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TRANSFER OF OFFENDERS AND ADMINISTRATION OF
FOREIGN PENAL SENTENCES

GOVERNMENT

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON

SENTENTIARIES AND CORRECTIONS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1682

TO PROVIDE FOR THE IMPLEMENTATION OF TREATIES
FOR THE TRANSFER OF OFFENDERS TO OR FROM FOREIGN
COUNTRIES

JULY 13 AND 14, 1977

Printed for the use of the Committee on the Judiciary



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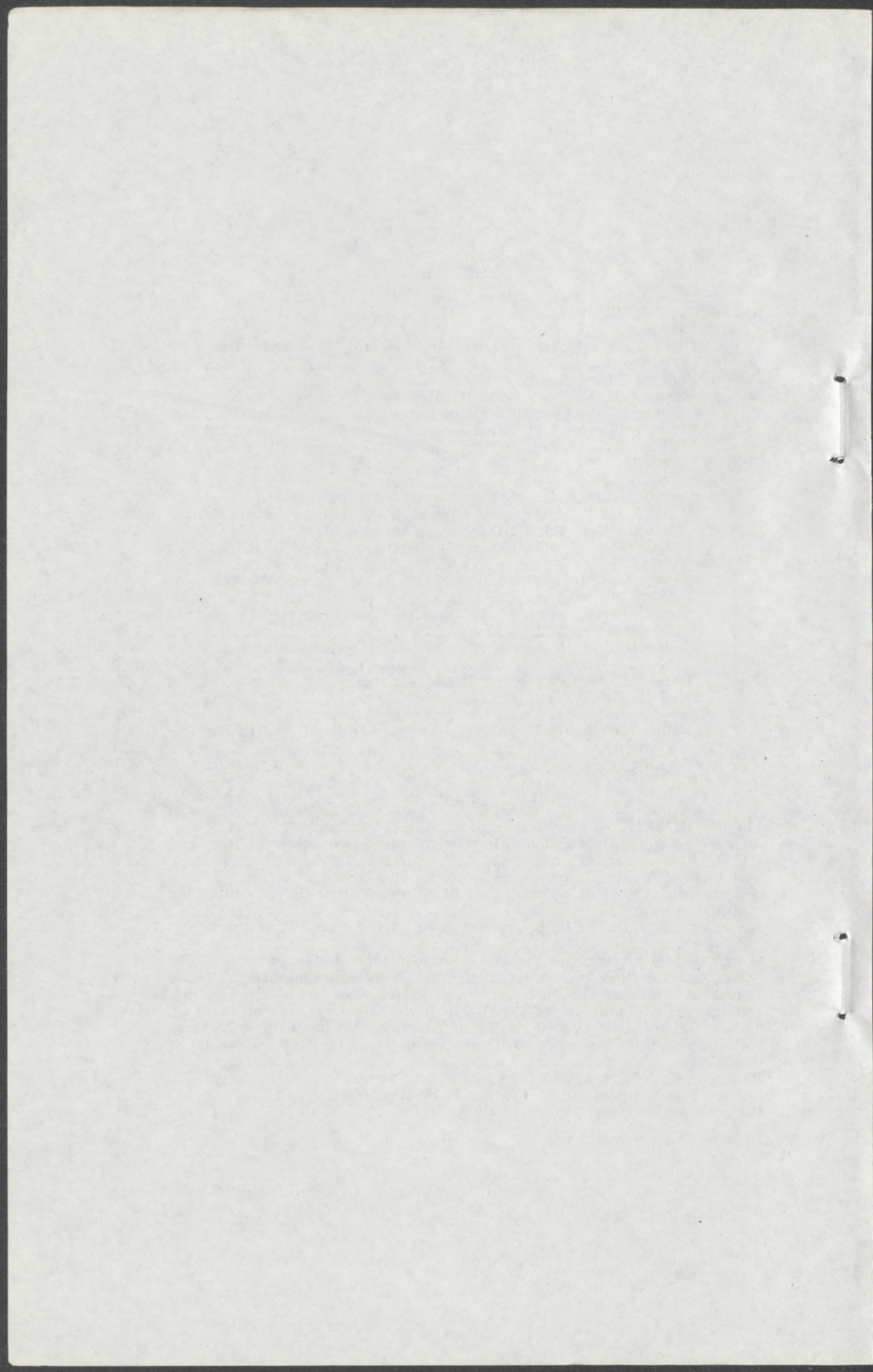
CHARLES McC. MATHIAS, JR., Maryland

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TRANSFER OF OFFENDERS AND ADMINISTRATION OF FOREIGN PENAL SENTENCES

WEDNESDAY, JULY 13, 1977

U.S. SENATE,
SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 8:45 a.m., in room 6226, Dirksen Senate Office Building, Senator Joseph R. Biden (chairman of the subcommittee) presiding.

Present: Senator Mathias.

Staff present: James G. Meeker, staff director; and Judith E. Snopek, chief clerk. Also present: Jerry Doherty, Katrina Lantos, and Michael Klipper.

Senator BIDEN. The hearing will come to order please.

I am pleased this morning to convene hearings on S. 1682, legislation to provide for implementation of treaties between the United States and Canada and Mexico for the transfer of criminal offenders to their home nation to serve prison sentences. I want to begin these hearings by acknowledging the interest of my colleagues in this legislation; particularly Senator Mathias, who is a member of the Subcommittee on Corrections, and Senator Bentsen, who joined me in the introduction of this administration bill.

The history of how we have come to consider this legislation is a brief but interesting one. Much of the narcotics and other abusable drugs sold in the United States is smuggled in from other countries. It has been, and still is, national policy to seek the assistance of other governments in controlling the international flow of these dangerous drugs. One of the unfortunate consequences of this policy has been the incarceration of many young Americans in foreign jails following their convictions abroad. The largest number of these young people have been incarcerated in Mexico, and serious questions have been raised about the circumstances of their conviction and incarceration. The two treaties, which currently are pending before the Senate Foreign Relations Committee, and the implementing legislation which we are considering today are seen as a humane gesture to these individuals and to their families. If the treaties are ratified and their provisions implemented many young people would return, to be closer to home and family. Because Mexican sentences for drug trafficking do not provide parole, many young people would be released from prison once they have been returned to the United States.

Some of the tales which have been told in the news and to congressional committees of beatings, abuse, and inhumane punishment suggest that there is an urgent need for this bill. Because the criticism of Mexican judicial process and prison conditions has been broadly published, the incarceration of Americans in Mexican jails has become a matter of diplomatic discomfort between the two countries.

There are at least two reasons why this implementing legislation must be weighted carefully before it can be enacted. First, Mexico is still the source of the majority of heroin coming into the United States, according to the Drug Enforcement Administrator, Peter B. Bensinger. However, Bensinger also said that most of the Americans in Mexican institutions are not traffickers in such hard drugs. Most of these men and women have no prior criminal record, no connection to any continuing drug or narcotic conspiracy, and the basis of their conviction was either possession of a small amount, or a one-time effort to smuggle drugs into the United States.

The second, and more important reason that this legislation be given careful consideration is the complexity of the law when you have people convicted in one country incarcerated in the prisons of another.

The treaties and their implementing legislation require that an individual waive his right to pursue a collateral attack on the validity of the foreign court's action after he has returned to his native land. Congress must first weigh whether or not it is appropriate to establish this waiver process to the historic writ of habeas corpus in the statutes. Our criminal and civil law have long recognized that an individual may waive his rights when he perceives that it is in his advantage to do so. Such a waiver, however, must be knowing, intelligent, and voluntary. The second major question which Congress must weigh is the means for assuring that the waiver meets these tests.

I am pleased that we have Deputy Attorney General Peter Flaherty from the Department of Justice to share his thoughts on these and other very important questions with the subcommittee this morning. We will also have Prof. M. Cherif Bassiouni to assist the subcommittee on its deliberations of these important questions of law.

Ms. Barbara M. Watson of the State Department Bureau of Security and Consular Affairs will add to the subcommittee's deliberations by bringing us the history of this prisoner transfer plan, and to discuss the legal problems that will face those who counsel the American citizens in foreign countries when the treaties have been ratified.

I would like to apologize for being late. In this era of abuse of authority by high elected officials, I want you to know that I tried to abuse it and could not. I tried to get on an Allegheny flight in Philadelphia, and they bounced me so I had to drive. They told me that I was not in line in time. I want you to know for the record that I tried to abuse my authority and it did not work. I had to drive and I am late. I am very very sorry. I apologize for holding you up.

Senator Mathias, I understand, was here. Senator Mathias will return later.

