Brief in Extradition Case, US v. Lindstrom (Code Case99B)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2886
LARS ERIK LINDSTROM,Petitioner-Appellant v. JEROME F. GRABER, Warden, Respondent-Appellee
Hon. RICHARD A. POSNER, Hon. RICHARD D. CUDAHY, Hon. DIANE P. WOOD,

PETITIONER'S MEMORANDUM IN RESPONSE TO THE COURT'S ORDER OF OCTOBER 22, 1999

Anthony D'Amato, attorney for the petitioner Lars Erik Lindstrom, respectfully submits this Memorandum in response to the Court's order of October 22, 1999. The Court ordered the petitioner to address only the legal arguments raised by the respondent in response to the Court's order to show cause of September 17, 1999. The petitioner interprets this Court's order as not including the issue of the legal standards regarding contempt of court for the reason that the petitioner does not regard himself as necessarily adversarial to the respondent on that issue. If the petitioner's interpretation is mistaken, I will hasten to supplement the present Brief with arguments addressed to the issue of contempt of court.

I. The Irrelevance of Foreign Policy and Separation of Powers

The theory that extradition cases are within the foreign affairs power of the Executive Branch is invoked throughout the respondent's Show Cause Brief (FN 1) conveying the impression is that the petitioner's reliance on the rule of law is threatening the ability of the United States to maintain good relations with Norway. Thus the respondent claims that "the State Department's practice attempts to balance the obligation to its treaty partners with the desire to provide the fugitive with some review of the extraditability decision." Id. at 10. The balancer in the present case is AUSA Lori Lightfoot. Not only does she carry the responsibility for balancing the petitioner's rights against the State Department's desires, but in addition, according to the United States Attorneys' Manual, she wears a Norwegian hat: "The prosecutor represents the foreign country that originated the request [for extradition]. However, he or she is paid by the United States and supervised by the Executive Branch." Show Cause Brief tab 30, at 14. FN 2.
To the contrary, there is no mention of international extradition in the Constitution. International extradition does not fall within the foreign affairs power of the Chief Executive. FN 3 Instead it depends entirely on treaties, which constitute part of the supreme law of the land under Article 6 ¶ 2 of the Constitution. As Chief Justice Hughes wrote for a unanimous Court:

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states. But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executives to deliver them up." As stated by John Bassett Moore in his treatise on Extradition—summarizing the precedents—"the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Counsel for the petitioners do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.

There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.

Valentine v. United States, 299 U.S. 5, 8-9 (1936) (internal citations omitted).
In 1876 it had been held that no order of the President in relation to the prosecution of an extradited prisoner can legally restrict or enlarge the jurisdiction of the courts. United States v. Lawrence, 26 F.Cas. 879 (C.C.N.Y. 1876). As the Second Circuit summarized in 1960, "The right of international extradition is solely the creature of treaty" (citing Factor v. Laubenheimer, 290 US. 276, 287 (1933)). Gallina v. Fraser, C.A.2 (Conn.) 1960, 278 F.2d 77 (2d Cir. 1960), cert. denied 364 U.S. 851.
From the beginning of this nation, it has been the responsibility of the Judiciary to interpret treaties. See, e.g., Geofroy v. Riggs, 133 U.S. 258 (1890). The treaty in the present case is the Extradition Treaty between the United States of America and the Kingdom of Norway, Show Cause Brief tab 29. The relevant provision for present purposes is:

Article 10
The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with the law of the requested state and the person whose extradition is sought shall have the right to use such remedies and resources as are provided by such law.

There is no provision in the Treaty stating or implying that the rights of the person whose extradition is sought may be compromised, watered down, or "balanced" against foreign policy considerations. The Treaty, which is binding on all branches of the government of the United States ("the requested state") as the supreme law of the land, "creates no executive prerogative to dispose of the liberty of the individual," in the words of Chief Justice Hughes quoted above. The treaty grants the petitioner in the present case the right to rely upon the laws of the United States as they are and not as the State Department would have them. This is exactly what Norway bargained for when it ratified the treaty with the United States. There can be no reasonably anticipated disruption of good relations with Norway when the Judicial branch simply extends to Norway the full force and effect of the terms of the treaty it has signed and ratified. The talk about separation of powers and foreign policy considerations is simply out of place in the context of international extradition.

