed out, "decides the question."\textsuperscript{309} Hamilton explained that "thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."\textsuperscript{310} The federal law and Constitution would be "interpreted and applied one way in one State and another way in another," and "would cease to be a law for the United States, because the decisions would establish no rule for the United States; and the Consti-

\textsuperscript{305} Wilson, \textit{supra} note 125, at 49.
\textsuperscript{306} 3 \textit{ELLIOT'S DEBATES, supra} note 64, at 532.
\textsuperscript{307} \textit{Report on Trade and Revenue, 28 AM. HIST. LEAFLETS 26, 29} (1896).
\textsuperscript{308} 13 \textit{JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 182} (1936).
\textsuperscript{309} \textit{The Federalist No. 80, at 476} (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\textsuperscript{310} \textit{Id.}
tion... would lose its uniform force and obligation."311 The result would be disaster and dissolution of the Union.312 Madison, too, complained vehemently against the continuing violation of American treaty obligations by the states.313

As previously noted, the states possess no pre-existing authority to extradite or to conduct extradition hearings; to authorize them to do so now could cause problems of treaty application. If a single state court could construe a treaty to prevent extradition, and another state court could select a different approach allowing extradition, the Framers' worst fears would be realized. The need for a national approach to extradition was evident. The use of state courts for holding extradition hearings, then, would seem to be at odds with the need for uniform action.

C. State Courts and the Lack of Tradition

Another reason against state courts conducting international extradition proceedings is that such state actions have fallen into general disuse. Judge Friendly, writing for the Second Circuit in In re Mackin, noted that "our research [concerning state conducted, international extradition proceedings] has found [no 18 U.S.C. section 3184 extradition cases] more recent than the mid-19th century."314 The Mackin court does indicate that there have been state court decisions involving naturalization, but "extradition has international aspects far more serious than naturalization."315 There exists scant historical support for state involvement in extradition proceedings. As a matter of historical fact, state courts have simply played no role in international extradition proceedings.

VI. APPROACHES TO CORRECTING THE PROBLEM: MAGISTRATES SHOULD NOT BE PERMITTED TO PRESIDE ABSENT SPECIAL ASSIGNMENT, CONSENT OF THE PARTIES, AND DE NOVO REVIEW BY THE APPOINTING DISTRICT COURT

To satisfy the demands of Article III and Fifth Amendment Due Process, magistrates (like state court judges) should not be authorized to pre-

311. THOMAS M. COOLEY, CONSTITUTIONAL LAW 110 (Boston, Little, Brown, & Co. 1880).
312. Id.
313. James Madison, Vices of the Political System of the United States (April, 1787), reprinted in 9 THE PAPERS OF JAMES MADISON 345 (Robert A. Rutland ed., 1975). Madison declared that one part of the Union should not be able to bring "the greatest of public calamities" upon the whole. Id. at 349.
315. Id. It would seem, therefore, that state courts should not be permitted to conduct extradition hearings.
side at extradition hearings. In lieu of this absolutist approach, state courts should not be permitted to conduct extradition proceedings, and district courts should not allow magistrates to superintend extradition proceedings absent special appointment, consent of the parties, and de novo review by the appointing court. The appointing court should, therefore, institute a magistrate's judgment instead of a final judgment, with the ultimate determination the sole responsibility of the district court. This proposal is consistent with the procedure applied to a magistrate conducting a civil jury or misdemeanor criminal trial. This alternative to Article III adjudication is recommended with a certain amount of trepidation, however. Each of these requirements is itself subject to some skepticism. Before concluding this essay, then, the problems associated with magistrate adjudication will be briefly recounted.

A. A Critique of Case-by-Case Designation

In In re Kaine, Justice Nelson's opinion read the extradition statute as authorizing a commissioner to preside at an extradition hearing only when specially appointed by the district court for the purposes of a particular case. This interpretation was based, in part, on a recognition of the need to control the determination.

There is an argument, however, that Congress may have violated Article II by empowering judges to appoint magistrates, at least when magistrates exercise the judicial power of the United States. The argument against this practice is as follows: Federal judges must be appointed by the President with the advice and consent of the Senate. Numerous courts have argued that Congress may provide for the judicial appointment of magistrates without the advice and consent of the Senate because the Constitution permits Congress to vest "in the Courts of Law" the power to appoint "inferior officers" of the United States. This argument, however, assumes that magistrates are inferior officers. It is true that in most of their functions, magistrates operate as "inferior officers." When they exercise the "judicial Power of the United States," however, they cease to be inferior

317. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 401 n.2 (Boston, Little, Brown, & Co. 4th ed. 1873).
318. U.S. CONST. art. II, § 2; see also Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-53 (1931) (noting that commissioners may be appointed by district courts as inferior officers); Rice v. Ames, 180 U.S. 371, 378 (1901) (remarking that Congress may authorize courts to appoint commissioners).
officers and may, in fact, become de facto federal judges. Because the Constitution commits the decision of whom will exercise federal judicial power to the joint hands of the President and the Senate, it should not be so easily delegated to the sole authority of the judiciary.

A second obstacle posed by case-by-case delegation is that litigants may be subtly coerced into a magistrate trial by district court backlog or even pressure applied by the court itself. Such a situation would be at odds with providing each litigant with her day in court.