Before we begin with the first witness I would like to place a copy of S. 1682 into the record.

[Aforementioned bill follows:]

95TH CONGRESS
1ST SESSION

S. 1682

IN THE SENATE OF THE UNITED STATES

JUNE 13 (legislative day, MAY 18), 1977

Mr. BIDEN (for himself and Mr. BENTSEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the implementation of treaties for the transfer of offenders to or from foreign countries.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That title 18, United States Code, is amended by inserting
4 after chapter 305 the following new chapter:

5 **"Chapter 306.—TRANSFER TO OR FROM FOREIGN**
6 **COUNTRIES**

"Sec.

"4100. Scope and limitation of chapter.

"4101. Definitions.

"4102. Authority of the Attorney General.

"4103. Applicability of United States laws.

"4104. Transfer of offenders on probation.

"4105. Transferred offender serving sentence of imprisonment.

"4106. Transfer of offenders on parole; parole of offenders transferred.

"4107. Verification of consent of offender to transfer from the United States.

II

"4108. Verification of consent of offender to transfer to the United States.

"4109. Right to counsel, appointment of counsel.

"4110. Transfer of juveniles.

"4111. Prosecution barred by foreign conviction.

"4112. Loss of rights, disqualification.

"4113. Status of alien offender transferred to a foreign country.

"4114. Return of transferred offenders.

1 **"§ 4100. Scope and limitation of chapter**

2 “(a) The provisions of this chapter relating to the
3 transfer of offenders shall be applicable only when a treaty
4 providing for such a transfer is in force, and shall only be
5 applicable to transfers of offenders to and from a foreign
6 country pursuant to such a treaty. A sentence imposed by a
7 foreign country upon an offender who is subsequently trans-
8 ferred to the United States pursuant to a treaty shall be
9 subject to being fully executed in the United States even
10 though the treaty under which the offender was transferred
11 is no longer in force.

12 “(b) An offender may be transferred from the United
13 States pursuant to this chapter only to a country of which
14 the offender is a citizen or national. Only an offender who is
15 a citizen or national of the United States may be transferred
16 to the United States. An offender may be transferred to or
17 from the United States only with the offender's consent. If
18 at the time of transfer the offender is under eighteen years
19 of age the transfer shall not be accomplished unless consent
20 to the transfer be given by a parent or guardian.

1 “(c) An offender shall not be transferred to or from
2 the United States if a proceeding by way of appeal or of
3 collateral attack upon the conviction or sentence be pending,
4 nor shall an offender be transferred until the prescribed time
5 for appeal of the offender’s conviction and sentence has
6 expired.

7 “(d) The United States upon receiving notice from
8 the country which imposed the sentence that the offender
9 has been granted a pardon, commutation, or amnesty, or
10 that there has been an ameliorating modification or a
11 revocation of the sentence shall give the offender the benefit
12 of the action taken by the sentencing country.

13 “(e) A decision of the United States to consent or
14 refuse to consent to a transfer of an offender is a discretionary
15 decision and shall not be reviewable by any court.

16 **“§ 4101. Definitions**

17 “As used in this chapter the term—

18 “(a) ‘imprisonment’ means a penalty imposed by a
19 court under which the individual is confined to an
20 institution;

21 “(b) ‘juvenile’ means—

22 “(1) a person who is under eighteen years of
23 age; or

24 “(2) for the purpose of proceedings and dis-
25 position under this chapter because of an act of

1 juvenile delinquency, a person who is under twen-
2 ty-one years of age;

3 “(c) ‘juvenile delinquency’ means—

4 “(1) a violation of the laws of the United
5 States or a State thereof or of a foreign country
6 committed by a juvenile which would have been a
7 crime if committed by an adult; or

8 “(2) noncriminal acts committed by a juvenile
9 for which supervision or treatment by juvenile
10 authorities of the United States, a State thereof,
11 or of the foreign country concerned is authorized;

12 “(d) ‘offender’ means a person who has been con-
13 victed of an offense or who has been adjudged to have
14 committed an act of juvenile delinquency, or who is
15 accused of an offense but has been determined to be
16 mentally ill;

17 “(e) ‘parole’ means any form of release of an
18 offender from imprisonment to the community by a re-
19 leasing authority prior to the expiration of his sentence,
20 subject to conditions imposed by the releasing authority
21 and to its supervision;

22 “(f) ‘probation’ means any form of a sentence to a
23 penalty of imprisonment the execution of which is sus-
24 pended and the offender is permitted to remain at liberty
25 under supervision and subject to conditions for the breach

1 of which the suspended penalty of imprisonment may be
2 ordered executed;

3 “(g) ‘sentence’ means not only the penalty im-
4 posed but also the judgment of conviction in a criminal
5 case of the adjudication of delinquency in a juvenile
6 delinquency proceeding;

7 “(h) ‘State’ means any State of the United States,
8 the District of Columbia, the Commonwealth of Puerto
9 Rico, and any territory or possession of the United
10 States;

11 “(i) ‘transfer’ means a transfer of an individual for
12 the purpose of the execution in one country of a sentence
13 imposed by the courts of another country and also the
14 transfer of a mentally ill person accused of an offense in
15 one country to the country of which he is a citizen or
16 national for the purpose of treatment;

17 “(j) ‘treaty’ means a treaty under which an of-
18 fender sentenced in the courts of one country may be
19 transferred to the country of which he is a citizen or
20 national for the purpose of serving the sentence.

21 **“§ 4102. Authority of the Attorney General**

22 “The Attorney General is authorized—

23 “(1) to act on behalf of the United States as the
24 authority referred to in a treaty;

25 “(2) to receive custody of offenders under a sen-

1 tence of imprisonment, on parole, or on probation who
2 are citizens or nationals of the United States transferred
3 from foreign countries and as appropriate confine them
4 in penal or correctional institutions, or assign them to
5 the parole or probation authorities for supervision;

6 “(3) to transfer offenders under a sentence of im-
7 prisonment, on parole, or on probation to the foreign
8 countries of which they are citizens or nationals;

9 “(4) to designate citizens of the United States to
10 verify the consent of convicted offenders who are citi-
11 zens or nationals of the United States to be transferred
12 to the United States;

13 “(5) to make regulations for the proper imple-
14 mentation of such treaties;

15 “(6) to render to foreign countries and to receive
16 from them the certifications and reports required to be
17 made under such treaties;

18 “(7) to make arrangements by agreement with the
19 States for the transfer of offenders in their custody
20 who are citizens or nationals of foreign countries to the
21 foreign countries of which they are citizens or nationals
22 and for the confinement, where appropriate, in State
23 institutions of offenders transferred to the United States;

24 “(8) to make agreements and establish regulations
25 for the transportation through the territory of the

1 United States of offenders convicted in a foreign country
2 who are being transported to a third country for the
3 execution of their sentences, when a treaty is in force
4 between the United States and the foreign country pro-
5 vides for such transit;

6 “(9) to make agreements with the appropriate
7 authorities of a foreign country and to issue regulations
8 for the transfer and treatment of juveniles who are
9 transferred pursuant to treaty;

10 “(10) in concert with the Secretary of Health,
11 Education, and Welfare, to make arrangements with
12 the appropriate authorities of a foreign country and to
13 issue regulations for the transfer and treatment of indi-
14 viduals who are accused of an offense but who have
15 been determined to be mentally ill; such agreements
16 and regulations may also provide for the return of the
17 accused person to the country in which he is charged
18 upon his recovery from the mental illness;

19 “(11) to designate agents to receive, on behalf of
20 the United States, the delivery by a foreign government
21 of any citizen or national of the United States being
22 transferred to the United States for the purpose of
23 serving a sentence imposed by the courts of the foreign
24 country, and to convey him to the place designated by
25 the Attorney General. Such agent shall have all the

1 powers of a marshal of the United States in the several
2 districts through which it may be necessary for him to
3 pass with the offender, so far as such power is requisite
4 for the offender's transfer and safekeeping; within the
5 territory of a foreign country such agent shall have such
6 powers as the authorities of the foreign country may
7 accord him;

8 “(12) to delegate the authority conferred by this
9 chapter to officers of the Department of Justice.

10 **“§ 4103. Applicability of United States laws**

11 “All laws of the United States, as appropriate, pertain-
12 ing to prisoners, probationers, parolees, and juvenile offenders
13 shall be applicable to offenders transferred to the United
14 States, unless a treaty or this chapter provides otherwise.

15 **“§ 4104. Transfer of offenders on probation**

16 “(a) Prior to consenting to the transfer to the United
17 States of a convicted offender who is on probation, the
18 Attorney General shall determine that the appropriate
19 United States district court is willing to undertake the
20 supervision of the offender.