II. Extradition Cannot Proceed When a Case is Sub Judice

The respondent argues that an extraditee may be extradited while his habeas appeal is pending, so long as no stay order has been issued. FN 4. The respondent even contends that a person may be extradited after his initial habeas petition has been filed and before an Article III judge has ruled on it! FN5.
There is no doubt that an extraditee may seek a stay order, but there is nothing in the treaty or statutes to suggest that he must. There is no mention of a stay in either the Treaty with Norway nor in the extradition laws of the United States (18 USC §§ 3181 et seq.) Inasmuch as the respondent concedes that extradition law can be "complicated," "arcane," and "thorny," (Show Cause Brief at 3, 19), it is a bit much to expect an extraditee or his counsel (if he is represented by counsel) to be on notice that a stay order is required to safeguard an original or appellate habeas procedure when the relevant treaty and statutes do not mention it. To the relatively inexperienced extraditee, it would appear reasonable to assume that if a habeas corpus petition has been filed, or if the case is on review or on appeal, there could not possibly be a need to obtain extra protection—in the form of a stay order—to safeguard the integrity of the judicial process. It would be like requiring him to add an exclamation point at the end of his petitions and pleadings if he would like to stay around to argue them.
In fact the extradition statutes and procedure, although "clunky," (DeSilva v. DiLeonardi, 181 F.3d 865, 869-70 (7th cir. 1999)) do not contain a gap that must be filled by reading in a stay requirement. The

extradition procedure is straight-forward. Initially, there is a hearing on the request for extradition before any judge or magistrate. 18 U.S.C. § 3184. Since neither magistrates nor state court judges are Article III judges, the hearing is essentially a preliminary examination to determine probable cause. Ward v. Rutherford, 921 F.2d 286, 287 (D.C. Cir. 1990) (Ginsburg, J.), cert. dismissed 501 U.S. 1225 (1990). Because of the substantial personal liberty interest at stake in an extradition proceeding, the availability of habeas review by an independent judge appointed for life is clearly an integral part of an extraditee's constitutional rights. As this Court held in 1984: "No direct review of the magistrate's certification of extraditability under section 3184 is available, since it is not considered a 'final order.' The proper procedural path for judicial review is by means of a petition for a writ of habeas corpus." In re Burt, 737 F.2d 1477, 1482 n.9 (7th Cir.1984). FN 6. Since a habeas proceeding is an original action, it naturally incorporates the availability of appellate review. As Judge Ginsburg held, "actions taken by magistrates in international extradition matters are subject to habeas corpus review by an Article III district judge, with appellate review available thereafter." Ward v. Rutherford, 921 F.2d. at 288.

The respondent's claim that the extradition may proceed even if it is under appellate review—so long as a stay order has not been obtained by the extraditee—is without foundation in either in treaty or statutory law. The petitioner has the right, as provided by the Treaty with Norway, "to use such remedies and resources as are provided by such law [the law of the United States]." (Article 10, quoted above in the text.) There is nothing in the treaty or the extradition statutes to suggest that an extraditee is not legally entitled to a writ of habeus corpus by a district judge or not entitled to appellate review if a district judge dismisses the case. To the contrary, the extraditee is entitled to exhaust the full legal remedies available to him under the treaty and relevant statutes. FN 7.

The respondent can fairly be taken to have conceded, during the course of this litigation, that extradition is illegal during the pendency of appellate review of a habeas decision. On August 19, 1999, the respondent asked Judge Norgle to dismiss the petitioner's emergency motion for a stay of extradition on the ground that more than sixty days had elapsed since the entry of Judge Coar's denial of the petitioner's first habeas petition. More than sixty days had in fact elapsed. In support of the respondent's position, AUSA Lightfoot argued, among other things, that Lindstrom's notice of appeal of Judge Coar's decision tolled the sixty-day extradition period of 18 U.S.C. § 3188, even though the petitioner had not requested a stay. In effect she was arguing that extradition cannot take place because the case is sub judice—that the statutory sixty-day limitation period is presently in suspension. Judge Norgle refused the emergency motion for several reasons, one of them being precisely that the extradition statute was tolled with the filing of the Notice of Appeal. See Government's Motion to Immediately Lift Temporary Stay, at 3-4. FN8 The statute in question provides as follows:

§ 3188. Time of commitment pending extradition

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

Clearly if this statute is tolled, then the extraditee cannot be "committed for rendition" during the period of the tolling. Otherwise the concept of tolling would make no sense. To put the matter differently, so long as the petitioner's habeas petition is sub judice, he can not be a person who is at the same time "committed for rendition." If he is not available for extradition, then the State Department has no legal right to extradite him. He will not be committed for rendition unless and until the courts of appropriate

jurisdiction have so determined. FN 9 This is precisely what Judge Norgle recognized when he held that § 3188 had been tolled by the petitioner's appeal.