B. A Critique of Consent

Congress found that "in light of this requirement of consent no witness at the hearings on the bill [permitting magistrate trial] found any constitutional question that could be raised against the provision." Under at least one theory, the primary purpose of Article III is to protect the rights of litigants. Accordingly, the personal right to adjudication by an Article III judge is akin to other fundamental rights that the accused can waive, such as the right to a jury trial or the right to be free from self-incrimination. Voluntary consent to magistrate adjudication, then, is the sole predicate necessary to assuaging constitutional concerns.

This argument, however, focuses solely on the personal component of Article III, ignoring the equally, if not more important, structural component. With respect to structural integrity, Article III serves to delineate the role of the judiciary in the constitutional framework and further defines substantive limits on congressional authority to restrict, or to expand, the exercise of judicial power.

Individual litigants, while seeking to advance certain litigation strategies, have entirely personal reasons for waiving their Article III rights. They may decide to consent to magistrate hearing on the basis of purely pragmatic considerations such as likelihood of success or speed of resolution. Accordingly, they have little interest in preserving political values such as the separation of powers or the public's general interest in maintaining a respected, impartial judiciary. The Supreme Court has articulated that mere litigant consent cannot cure a constitutional defect of this type: "To the extent that this structural principle is implicated in a given case,

320. See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 549-50 (9th Cir.) (Schroeder, J., dissenting) (arguing that the term "inferior officers" refers to such officers as clerks of court, not officers who exercise Article III power), cert. denied, 469 U.S. 824 (1984); cf. 28 U.S.C. § 171(a) (1988) (stating that judges of the United States Claims Court, an Article I court, are to be appointed by the President with approval by the Senate).
322. See Pacemaker, 725 F.2d at 543.
the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2.\(^{323}\)

Pinning hopes on a consent requirement, then, only fulfills one aspect of Article III interests.\(^{324}\)

### C. A Critique of De Novo Review

In *Raddatz*, Justice Thurgood Marshall identified the problem inherent in de novo review. In his dissent, Justice Marshall asserted that a judge cannot enter a final decision relying only upon the magistrate's recommendations with respect to credibility, because the reviewing judge cannot possibly assess the witness's demeanor from a "cold record."\(^{325}\) Under those circumstances, the judge who decided would not be the same judge who had heard the testimony, thus violating an important requirement of due process. Accordingly, if the district court relied entirely on the magistrate's findings, without conducting additional proceedings, the de novo determination would be inadequate to vest the judicial power in the Article III court. The magistrate would be, for all practical purposes, the final decision maker. Hence, de novo review does little to secure the interests of due process.

Justice Marshall nonetheless conceded that due process does not require an Article III judge to determine all facts involved in the litigation; he averred that in those cases in which "personal liberty [is] at stake . . . a citizen is constitutionally entitled to an independent determination of the case-dispositive facts by an Art. III court."\(^{326}\) Such factual issues are not uncommon to extradition proceedings.

A further difficulty with appellate review is that it places the district court in the unusual position of acting as an appellate court.\(^{327}\) This diffi-

---


324. In *Schor*, the Court offered the following observation about consent:
   This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack.
   *Id.* at 855 (citation omitted). This caveat to legislative court jurisdiction, however, may not apply to magistrate adjudication because legislative courts are not under the direct supervision of district court judges. Of course, this Article argues that neither are magistrates when presiding at extradition hearings.


326. *Id.* at 712.

327. For an opposing view, see Fallon, *supra* note 46. In his article, Professor Richard Fallon notes that Article III is "a nontrivial safeguard of adjudicative fairness." *Id.* at 941. He argues
culty is compounded by the fact that the district court may appoint and remove the magistrate. This hardly corresponds to the type of independence expected of a decision in a significant criminal proceeding.

Judicial control of magistrates is flawed as a means of safeguarding constitutional values in that it defeats the purpose of judicial independence. Magistrates cannot be independent in their decision-making when they are subject to direct control by a district court.

VII. CONCLUSION

There is little doubt that extradition has significant consequences for the accused. In the United States, one who is accused of a crime is provided certain procedural guarantees to ensure fairness. Article III’s personal interest component, which preserves litigants’ rights to impartial and independent adjudication of their claims, and its parallel structural interest, which serves to secure the independence of the judiciary, are jeopardized by referral of an extradition hearing to a magistrate. In addition, state court judges are ill-equipped to conduct extradition proceedings. Due process norms and the requirements of fundamental fairness are satisfied only if the accused receives Article III protection prior to surrender to the executive branch. Because such important issues are at stake here, namely, the protection of a United States citizen from foreign prosecution, an Article III judge should hear an extradition proceeding in the first instance. In the alternative, magistrate adjudication should be proceeded by special appointment and conditioned upon the consent of the parties. Review of a magistrate’s determination should not be confined to a limited habeas corpus review, but should be afforded de novo review by an Article III court.

Although the extradition hearing is not final in the sense that the accused will face immediate extradition, it is final in that the accused will be denied review by, or adjudication in, an Article III court. Given the geopolitical interests surrounding international extradition, the presence of an Article III judge at the outset of an extradition proceeding is not a superfluous luxury, but a constitutional necessity.

that “sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court [an Article III court] will always satisfy the requirements of Article III.” Id. at 933. Fallon indicates that searching review must go to the merits of the dispute. Id. Compare Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 DUKE L.J. 197 (1983). Professor Akhil Amar has argued that Article III at least requires the possibility of appellate review by an Article III court of the decisions of legislative courts, administrative agencies, or even state courts. Akhil R. Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205 (1985).