21 “(b) Upon the receipt of an offender on probation from
22 the authorities of a foreign country, the Attorney General
23 shall cause the offender to be brought before the United
24 States district court which is to exercise supervision over the
25 offender.

9

1 “(c) The court shall place the offender under supervision
2 of the probation office of the court. The offender shall be
3 supervised by a probation officer, under such conditions as
4 are deemed appropriate by the court or probation officer,
5 as though probation had been imposed by the United
6 States district court.

7 “(d) The probation may be revoked in accordance with
8 section 3653 of this title and rule 32 (f) of the Federal
9 Rules of Criminal Procedure. A violation of the conditions
10 of probation shall constitute grounds for revocation. If pro-
11 bation is revoked the suspended sentence imposed by the
12 sentencing court shall be executed.

13 “(e) The provisions of sections 4105 and 4106 shall
14 be applicable following a revocation of probation.

15 “(f) Prior to consenting to the transfer from the
16 United States of an offender who is on probation, the Attor-
17 ney General shall obtain the assent of the court exercising
18 jurisdiction over the probationer.

19 “(g) The decision of the court to undertake or not
20 undertake the supervision of an offender on probation re-
21 ferred to in (a) and of the court to assent or not assent to
22 the transfer from the United States of an offender on proba-
23 tion referred to in (f) shall not be reviewable by any other
24 court.

1 **“§ 4105. Transferred offender serving sentence of imprison-**
2 **ment**

3 “(a) Except as provided elsewhere in this section, an
4 offender serving a sentence of imprisonment in a foreign
5 country transferred to the custody of the Attorney General
6 shall remain in the custody of the Attorney General under
7 the same conditions and for the same period of time as an
8 offender who had been committed to the custody of the At-
9 torney General by a court of the United States for the pe-
10 riod of time imposed by the sentencing court.

11 “(b) The transferred offender shall be given credit
12 toward service of the sentence for any days, prior to the
13 date of commencement of the sentence, spent in custody in
14 connection with the offense or acts for which the sentence
15 was imposed; except that, if the judgment or other docu-
16 ments officially certified by foreign authorities indicate that
17 this time spent in custody prior to sentence has been taken
18 into account in the length of sentence imposed, credit shall
19 not be given by the Attorney General for such presentence
20 custody.

21 “(c) (1) The transferred offender shall be entitled to all
22 credits for good time, for labor, or any other credit toward
23 the service of the sentence which had been given by the
24 transferring country for time served as of the time of the
25 transfer. Subsequent to the transfer, the offender shall in

1 addition be entitled to credits for good time, computed on the
2 basis of the time remaining to be served at the time of the
3 transfer and at the rate provided in section 4161 of this title
4 for a sentence of the length of the total sentence imposed
5 and certified by the foreign authorities. These credits shall
6 be combined to provide a release date for the offender pur-
7 suant to section 4164 of this title.

8 “(2) If the country from which the offender is trans-
9 ferred does not give credit for good time, the basis of com-
10 puting the deduction from the sentence shall be the sentence
11 imposed by the sentencing court and certified to be served
12 upon transfer, at the rate provided in section 4161 of this
13 title.

14 “(3) A transferred offender may earn extra good time
15 deductions, as authorized in section 4162 of this title, from
16 the time of transfer.

17 “(4) All credits toward service of the sentence, other
18 than the credit for time in custody before sentencing, may be
19 forfeited as provided in section 4165 of this title and may be
20 restored by the Attorney General as provided in section 4166
21 of this title.

22 “(5) Any additional sentence for an offense against the
23 United States, imposed while the transferred offender is
24 serving the sentence of imprisonment imposed in a foreign
25 country, shall be aggregated with the foreign sentence, in

1 the same manner as if the foreign sentence was one imposed
2 by a United States district court for an offense against the
3 United States.

4 **"§ 4106. Transfer of offenders on parole; parole of offend-**
5 **ers transferred**

6 "(a) Upon the receipt of an offender who is on parole
7 from the authorities of a foreign country, the Attorney
8 General shall assign the offender to the United States Parole
9 Commission for supervision.

10 "(b) The United States Parole Commission and the
11 Chairman of the Commission shall have the same powers
12 and duties with reference to an offender transferred to the
13 United States to serve a sentence of imprisonment or who at
14 the time of transfer is on parole as they have with reference
15 to an offender convicted in a court of the United States except
16 as otherwise provided in this chapter or in the pertinent
17 treaty. Sections 4201 through 4204; 4205 (a), (d), (e),
18 and (h) ; 4206 through 4215; and 4218 of this title shall be
19 applicable.

20 "(c) An offender transferred to the United States to
21 serve a sentence of imprisonment shall be eligible for parole
22 under section 4205 (a) of this title subject to the provisions
23 of section 4205 (h) of this title.

24 "(d) An offender transferred to the United States to
25 serve a sentence of imprisonment who was under the age of

1 twenty-two years at the time of the conviction shall be
2 eligible for parole at any time.

3 **"§ 4107. Verification of consent of offender to transfer**
4 **from the United States**

5 " (a) Prior to the transfer of an offender from the
6 United States, the fact that the offender consents to such
7 transfer and that such consent is voluntary and with full
8 knowledge of the consequences thereof shall be verified by a
9 Federal magistrate as defined in rule 54 (c) of the Federal
10 Rules of Criminal Procedure.

11 " (b) The consequences of consenting to the transfer
12 which must be brought to the attention of the offender are:

13 " (1) only the appropriate courts in the United
14 States may modify or set aside the conviction or sentence
15 and any proceedings seeking such action may only be
16 brought in such courts, and by his consent he waives
17 all rights to institute proceedings in the courts of the
18 country to which he is to be transferred seeking to chal-
19 lenge, modify, or set aside his conviction or sentence;

20 " (2) the sentence shall be carried out according to
21 the laws of the country to which he is to be transferred
22 and that those laws are subject to change; and

23 " (3) if a court of the country to which he is trans-
24 ferred should determine upon a proceeding initiated by
25 him or on his behalf that his transfer was not accom-

1 plished in accordance with the treaty or laws of that
2 country, he may be returned to the United States for the
3 purpose of completing the sentence.

4 **“§ 4108. Verification of consent of offender to transfer to**
5 **the United States**

6 “(a) Prior to the transfer of an offender to the United
7 States, the fact that the offender consents to such transfer
8 and that such consent is voluntary and with full knowledge
9 of the consequences thereof shall be verified by a United
10 States magistrate, or by a citizen of the United States spe-
11 cifically designated by the Attorney General. The designation
12 by the Attorney General of a citizen who is an employee or
13 officer of a department or agency of the United States other
14 than the Department of Justice shall be with the approval
15 of the head of that department or agency.

16 “(b) The consequences of consenting to the transfer
17 which must be brought to the attention of the offender are:

18 “(1) only the country in which he was convicted
19 and sentenced may modify or set aside the conviction or
20 sentence and any proceedings seeking such action may
21 only be brought in the courts of that country, and by his
22 consent he waives all rights he might have had to in-
23 stitute proceedings in the courts of the United States
24 seeking to challenge, modify, or set aside his conviction
25 or sentence;

1 “(2) the sentence shall be carried out according to
2 the laws of the United States and that those laws are
3 subject to change; and

4 “(3) if a United States court should determine upon
5 a proceeding initiated by him or on his behalf that his
6 transfer was not accomplished in accordance with the
7 treaty or laws of the United States he may be returned
8 to the country which imposed the sentence for the pur-
9 pose of completing the sentence.

10 **“§ 4109. Right to counsel, appointment of counsel**

11 “In proceedings to verify consent of an offender for
12 transfer, the offender shall have the right to advice of counsel.
13 If the offender is financially unable to obtain counsel—

14 “(a) counsel for proceedings conducted under sec-
15 tion 4107 shall be appointed in accordance with the
16 Criminal Justice Act (18 U.S.C. 3006A). Such appoint-
17 ment shall be considered an appointment in a misde-
18 meanor case for purposes of compensation under the Act;

19 “(b) counsel for proceedings conducted under sec-
20 tion 4108 shall be provided by the Secretary of State,
21 under regulations to be prescribed by him. The Secretary
22 may, without regard to section 3106 of title 5, United
23 States Code, employ counsel and pay counsel fees and
24 other expenses incident to the representation.

25 Appropriations available to the Department of State for the

1 salaries and expenses of persons under its jurisdiction may be
2 used to carry out the provisions of this subsection.