Justice Arthur Goldberg, in chambers, considered a situation similar to the one before Judge Norgle. See Jiminez v. U.S. Dist. Court for the Southern Dist. of Fla., 84 S.Ct. 14 (1963). In that case petitioner Jiminez, the former Head of State of the Republic of Venezuela, had been found extraditable by a federal magistrate. He then filed for a writ of habeas corpus, it was rejected, he appealed, the rejection was affirmed, he petitioned to the Supreme Court for a writ of certiorari, it was denied, he asked for a rehearing, it was denied—all of which consumed nearly two years. Then he applied to a state court judge for dismissal under 18 U.S.C. § 3188. There were a few additional procedural maneuvers of no consequence here, at the end of which the petitioner asked Justice Goldberg for a stay of extradition. One of the issues before Justice Goldberg was the construction of the sixty-day limitation period. Justice Goldberg reasoned as follows:

Petitioner construes the two-month period in § 3188 to run from the time of the original commitment order of the extraditing magistrate, not from the time his legal rights were finally determined by this Court's denial of certiorari and rehearing. From this construction, one of two results must follow: If the Government were prevented from removing him during the pendency of review proceedings, then the accused could readily frustrate this country's treaty obligations simply by invoking such proceedings for two months; if, on the other hand, the Government were permitted to remove him while proceedings were pending, then the statute would effectively foreclose review of extradition orders. A construction which compels a choice between such alternatives is untenable.

Justice Goldberg then resolved the dilemma as follows:

The common-sense reading of § 3188 is that where as here, the accused has instituted and pursued review of his extradition order, the two-month period runs from the time his claims are finally adjudicated, not from the time of the original commitment order he has been challenging.

However, the respondent interprets Justice Goldberg's opinion as "not stand[ing] for the proposition that, even in the absence of the stay, we have to await the end of proceedings to return a fugitive." Show Cause Brief at 22 n.4. This is a peculiar conclusion to derive from Justice Goldberg's opinion inasmuch as in such a high profile case (involving the former Head of State of the requesting country) there was no question of the State Department's forcible rendition of the extraditee to Venezuela before he had exhausted his legal remedies. The extraditee must have known this in his own decision not to apply for a stay. Although the respondent is technically correct in saying that Justice Goldberg did not address the issue of what might happen "in the absence of the stay," it is a fair inference from his reasoning as a whole that he would have been shocked if the State Department had suggested to him that it had the right to whisk away the petitioner to Venezuela at any time while his case was pending simply because the petitioner had failed to apply for a stay. Justice Goldberg might have even been more astonished if the State Department had told him that the only reason they had not done it was because this was a high profile case. It is hard to imagine that Justice Goldberg would have taken the care to review the merits of all the petitioner's assortment of claims if he thought that his opinion would be distinguishable in the future on the ground that full justice is only owed to high-profile petitioners and not to the normal run of extradition cases. It is also hard to imagine that he would have taken the care to review the merits of the case if his exercise was simply the avoidable consequence of a prior unilateral decision by the Executive Branch not to remit this particular petitioner to Venezuela. It would be like saying that there may be a rule of law in international extradition cases, but only by leave of the State Department.

It follows from Justice Goldberg's opinion that if the present petitioner cannot have it both ways, neither can the respondent. The statute is tolled from the time the petitioner files for habeas corpus until his

claims are finally adjudicated or until a court otherwise commits him for extradition within the meaning of § 3188.