3 **“§ 4110. Transfer of juveniles**

4 “An offender transferred to the United States because of
5 an act which would have been an act of juvenile delinquency
6 had it been committed in the United States or any State
7 thereof shall be subject to the provisions of chapter 403 of this
8 title except as otherwise provided in the relevant treaty or in
9 an agreement pursuant to such treaty between the Attorney
10 General and the authority of the foreign country.

11 **“§ 4111. Prosecution barred by foreign conviction**

12 “An offender transferred to the United States shall not
13 be detained, prosecuted, tried, or sentenced by the United
14 States, or any State thereof for any offense the prosecution
15 of which would have been barred if the conviction upon
16 which the transfer was based had been by a court of the
17 jurisdiction seeking to prosecute the transferred offender.

18 **“§ 4112. Loss of rights, disqualification**

19 “An offender transferred to the United States to serve
20 a sentence imposed by a foreign court shall not incur any
21 loss of civil, political, or civic rights nor incur any dis-
22 qualification other than those which under the laws of the
23 United States or of the State in which the issue arises would
24 result from the fact of the conviction in the foreign country.

1 **“§ 4113. Status of alien offender transferred to a foreign**
2 **country**

3 “(a) An alien who is deportable from the United States
4 but who has been granted voluntary departure pursuant to
5 section 1252 (b) or section 1254 (e) of title 8, United States
6 Code, and who is transferred to a foreign country pursuant
7 to this chapter shall be deemed for all purposes to have vol-
8 untarily departed from this country.

9 “(b) An alien who is the subject of an order of de-
10 portation from the United States pursuant to section 1252
11 of title 8, United States Code, who is transferred to a for-
12 eign country pursuant to this chapter shall be deemed for
13 all purposes to have been deported from this country.

14 “(c) An alien who is the subject of an order of ex-
15 clusion and deportation from the United States pursuant to
16 section 1226 of title 8, United States Code, who is trans-
17 ferred to a foreign country pursuant to this chapter shall be
18 deemed for all purposes to have been excluded from admis-
19 sion and deported from the United States.

20 **“§ 4114. Return of transferred offenders**

21 “Upon a final decision by the courts of the United States
22 that the transfer of the offender to the United States was not
23 in accordance with the treaty or the laws of the United States
24 and ordering the offender released from serving the sentence

1 in the United States, the offender may be returned to the
2 country from which he was transferred to complete the sen-
3 tence if the country in which the sentence was imposed
4 requests his return.

5 "The procedures for the extradition of fugitives shall
6 apply to the return of the offender with the following limita-
7 tions:

8 "(1) the offense for which the offender was sen-
9 tenced shall be deemed to be an extraditable offense in-
10 cluded in the treaty of extradition;

11 "(2) a certified copy of the sentence shall con-
12 stitute evidence sufficient to sustain the charge under the
13 provisions of the proper treaty or convention;

14 "(3) the proceedings for the return of the offender
15 must be initiated within sixty days from the date on
16 which the decision ordering his release became final;

17 "(4) an offender returned under such proceedings
18 shall not be deemed for any purpose to have been ex-
19 tradited; and

20 "(5) the return of an offender shall be conditioned
21 upon the offender being given credit toward service of
22 the sentence for the time spent in the custody of or
23 under the supervision of the United States."

24 SEC. 2. That section 636 of title 28, United States Code,
25 is amended by adding a subsection (f) as follows:

1 “(f) A United States magistrate may perform the
2 verification function required by section 4107 of title 18.
3 When a treaty requires or upon the request of the Attorney
4 General, a magistrate may be assigned by a judge of any
5 United States district court to perform the verification re-
6 quired by section 4108 of title 18 and may perform such
7 function beyond the territorial limits of the United States.
8 A magistrate assigned such function shall have no authority
9 to perform any other function within the territory of a
10 foreign country.”.

11 SEC. 3. That chapter 153 of title 28, United States Code,
12 is amended by adding the following section:

13 “§ 2256. **Jurisdiction of proceedings relating to transferred**
14 **offenders**

15 “When a treaty is in effect between the United States
16 and a foreign country providing for the transfer of convicted
17 offenders—

18 “(1) the country in which the offender was con-
19 victed shall have exclusive jurisdiction and competence
20 over any proceedings, regardless of their form, seeking
21 to challenge, modify, or set aside convictions or sentences
22 handed down by a court of such country;

23 “(2) all proceedings instituted by or on behalf of
24 an offender transferred from the United States to a
25 foreign country seeking to challenge, modify, or set

1 aside the conviction or sentence upon which the transfer
2 was based shall be brought in the court which would
3 have jurisdiction and competence if the offender had not
4 been transferred;

5 “(3) all proceedings instituted by or on behalf of
6 an offender transferred to the United States pertaining
7 to the manner of execution in the United States of the
8 sentence imposed by a foreign court shall be brought in
9 the United States district court for the district in which
10 the offender is confined or in which supervision is exer-
11 cised and shall name the Attorney General and the offi-
12 cial having immediate custody or exercising immediate
13 supervision of the offender as respondents. The Attor-
14 ney General shall defend against such proceedings;

15 “(4) all proceedings instituted by or on behalf of
16 an offender seeking to challenge the validity or legality
17 of the offender's transfer from the United States shall
18 be brought in the United States district court of the
19 district in which the proceedings to determine the valid-
20 ity of the offender's consent were held and shall name
21 the Attorney General as respondent; and

22 “(5) all proceedings instituted by or on behalf of
23 an offender seeking to challenge the validity or legality
24 of the offender's transfer to the United States shall be
25 brought in the United States district court of the district

1 in which the offender is confined or of the district in
2 which supervision is exercised and shall name the At-
3 torney General and the official having immediate cus-
4 tody or exercising immediate supervision of the offender
5 as respondents. The Attorney General shall defend
6 against such proceedings.”.

7 SEC. 4. That chapter 48, title 10, United States Code,
8 is amended by adding the following sections:

9 **“§ 955. Prisoners transferred to or from foreign countries**

10 “(a) When a treaty is in effect between the United
11 States and a foreign country providing for the transfer of
12 convicted offenders, the Secretary concerned may, with the
13 concurrence of the Attorney General, transfer to said for-
14 eign country any offender against chapter 47 of this title.
15 Said transfer shall be effected subject to the terms of said
16 treaty and chapter 306 of title 18.

17 “(b) Whenever the United States is party to an agree-
18 ment on the status of forces under which the United States
19 may request that it take custody of a prisoner belonging to
20 its armed forces who is confined by order of a foreign court,
21 the Secretary concerned may provide for the carrying out
22 of the terms of such confinement in a military correctional
23 facility of his department or in any penal or correctional
24 institution under the control of the United States or which
25 the United States may be allowed to use. Except as other-

1 wise specified in such agreement, such person shall be treated
2 as if he were an offender against chapter 47 of this title.”.

3 SEC. 5. (a) The Department of Justice is authorized
4 to be appropriated in each fiscal year those sums which may
5 be necessary to carry out the responsibilities assigned to the
6 Attorney General under this Act.

7 (b) The Attorney General shall certify to the Secretary
8 of State the expenses of the United States related to the
9 return of an offender to the foreign country of which the
10 offender is a citizen or national for which the United States
11 is entitled to seek reimbursement from that country under
12 a treaty providing for transfer and reimbursement.

13 (c) The Attorney General shall certify to the Adminis-
14 trative Office of the United States Courts those expenses
15 which it is obligated to pay on behalf of an indigent offender
16 under section 3006A of title 18, United States Code, and
17 similar statutes.

Senator BIDEN. Our first witness will be the Honorable Peter Flaherty, Deputy Attorney General, U.S. Department of Justice. He will be accompanied by William Kenney and Michael Abbell.

**STATEMENT OF PETER FLAHERTY, DEPUTY ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY WILLIAM
KENNEY, ATTORNEY, CRIMINAL DIVISION; AND MICHAEL
ABELL, STAFF ASSISTANT TO ASSISTANT ATTORNEY GENERAL,
CRIMINAL DIVISION**

Mr. FLAHERTY. I think you're entitled to damages from Allegheny Airlines.

[Laughter.]

Senator BIDEN. In all honesty they told me I could make it, and then when I got there I couldn't.

Mr. FLAHERTY. I want to thank you, first of all, for the opportunity to appear before this subcommittee today on behalf of the Justice Department in support of S. 1682 which provides for the implementation of treaties for the transfer of offenders to or from foreign countries. The concepts embodied in this measure are strongly endorsed by the administration. As you know, a companion bill has been introduced in the House by Judiciary Committee Chairman Peter Rodino—H.R. 7148.

The United States has signed a treaty with the United Mexican States and a treaty with Canada based upon the principle that the sentence of an offender convicted of a crime in a foreign country can be more effectively and humanely served in his or her own country. This is a principle which we wholeheartedly endorse.

The treaties are before the Senate for advice and consent.

The treaties, as you know, are not self-executing and they require legislation before they may be implemented. S. 1682 would accomplish this purpose.

S. 1682 is also designed to permit the implementation of any future treaties on the execution of penal sentences.

Certain objectives of the treaties could have been accomplished by legislation independent of a treaty. When Americans violate laws in other countries, there is a direct impact on our foreign relations, however, and it is appropriate to tie the legislation to the existence of a treaty.

Neither S. 1682 nor the treaties confer a right on an offender to be transferred. They merely authorize the countries to transfer offenders. The treaties and S. 1682 have been drafted to give the greatest consideration to the interests of the offender for humane incarceration.

We believe the treaties and the proposed implementing legislation will improve the administration of criminal justice, while safeguarding and insuring that the humanitarian purpose of these treaties will not be subverted. A transfer may be accomplished only if the offender consents with full knowledge of the consequences of the transfer.

Recognizing the potentially coercive situation in which offenders find themselves, every effort has been made in the proposed implementing legislation to guarantee that the consent required by the treaties

will in fact be voluntarily and understandingly given. The offender is given the opportunity to consult counsel prior to giving final consent. Therefore, it can truly be said that the treaties and legislation will provide a positive opportunity for humane incarceration to the offender; namely, the voluntary serving in the country of which he is a citizen, and to which he has closer ties, of a sentence imposed by a foreign country.

Other benefits also accrue to the offender who is transferred. First, the treaties and the proposed legislation provide that the sentence, for the execution of which the offender is transferred, shall operate as a bar to further prosecutions in the receiving state to the same extent as if the sentence has been issued by a court of the particular jurisdiction seeking to prosecute. This provision, in effect, is the extension of the policy behind the double jeopardy clause of the Bill of Rights to a situation to which that clause otherwise would not be applicable.

Second, although recognizing the sentence of the foreign jurisdiction for this purpose, neither the treaties nor the proposed legislation converts the foreign sentence to a domestic sentence for the purpose of determining the adverse consequences of the sentence. Rather, it is provided that the transfer will not result in adverse consequences other than those which in any event would flow from the fact of the foreign conviction.

Third, the parole system of the receiving state will govern eligibility, timing, and conditions of release from prison.

Canada will not be prepared to implement its treaty until late this year at the earliest. However, Mexico is presently ready to implement its treaty, and we are presently drawing up plans for the rapid implementation of the treaty with Mexico. We are also working with the State Department and the Mexican Government to complete as much of the necessary preparatory work as possible in order to permit us to effect the transfers under the treaty with Mexico at the earliest possible date.

However, I must stress that the actual implementation of the treaty in the field is not a simple undertaking. The public must not be misled into assuming that the transfers can be accomplished within a few days of the effective date of the treaty and the enactment of the implementing legislation.

In order to assure the voluntariness of the decisions by Americans convicted by Mexican courts to serve their sentences in Federal prisons and subject to the Federal parole system, it is essential that U.S. Government representatives as provided in the legislation meet with such prisoner who is presently eligible for transfer or who will be eligible for transfer upon termination of any pending appeal or collateral attack on his or her Mexican conviction. At these meetings, the prisoners will be advised of the ramifications of their consent including, among other things: the criteria for the selection of the Federal institutions at which they will serve their sentences; their parole eligibility dates; the earliest dates at which they can hope for favorable parole consideration in light of Parole Commission guidelines; to the extent permitted by the positiveness of their identification, the pendency of warrants for their arrest in the United States such as other detainees that may be waiting for them; their right to consult counsel prior to

the transfer verification proceedings; and, the effect of their consent to transfer on their ability to attack their Mexican convictions. All of these matters will have to be discussed with each offender or prisoner separately. That is part of the time-consuming process that we think will take place, although we expect to do this as rapidly as possible with personnel from the Justice Department and the State Department.

It would appear that such meetings will have to take place at each of the Mexican correctional institutions involved. As is readily apparent from the fact that there are presently roughly 500 Americans in Mexican prisons throughout all of Mexico who will be eligible, or who will become eligible upon the conclusion of their appeals, conducting such briefings will be a major time-consuming task.

While we will make every effort to allocate sufficient manpower to conduct such briefings as expeditiously as possible, we are not now in a position to determine the timelag between the effective date of the Mexican treaty and the initial transfers of prisoners under it.

We can report, however, Mr. Chairman, that at least eight agencies are already actively involved in making arrangements for the transfer of offenders if the treaties are ratified and the legislation enacted. The Parole Commission, the Bureau of Prisons, and the Probation Office of the Administrative Office of the U.S. Courts are already working on plans which will expedite the transfer processing and the determination of parole eligibility after transfer.

As a result of our internal review of S. 1682 and having taken into consideration comments and suggestions made by staff members of this subcommittee and of other committees, we have drafted proposed refinements and alternatives to certain provisions of S. 1682. I would like to submit these draft proposals and an explanatory memorandum for the record, Mr. Chairman. In addition, I would like to submit for the record the Department's section-by-section analysis of the legislation as introduced.

Senator BIDEN. They will be inserted in the record.

[Material follows:]

Suggested Refinements and/or Alternatives With Respect to
Proposed Legislation to Provide for the Implementation of
Treaties for the Transfer of Offenders to or from Foreign
Countries: S. 1682 and H.R. 7148

As the result of continuing internal review of the captioned treaty implementation legislation and discussions with Senate and House of Representatives committee staff members, we have developed the following suggested refinements and alternatives with respect to the present provisions of the respective Senate and House bills:

Section 4100(b): In order for the treaties to be applicable, the offense for which the offender was sentenced must be an offense against the laws of both the transferring and receiving countries. To carry forward this concept from the treaties to the implementing legislation, the following amendment to this subsection is suggested:

Change the period after the word "consent" at the end of the third sentence to a comma, and add "and only if the offense for which the offender was sentenced satisfies the requirement of 'double criminality' as defined in this chapter."

The implementing legislation presently is silent with respect to the revocability of a transferring offender's consent. It is obvious that serious legal problems could arise if an offender who has transferred in compliance with the requirements of a treaty and the implementing legislation attempts to revoke his consent to transfer. To avoid this problem, the implementing legislation should provide that an offender's consent, once verified by a verifying officer, is irrevocable. Accordingly, it is suggested that the following

change be made in this subsection:

After the word "chapter" in the amendment suggested above, insert the sentence, "Once an offender's consent to transfer has been verified by a verifying officer, that consent shall be irrevocable."

This subsection also provides that with respect to offenders under 18 years of age the requisite consent to transfer must be given by the parent or guardian of such offenders. This provision is based on the language in the Mexican treaty which states that the consent for transfer must be obtained from "the legally authorized person." Article VIII, Para. 1. The Canadian treaty is silent on the subject.

While the present proposed provision requiring consent by a parent or guardian is workable, the Congress may wish to consider the alternative of also giving the appropriate court in the sentencing country the power of consent in order to avoid problems occasioned by the unusual vindictive parent or guardian. This change could be effected by deleting the period after "guardian" in line 9, and adding "or by an appropriate court of the sentencing country."

Section 4100(c): Both the Mexican and Canadian treaties prohibit transfer while an appeal or collateral attack is pending or before the prescribed time for appeal of an offender's conviction or sentence has expired. Article II, Para. 6 (Mexican treaty); Article II, Para. e (Canadian treaty). Future treaties, however, may provide that if both the offender and all others waive their respective appeal rights, the transfer can take place before the expiration of the prescribed time

for appeal. Therefore, it is suggested that the following amendment to this subsection be made:

Change the comma after the word pending in line 4 of this subsection to a semicolon, and delete the remainder of the subsection.

The suggested deletion, of course, will have no effect on the governing provisions of the Mexican and Canadian treaties.

Section 4100(e): Since it will be the policy of this Administration to accept all United States nationals seeking to transfer under treaties, with respect to whom the transferring countries have consented to transfer, we believe it is unnecessary for this subsection to preclude judicial review of the decision of the United States to consent or refuse to consent to such transfer. Moreover, the possibility of judicial review of such decisions in future Administrations may have a salutary effect in insuring the proper exercise of such discretion in the future. Therefore, it is suggested that this provision be limited to the non-reviewability of discretionary decisions of refusal of consent to transfers of offenders from the United States. Accordingly, the following amendment to this subsection is suggested:

After the word "offender" in line 2 of this subsection add the phrase "from the United States."