III. The Respondent's Fear of Indefinite Delay is Unfounded

The respondent fears that the treaties and statutes applicable in international extradition cases, if applied according to their terms, would afford extraditees the opportunity for indefinite delays. The extraditee would merely file successive habeas petitions and take each one through all available stages of appellate review. At least, that is the fear that is put forth in the Show Cause Brief as a reason for drastic reinterpretation of existing statutory language. Thus, despite the clear terms of Rule 23(a) of the Federal Rules of Appellate Procedure, the respondent argues that the Rule should be disregarded in its entirety because "it was designed for a different circumstance and cannot be applied to international extradition cases." Show Cause Brief at 54. In other words, an extraditee who is exercising his right under Article 10 of the Treaty with Norway "to use such remedies and resources as are provided by such law" must understand that Rule 23(a) is somehow not provided by law. Yet there is nothing in Rule 23(a) that excludes its applicability to international extraditions. What the extraditee must figure out is that the Rule is too good to be true. For if Rule 23(a) were provided by law, it would give him too much of an advantage, and therefore the courts should ignore the Rule.

The respondent adds a textual reason for construing Rule 23(a) as not applying to international extradition. Rule 23(a) requires that if a transfer of custody in a habeas corpus proceeding is applied for, the judge "may authorize the transfer and substitute the successor custodian as a party." The respondent argues that this provision "is singularly inapplicable to international extradition cases because a foreign agent, who has taken custody of a fugitive and departed the United States, could not logically be the successor party." Show Cause Brief at 55. Yet it is clear that the successor custodian, whether in a domestic or in an international extradition case, must have consented to take custody. (Custody is not forced upon unwilling successor custodians.) There is nothing in international law that prevents agents of Norway, or the King of Norway himself, from consenting to be a party in an extradition case as a condition for the transfer of custody. The King of Norway is not barred from consenting to anything by virtue of United States law. For example, if the respondent in the present case had sought permission from this Court under Rule 23(a) to transfer custody of the petitioner to the Norwegian agents, one of the options available to the Court would have been to require as a condition of such transfer the consent of the King of Norway to becoming party to the case. This could be explained to Norway in roughly the following way: "We are willing to hold the petitioner in our jail until we have determined that he is committed for rendition. That process may take some time. If you would prefer that he be held in a Norwegian prison pending the extradition determination, you may take him into custody provided that, if we eventually determine that he is not committed for rendition, you will expeditiously send him back." While this procedure may seem cumbersome and clunky, it is certainly not "illogical" or "impossible." However, it is far more likely, as a practical matter, that a habeas judge will take one of the two other alternatives provided by Rule 23(a). The judge can either deny the transfer request, or authorize it without substituting the successor custodian as a party. Either of these alternatives would have avoided the entire present controversy. Indeed, if the arguments presented in the first two parts of this Memorandum are accepted, the State Department could use Rule 23(a) as one available procedure for determining whether, while an extraditee's case is pending, he may or may not be committed for rendition to the requesting country. It is strange that the State Department is trying to read Rule 23(1a) off the books in international extradition cases.

Yet the respondent's discomfiture with Rule 23(a) is explainable if we consider how Judge Coar, the habeas judge, might have reacted to a hypothetical request by the respondent for an authorization of custody transfer under that Rule. The judge, having just certified the appealability of the petitioner's human-rights claim to this Court, might well have asked the respondent whether the Rule 23(a)

application was an attempt to wipe out the judge's decision on appealability and the research that went into it by sending the petitioner abroad before the Seventh Circuit had a chance to consider the human-rights question. There is scant likelihood that Judge Coar, if he were to ask such a question, would then authorize the custody transfer. A comparable Rule 23(a) risk to the respondent could be present in nearly every extradition case that is on habeas review. Hence the State Department undoubtedly prefers an unfettered right to proceed with the extradition in all cases where a stay order has not been obtained than to put its cards face-up on the table by taking a chance on Rule 23(a).

The respondent has exposed enough of the State Department's thinking and instruction manuals in the present case to enable this Court to arrive at a reasonable guess as to the core legal strategy of the OIA in this and perhaps in every extradition case. It is to ensure that the burden is always placed upon the extraditee to protect his legal rights by requesting and obtaining a stay order. The State Department wishes to enjoy the discretion, right after a magistrate's or judge's certification of extraditability, to shortcut the judicial process and remit the extraditee to the requesting country. It wishes to avoid having to ask any court for permission to remit the extraditee while his legal rights are being adjudicated. Hence it asks this Court to approve the bright-line rule that, in the absence of a stay order, the extraditee can at any time be turned over to foreign agents and sent out of the country. FN 10

The respondent may be counting on the probability that, in the numerous extradition cases that go on all the time, many of the extraditees or their attorneys may be unaware of an obligation to protect the integrity of the judicial process by obtaining a stay order. Thus an extraditee may suddenly find himself on a plane heading out of the country even while his habeas petition or appeal is pending. To be prudent, the respondent might refrain from expelling placing high profile extraditees, but may count on the normal extraditee's having enough problems without continuing a pointless litigation back in the United States. And even if the extraditee complains through his attorney, the respondent may expect that most judges – noting that the petitioner is no longer in the jurisdiction – may be inclined to dismiss the complaint as moot.