The Congress also may wish to consider whether it would be desirable to eliminate the non-reviewability of discretionary decisions of refusal of consent to transfers of offenders from the United States as well. The non-reviewability of such decisions could be eliminated by deleting this subsection entirely.

Section 4101(a): To conform to the suggested change in §4100(b) with respect to "double criminality," it is necessary to add a subsection defining this term. It also will be necessary to make the conforming numbering changes in the other subsections of §4101. This suggested subsection should read as follows:

(a) "double criminality" means that at the time of transfer of an offender the offense for which he has been sentenced is still an offense in the transferring country and is also an offense in the receiving country. With regard to a country which has a federal form of government, an act shall be deemed to be an offense in that country if it is an offense under the federal laws or the laws of any state or province thereof.

Section 4101(b)(2): The following technical change should be made in this subsection to eliminate an erroneous reference:

The word "this" in line 2 should be deleted, and the phrase "403 of this title" should be inserted after the word "chapter."

Section 4101(d): It appears to us to be preferable to leave all matters relating to mentally ill persons accused of crimes to be handled pursuant to §4102(10), which authorizes the Attorney General, in concert with the Secretary of Health, Education and Welfare, to enter into agreements with the appropriate authorities of foreign countries for the transfer and treatment of such individuals, rather than to classify such individuals as offenders. Therefore, it is suggested that the following change be made in the definition of the term "offender" in this subsection:

Change the comma after the word "delinquency" in line 3 to a semicolon and delete the remainder of the subsection.

Section 4101(g): In many instances offenders convicted in foreign countries of certain offenses were, in the same proceedings, acquitted of other offenses. In order to make it clear that the bar to prosecution in the United States applies not only to offenses for which transferring offenders were convicted, but also to offenses of which they were acquitted in the same proceedings, it is necessary to clarify the definition of the term "sentence" as used in this chapter and as referred to by section 4111 as discussed below. Accordingly, it is suggested that the following change be made in this subsection:

After the word "case" in line 3, insert the phrase "or judgment of acquittal in the same proceeding."

As the result of a typographical error in this subsection, the first "of" in line 3 should be changed to "or."

Section 4101(i): For the reasons set forth with respect to §4101(d), the inclusion of mentally ill persons accused of crimes, should be deleted from this provision. Accordingly, it is suggested that the following change be made in this subsection:

After the word "country" in line 3, insert a semicolon, and delete the remainder of the subsection.

Section 4101(k): Because of the reference to the term "verifying officer" with respect to the amendments to sections 4107 and 4108 suggested below, it would appear desirable to include a definition of the term in the definitional section -- §4101. Therefore, it is suggested that the following definition

be included in §4101:

(k) "verifying officer" means a United States magistrate, a judge of the United States as defined in 28 U.S.C. 451, or a citizen specifically designated by a judge of the United States as defined by 28 U.S.C. 451.

Section 4102(4): In order to avoid the slightest appearance of a conflict of interest with respect to the designation of citizens to verify the consent of offenders eligible for transfer under offender transfer treaties, it is preferable to place such designation authority in a judge of the United States rather than in the Attorney General. The Administrative Office of the United States Courts has no objection to having such authority granted to judges of the United States under this legislation. Therefore, this subsection should be deleted with the appropriate changes being made elsewhere in the implementing legislation to grant such designation authority to judges of the United States. The deletion of this subsection also will necessitate the renumbering of the succeeding subsections of §4102.

Section 4102(5): In order to make it more clear that the Attorney General has broad regulation making authority with regard to the proper implementation of offender transfer treaties, it is desirable to specifically extend such regulation making authority to the proper implementation of the implementing legislation as well. Therefore, it is suggested that the following change be made in this subsection:

Delete the semicolon after the word "treaties" in line 2, and add "and this chapter;" after the word "treaties."

Section 4102(8): Whereas our treaty with Canada provides

for the transit of offenders through the United States to or from Canada pursuant to a treaty between Canada and a third country, the treaty with Mexico does not. See Article VII (Canadian treaty). Therefore, the last clause of the proposed subsection would prevent us from entering into an agreement with Mexico with respect to the transit of transferring offenders to and from third countries. This matter is of particular importance because of an impending offender transfer treaty between Mexico and Canada. Accordingly, it is suggested that the following change be made in this subsection:

Insert a semicolon after the word "sentences" in line 5, and delete the remainder of the subsection.

Section 4104(a): The following technical change should be made in this subsection:

Delete the words "a convicted" in line 2, and insert in their stead the word "an."

Section 4104(g): This subsection makes non-reviewable the refusal of a United States district judge to undertake the supervision of a United States citizen on probation in a transferring country or his refusal to assent to the transfer from the United States of an offender who is on probation. Consideration should be given to the desirability of permitting United States Courts of Appeals to review the exercise of such discretion by district judges. Accordingly, if the Congress deems such appellate review desirable, this subsection should be deleted.

Section 4105(b): This subsection presently provides that

offenders transferred to the United States for service of their sentences are to be given credit for time spent in custody in the transferring country, in connection with the offense or acts for which the sentence was imposed, prior to their being sentenced, unless it is clear that such presentence custody was taken into account by the sentencing court. While we believe the provision as presently written will give the intended effect to sentences of transferring countries' courts, it should be noted that 18 U.S.C. 3568 provides that such presentence custody time must be credited for all sentences imposed by United States federal courts regardless of the stated intention of the sentencing court.

Because foreign judges, unlike federal judges, can be presumed to be unaware of the possibility that their sentencing intentions with respect to the crediting of presentence custody time could be frustrated by the automatic crediting of such time in the United States, we believe the present provision should not be changed. However, should Congress deem the difference in the crediting of presentence custody time to transferring offenders and domestic federal offenders in some way anomalous, it should delete the exception from the last six lines of this subsection.

Section 4105(c)(5): This subsection in effect provides that if a transferring offender is convicted of a separate offense in a United States federal court, the federal court can make the sentence for the federal offense either concurrent or consecutive to the sentence imposed by the foreign country

which the transferring offender was serving at that time. If the court does not specify whether the sentence for the separate United States offense is to be served concurrently or consecutively to such foreign sentence, it will be deemed to be a concurrent sentence.

Since the sentence for the offense against the United States referred to by this subsection is a sentence for a separate offense and not an additional sentence for the same act which resulted in the foreign sentence (see §4111), the use of the word "additional" in the first line of this subsection is confusing. Therefore, it is recommended that that word be deleted.

Sections 4106(c) and (d): The implementation legislation as introduced would make offenders transferred to the United States, who were convicted after they attained age twenty-two, eligible for parole after they had served one-third of their sentences, if their sentences were between one and thirty years, or after ten years, if their sentences were for more than thirty years. See 18 U.S.C. 4205(a). Such offenders who were under age twenty-two at the time of their convictions would be eligible for parole at any time. See 18 U.S.C. 5017(a).

Consideration should be given to making all offenders transferring to the United States eligible for parole at any time for the following reasons:

(1) The majority of United States nationals serving sentences in foreign countries for offenses committed in those

countries were convicted of narcotics offenses. More than two-thirds of federal narcotics offenders who receive sentences of more than one year are presently sentenced under 18 U.S.C. 4205(b) (2) which makes them eligible for parole at such time as the Parole Commission determines. Thus, it is more in accord with present sentencing practices in the federal courts to apply such parole eligibility standards to offenders transferring to the United States to serve their foreign sentences.

(2) Although there does not appear to be any great divergence between the sentences assessed by United States, Mexican, and Canadian courts for essentially similar offenses, in the future we may enter into a treaty with a country which imposes substantially more severe sentences. By making transferring offenders sentenced in such countries eligible for parole at the Parole Commission's discretion, the Parole Commission will be able to treat such offenders as if they had been convicted and sentenced for similar offenses in the United States. Such a result would enhance the government's ability to attain the goal of substantially equal treatment of all similarly situated persons who commit similar offenses.

If this alternative with respect to the parole eligibility of offenders transferring to the United States under offender transfer treaties is deemed desirable, the following changes should be made in these sections:

Delete the phrase "under section 4205(a) of this title subject to the provisions of section 4205(h) of this title" from lines 3 and 4 of §4106(c). Substitute in its stead the phrase "at such time as the Parole Commission may determine." Delete §4105(d) which becomes superfluous.

Section 4107(a): Because of some ambiguity in the definition of the term "Federal Magistrate" in Rule 54(c) of the Federal Rules of Criminal Procedure insofar as it affects the implementation of offender transfer treaties, it is desirable to make the following clarifying change in the language of this subsection:

Delete the word "Federal" in line 5, insert in its stead the words "United States", delete the phrase "as defined in Rule 54(c) of the Federal Rules of Criminal Procedure" in lines 5 and 6, and insert in its stead the phrase "or a judge of the United States as defined in 28 U.S.C. 451."

Section 4107(b): This subsection presently requires that certain consequences of consenting to transfer from the United States must be brought to a transferring offender's attention -- i.e. that any attack on his conviction or sentence can only be brought in the appropriate United States courts, that the sentence will be carried out according to the laws of the receiving country, and that he could be returned to the United States for service of the sentence if a court in the receiving country should determine that his transfer was not in accordance with the treaty or the laws of the receiving country.

Because of the critical importance of the voluntariness of the transferring offender's consent to transfer, it is desirable to amend this section to require even more specific advice of the consequences of transfer and acknowledgment of understanding of such consequences. In addition to the consequences presently enumerated in this subsection, a transferring offender should be advised that once his consent is verified by the verifying officer, it is irrevocable. Also, it is

desirable to require the verifying officer to formally advise such an offender of his right to consult with counsel, and to require him to make the inquiries necessary to determine that the consent is freely and voluntarily given and is not the result of unstated promises, threats, or other improper inducements.

Accordingly, it is recommended that the following subsections (b), (c), and (d) be substituted for present subsection (b):

(b) The verifying officer shall inquire of the offender whether he understands that:

(1) only the appropriate courts in the United States may modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in such courts;

(2) the sentence shall be carried out according to the laws of the country to which he is to be transferred and that those laws are subject to change;

(3) if a court in the country to which he is transferred should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of that country, he may be returned to the United States for the purpose of completing the sentence; and,

(4) his consent to transfer, once verified by the verifying officer, is irrevocable.

(c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided by this chapter. If the offender wishes to consult with counsel before giving his consent, he shall be advised that the proceedings will be continued until he has had an opportunity to consult with counsel.

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements.

Section 4107(e): While it has always been our intention that a permanent record be made of the consent verification proceedings, it appears preferable to specifically include such a requirement in the implementing legislation. Accordingly, it is suggested that the following new subsection be added to §4107:

(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment.

Section 4108(a): For the reasons set forth above with respect to the designation of citizens to hold consent verification proceedings under offender transfer treaties, it is desirable to amend this section to give such designation authority to a judge of the United States rather than the Attorney General. It also is desirable to make it clear that verification proceedings are to be held in the country in which the sentence was imposed. Accordingly, it is suggested that the following changes be made in this subsection:

After the word "verified" in line 4, insert the phrase "in the country in which the sentence was imposed." Delete the words "Attorney General" in line 6, and insert in their stead the phrase "a judge of the United States as defined in 28 U.S.C. 451." Delete the phrase "by the Attorney General" in lines 7 and 8, and the phrase "other than the Department of Justice" in line 10.

Section 4108(b): For the reasons set forth above in connection with the recommended expansion of the advice of consequences of transfer to offenders wishing to transfer from the United States, and of the assurances of the voluntariness of their consent to transfer, it is recommended that similar changes be made in this subsection with respect to offenders

wishing to transfer to the United States. Accordingly, it is recommended that the following subsections (b), (c), and (d) be substituted for present subsection (b):

(b) The verifying officer shall inquire of the offender whether he understands that:

(1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seeking such action may be brought in that country;

(2) the sentence shall be carried out according to the laws of the United States and that those laws are subject to change;

(3) if a United States court should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of the United States, he may be returned to the country which imposed the sentence for the purpose of completing the sentence; and

(4) his consent to transfer, once verified by the verifying officer, is irrevocable.

(c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided by this chapter. If the offender wishes to consult with counsel before giving his consent, he shall be advised that the proceedings will be continued until he has had an opportunity to consult with counsel.

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements.

Section 4108(e): For the reasons set forth above with respect to §4107(e), it is desirable to include a requirement that verification proceedings with respect to offenders transferring to the United States be recorded. Therefore, it is suggested that a new subsection, §4108(e), having the same language as proposed new §4107(e), be added to the implementing

legislation.

Section 4111: Because it is the intention of the treaties not only to bar prosecution in the receiving country for the offense for which a transferring offender was convicted, but also to bar prosecution of those offenses for which the transferring offender was acquitted in the transferring country (where such acquittals were part of the same proceedings which resulted in the conviction which is the subject of the transfer), it is necessary to amend the presently proposed §4111. Accordingly, it is suggested that the following change be made in this section:

Delete the word "conviction" in line 4, and substitute in its stead the word "sentence."

See definition of "sentence" in §4101(g).

Section 4115: In some foreign countries, including Mexico, sentences with respect to crimes in which there is a victim often include restitution or reparations as part of the penalty or award of damages attendant to conviction. Whereas we believe that the handling of ordinary criminal fines imposed as part of criminal sentences should pose no significant impediment to the transfer process because of the ability of the affected governments to work out between themselves the procedures for dealing with such fines, restitution to the victims of crimes committed by United States citizens and nationals in foreign countries presents a more substantial problem.

It is conceivable that some countries will refuse to consent to the transfer of offenders who owe restitution or

reparations to the victims of the crimes committed by such offenders. It is easy to sympathize with the desire of such countries to see that the victims of crimes committed by foreigners are compensated for their losses. While it would appear to be inappropriate for the United States to effectively ransom its offender-citizens who owe restitution or reparations either by paying such monies to the sentencing country or by lending such monies to the offender-citizen, it would appear appropriate for the federal government to agree to pursue the collection of such restitution or reparations after such an offender is transferred to the United States pursuant to an offender transfer treaty. Accordingly, it is suggested that the following new section be added to the implementing legislation to effect this end:

§4115 Execution of sentences imposing an obligation to make restitution or reparations.

If in a sentence issued in a penal proceeding of a transferring country an offender transferred to the United States has been ordered to pay a sum of money to the victim of the offense for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the monies ordered to be paid may be instituted by the Attorney General in any United States district court. Monies recovered pursuant to such proceedings shall be transmitted through diplomatic channels to the treaty authority of the transferring country for distribution to the victim.

Section 2256: The implementing legislation creates a new section 2256, Title 28, United States Code, delineating the jurisdiction of the state and federal courts over matters which may arise from the treaties and the implementing legislation.

While not suspending the writ of Habeas Corpus, the treaties and this section give the country in which the offender was convicted the exclusive jurisdiction over proceedings seeking to challenge, modify or set aside convictions handed down by a court of such country. However, because some of the language in §2256(1) possibly could be read as an attempt to suspend the writ of Habeas Corpus, it is desirable to remove that language. Accordingly, it is suggested that the following change be made in §2256(1):

Delete the word "any" and the phrase ", regardless of their form," in line 3 of this subsection.

Section by Section Analysis of S. 1682 (H.R. 7148) as
Introduced in Congress.

The proposed legislation S.1682 (H.R. 7148) is drafted to implement all treaties on the execution of penal sentences which may enter into force.

It consists of five sections. The First section would add a new chapter 306 to Title 18 of the United States Code and contains the basic implementing provisions. Section 2 authorizes magistrates to conduct the required verification proceedings.

Section 3 would add a new section 2256 to Title 28 of the United States Code. It delineates the jurisdiction of the courts, state and federal, over matters arising from the transfer of offenders to the United States.

Section 4 would add a new section 955 to Title 10 of the United States Code providing for the transfer of military offenders.

Section 5 treats of fiscal matters arising under the treaties.

The first section of S.1682 (H.R. 7148) adds a new chapter to Title 18 consisting of the following:

§4100. Scope and limitation of chapter.

Subsection (a) as in the case of extradition (18 U.S.C. 3181) ties this legislation to the existence of a treaty and specifies that agreements for the transfer of offenders shall be in the form of treaties.

The proposed legislation does not refer specifically to all conditions which the Mexican and Canadian treaties impose on the transfer of an offender. There is some divergence between those two treaties and additional treaties may include conditions not included in the present treaties. Therefore, S.1682 (H.R. 7148) has been designed to accomodate the differences between the Mexican and Canadian treaties as well as any future treaties.