To the contrary, the burden on removing an extraditee from the judicial process should rest upon the State Department. It could apply for a "release" order, if nominally there is such a thing. It could apply for a transfer-of-custody order under Rule 23(a). Or it could simply argue to the court at any stage in the habeas process that further proceedings would be clearly without merit and that the extraditee should be committed for rendition. To be sure, such an order would be reviewable on appeal, and thus the extradition process may be delayed a short while. But if the habeas objections were indeed without merit, an appellate court or the Supreme Court on certiorari would see it quickly. Justice Goldberg was able to engage in a quick review of the merits in the Jiminez case and decide that further proceedings and reviews would be pointless. Hence there are many available steps the respondent can take to ensure that extraditees cannot prolong their cases indefinitely.

With an extraditee already "in" the judicial process, it should be the respondent's burden to get him "out" of the judicial process. Placing the burden has strategic consequences. For example, a person certified as extraditable might have filed, or be about to file, a petition for a writ of habeas corpus. If he fears that the U.S. Marshal may at any moment turn him over to foreign agents, then under the respondent's theory his only recourse would be to file for a stay of extradition. But he may reason that a federal judge might not want to issue him such a stay. She may already be skeptical of the merits of his habeas petition and may not want to take the additional step of ordering the State Department to desist. Or she may be troubled by the idea of ordering the State Department to do anything. She may be uncomfortable with the notion of meddling in foreign relations. Or she may simply believe that her job is to review the writ, and not to be concerned with external events. A prisoner who is extradited may seem to her to be in the same category as a prisoner who escapes; in either case, the habeas petition becomes moot due to external events apparently beyond the control of the court.

An extraditee or his attorney would therefore be placed in a strategic dilemma. On the one hand, obtaining a stay order would preserve his right to remain within the legal process. On the other hand, if

the request for a stay is denied, federal agents might immediately swoop down and turn him over to foreign agents. Surely it is unfair to put every potential extraditee at risk in this fashion. The extraditee is only attempting to exhaust the "remedies and resources" available under U.S. law. He will be inclined – assuming he knows about the availability of a stay – not to ask the court for one. Nevertheless, under the respondent's theory he must be ready to request a stay immediately if he finds out – as one of the petitioner's attorneys in the present case serendipitously found out – that the State Department is actively instituting steps to proceed with the extradition while his case is in the judicial system. An extraditee should not be the designated cheese in a game of cat-and-mouse that the executive branch wants to play with the judicial branch.

IV. Conclusion

International extradition is governed entirely by treaty and statutory law. The decision whether a person is eligible to be extradited – "committed for rendition" – is assigned solely to the judicial branch. The extraditee's fundamental personal liberties are at stake, and hence he or she has a constitutional right to a full habeas review of a magistrate's certification of extraditability. The executive branch should not be seeking ways to curtail this right or to "balance" it against considerations that are outside the governing treaty. Rather, the State Department should be primarily actuated by a desire to help ensure and secure the basic individual rights that are guaranteed by the Constitution and by treaties made under the authority of the United States to all persons lawfully within its jurisdiction.
Respectfully submitted,

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Footnotes

FN1 Response of Assistant United States Attorney Lori Lightfoot and Deputy United States Marshal Ron Randolph to the Court's September 17, 1999, Show Cause Order, at 3, 9-11, 48-54 et seq. [the "Show Cause Brief"].

FN 2 Thus it is unsurprising that she would reach a conclusion such as the following: "The second habeas action is only relevant to demonstrate the length to which Lindstrom will go to forum shop in his never ending quest to avoid justice in Norway where he was duly convicted of a serious felony." Government's Motion to Immediately Lift Temporary Stay, at 4. There is no balanced consideration here of Lindstrom's right to use legal remedies and resources as granted by the Treaty with Norway (quoted in the text, infra).

FN3 The respondent quotes Justice Sutherland's general observations in the Curtiss-Wright case, Show Cause Brief at 49; quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). But these observations were clearly dicta. In any event, in Reid v. Covert, 354 US 1, 5-6 (1957), the Supreme Court held that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."

FN 4 The respondent claims: "[I]f the district court rejects his arguments, after the magistrate judge has rejected his arguments, and no court has issued a stay, then it is important to fulfill the government's treaty obligations by extraditing him." Show Cause Brief at 11.

FN 5 The fugitive may challenge the finding of extraditability by means of a petition for a writ of habeas corpus. The filing of the petition does not automatically stay further proceedings, and in certain cases, the government may go forward with the extradition if the proceedings are not stayed by the order of the court." United States Attorneys' Manual, Show Cause Brief tab 30, at p. 16. If the arguments given in the text are persuasive, this assertion appears outrageous.

FN 6 The respondent, however, would have this Court believe that habeas review is granted through the largesse of the State Department: "The State Department's practice attempts to balance the obligation to its treaty partners with the desire to provide

the fugitive with some review of the extraditability decision. Criscitelli Aff. at par. 8. Allowing the fugitive to effectively appeal his case to the district court through a habeas petition, even in the absence of a stay, provides him with a significant opportunity to have his claim reviewed." Show Cause Brief at 10-11. Nor is this largesse always bestowed. See n. 5, supra.

FN 7 The respondent's fear that an extraditee might delay his extradition indefinitely by a combination of successive habeas petitions and reviews thereof is addressed in Part III of this Memorandum.

FN 8 The respondent argues throughout the Show Cause Brief that there is a simple bright-line rule that the government applies once a magistrate has determined that a person is extraditable, namely, that unless a court has issued a stay, the person can be extradited. See, e.g., Show Cause Brief at p. 34 (consistent with State Department practice and consistent with the training Safford had received over the years), p. 22 ("unless we have a stay in place, we can move him"). Since this rule is so clear, the question arises why the respondent found this case so difficult that day. The respondent says that the situation on August 19th "raised complicated, arcane issues of extradition law" (p. 3), that Lightfoot and Randolph "were given practically no time to determine the answers to very complex, sensitive issues," (p. 17), that the issues were "novel and thorny," that Lindstrom (who all the time was in handcuffs) had "created" an "extraordinarily difficult situation." (pp. 17-18), and that the area of extradition is "tricky and obscure" (p. 35 n.13). Yet the respondent has apparently felt no obligation to explain to this Court why a simple bright-line rule that had been applied consistently over many years could suddenly cause such havoc among government extradition lawyers in Washington and Chicago. Nevertheless, a reasonable explanation might be inferred. In order not to run the risk of having the extradition voided by the expiration of the 60-day period, the respondent had to argue to Judge Norgle that the statutory limitations period had been tolled. However, if the statute had been tolled by the filing of an appeal in the first habeas proceeding, it was still tolled on the morning of August 19th. In that case, the extradition by definition could not proceed. Hence the respondent was in the tricky and thorny position of having to argue that the appeal was alive for the purpose of the 60-day period but dead for the purpose of whisking the petitioner out of the country before anyone could sort the whole thing out. Lazarus had risen from the dead but only for the limited purpose of persuading Judge Norgle. Yet even in that brief appearance he had caused a considerable increase in telephone traffic between Washington and Chicago and complicated the lives of many federal attorneys—how to explain to one court in the Federal Building that the case was still alive while telling another court on a higher floor in the same building that the case has been dead for some time. The respondent appears to be continuing this dual approach. The most recent Show Cause Brief, despite its massive detail, makes no mention of the reasons Judge Norgle gave for denying the stay of extradition.

FN 9 Petitioner Lindstrom thus remained within the jurisdiction of this Court until the plane which he had been forced to board left the jurisdiction after 5 p.m. on August 19, 1999. Since he was not available for extradition prior to 5 p.m. on August 19, 1999 – he was not "committed for rendition" – any attempt to turn custody over to a foreign agent was legally invalid, a mistake of law. What the US marshal did not have he could not transfer. The Norwegian agents never obtained legal custody of the petitioner. Thus there would have been no need to reverse the surrender of custody in order to keep the petitioner within the jurisdiction of this Court, for there was never any legal surrender in the first place. The Secretary of State's surrender warrant was not "duly issued" because it was based on a legal mistake.

FN 10 See nn. 4-5, supra.