This subsection provides that the authorization to transfer offenders is limited to transfers "pursuant to such a treaty." All of the conditions contained in the

Mexican and Canadian treaties other than those pertaining to the consent of the offender are exclusively the concern of the contracting Parties, i.e. the countries involved. Therefore, the acceptance by the Receiving State of an offender from the Transferring or Sending State constitutes a determination binding on all concerned that the conditions precedent required by the treaty and legislation have been satisfied and is not reviewable. The acceptance by the Receiving State does not have the same binding effect with regard to the consent of the offender to the transfer. The offender has such an interest in the condition that his transfer may occur only with his consent that he may assert the absence of consent. This question would in the first instance be raised with the "authority" of the Receiving State and in the event of an adverse decision by that authority the offender may seek relief from the courts of the Receiving State. Any such claim would have to be made without undue delay or it would be barred by laches.

Subsection (a) further provides that if an offender is transferred pursuant to a treaty, the fact that the treaty thereafter ceases to be in force shall not operate to prevent the continued execution of the sentence.

Subsection (b) reiterates principles found in the Mexican and Canadian treaties and will constitute an expression of Congressional endorsement of the limitation imposed by those principles, viz. only citizens or nationals should be transferred; they may only be transferred to the country of which they are citizens or nationals; and a transfer may occur only with the consent of the offender. The requirement of the consent of the offender is not intended to be an expression of the view that transfer of offenders could not be accomplished without their consent, but rather an expression of a policy against involuntary transfers of civilian offenders in the international area.

Subsection (b) endeavors to protect a person under the age of eighteen by providing that the consent to transfer would be given by a parent or guardian and implements Article VIII(1) of the Mexican treaty.

Subsection (c) provides that only sentences which have become final may be the basis of a transfer. If litigation concerning the conviction or sentence be pending, such litigation must be finally resolved before the offender is eligible to be considered for transfer.

It is noted that in Mexico, Canada and many other countries an appeal may be taken by the prosecution. Therefore, until the expiration of the prescribed time for appeal, the sentence is not final and the offender is not eligible to be considered for transfer.

The prescribed time for appeal is generally short. In Mexico such matters are regulated in the applicable Code of Penal Procedure, i.e., in the Federal Code, the Code for the Federal District of Mexico or in the Code of the particular State by which the sentenced was imposed.

In Canada the time for appeal is regulated by the rules of the court which imposed the sentence.

The fact that there may exist a possibility of a collateral attack on the sentence does not prevent the offender from being considered for transfer.

It is to be noted that the pendency of litigation regarding issues other than the conviction or sentence does not effect eligibility for transfer.

Subsection (d) recognizes the right of the sentencing country to pardon the offender, to grant him a commutation or amnesty, to modify the sentence to the benefit of the offender, and to revoke the sentence.

Under the laws of many countries including Mexico an offender is given the benefit of subsequent ameliorating legislation even if it is enacted after his conviction has become final. Thus if a person was sentenced to 3 years for an offense for which the maximum at the time of sentencing was 6 years and subsequently the maximum penalty for that offense is reduced to 4 years, the offender's sentence would be reduced to 2 years. A convicted offender is also given the benefit of a subsequent repeal. If the provision under which he was sentenced is repealed, he is entitled to be released.

The subsection requires the United States to recognize subsequent ameliorations of the sentence, but only when it has received notice of such actions from the country in which the sentence was imposed.

Subsection (e) recognizes the decision of the United States to consent or to refuse to consent to a transfer as a discretionary action of the Executive in the field

of foreign relations and prevents any courts from reviewing the decision.

§4101. Definitions.

(a) The definition of "imprisonment" specifies that this penalty must have been imposed by a court. However, if the imprisonment imposed by a court does not have a specific duration, a specific duration may be subsequently fixed by the appropriate administrative authority as authorized by law.

(b) The definition of "juvenile" adopts the definition of Chapter 403 -- Juvenile Delinquency (18 U.S.C. 5031).

(c) The definition of "juvenile delinquency" adopts the definition of Chapter 403 -- Juvenile Delinquency (18 U.S.C. 5031), and adds a definition of a status offense.

(d) The definition of "offender" emphasizes that, other than the instance of one accused of an offense but who has been determined to be mentally ill, it is only those who have been convicted of an offense or adjudged to have committed an act of juvenile delinquency who may be transferred. The present treaties and this legislation do not otherwise provide for the transfer of an arrested person, or a person awaiting trial.

(e) The concept of "parole" is known in most other countries of the world but bears different names such as "conditional release before the expiration of the term." The Mexican "preparatory liberty" is within the concept of parole as defined in subsection (e).

(f) The concept of "probation" is known to many countries of the world under various names, e.g., Mexico has provisions for suspension of the sentence (condena condicional). The definition is broad enough to encompass all of them. The definition does not, however, encompass a sentence of straight probation nor one which grants probation but defers imposition of a sentence of imprisonment. These forms of probation have been excluded because if the offender having such a sentence violated the probation conditions, the courts of the country executing the sentence would be faced with determining the sentence of imprisonment to be imposed. At this time, it was not deemed expedient to authorize such action.

(g) The definition of "sentence" was drafted to include and to express the concept of the sentence in other countries. A sentence of a Mexican court includes the determination of culpability and lack of culpability. If a sentence is not guilty as to certain offenses but guilty as to others charged in the same proceeding and the convicted offender is transferred to the United States, the acquitting portion of the sentence will bear on the question of prosecutability of the offender in the United States. See §4111.

The Mexican treaty (Article VIII(1)) provides: "this treaty may also be applicable to persons subject to supervision or other measures under the laws of one of the Parties relating to youthful offenders."

The inclusion within the definition of "sentence" of an adjudication of delinquency in a juvenile delinquency proceeding is an expression of the intent of Congress that the transfer of "juveniles" who have been treated as "juveniles" is authorized, although such proceedings are generally regarded as civil in nature.

The definition of "State", "transfer", and "treaty" are self-explanatory.

§4102. Authority of the Attorney General.

This section designates the Attorney General as the "authority" referred to in the treaties and gives him the necessary authority to implement the treaties with regard to receiving American offenders from a foreign country who are serving a sentence of imprisonment, or who are on probation or parole. It also authorizes the Attorney General to transfer federal offenders who are serving a sentence of imprisonment or who are on probation or parole, to the country of which they are citizens.

The section also authorizes the Attorney General: to designate citizens of the United States to act as verifying officers; to make regulations for the implementation of the treaties; to make and receive the reports required under the treaties; and to designate agents to receive and transport offenders.

The section authorizes the Attorney General to make agreements with the states concerning: the transfer of state offenders who are foreign nationals and the lodging of transferred offenders in state institutions. See 18 U.S.C. 4002.

The Attorney General is authorized to make agreements with other countries which presumably would be subject to the Case Act (1 U.S.C. 112(b)). These international agreements would concern:

1. The transit of offenders through the territory of the United States. Such an agreement would enable a country, for example Canada, to transfer an offender from a third country through the United States and avoid the necessity of making such a transfer non-stop from the third country.
2. The transfer and treatment of juvenile offenders. The problems which may arise in connection with the transfer of juveniles are such that the proper protection of the juvenile may require a special agreement.
3. The transfer of individuals who are accused of an offense, but who have been determined to be mentally ill. This provision is supplementary to those contained in 24 U.S.C. 321, et seq. Such agreements would be made in conjunction with the Secretary of Health, Education, and Welfare who has available experts in the field of mental health.

Finally, this section authorizes the Attorney General to delegate the authority conferred on him by this chapter to officers of the Department of Justice.

§4103. Applicability of United States Laws.

This section establishes that all laws of the United States relating to a prisoner, probationer, parolee, or juvenile offender shall apply to an offender transferred to the United States for service of his sentence, unless the treaty or another provision of law precludes their application. The effect of this provision is to treat a foreign-imposed sentence as if it were one imposed by a court of the United States, bringing all questions of sentence computation, good time credits, parole release and revocation, and any other related subjects, under United States laws.

An example of a provision of law requiring a different course of action than that which would be available if the sentence had been by a United States court is found in section 4104(d). It requires that if probation is revoked, the suspended sentence imposed by the foreign country shall be executed. If the revocation had been of probation imposed by a United States court, the court could reduce the imposed sentence.

An example of a treaty provision which may require a different course of action than that which would be available if the sentence had been imposed by a United States court is found in Article V(3) of the Mexican treaty, and Article IV(3) of the Canadian treaty. Those articles provide "no sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the transferring (sending) State." As a result of these provisions, an offender who violates his parole must be given credit for the time he was under parole prior to its revocation. Under certain circumstances, the Parole Commission, if there has been a revocation of parole from a sentence of a United States Court, may determine not to give the parole violator credit for all such time (18 U.S.C. 4210(b)(2)).

\$4104. Transfer of offenders on probation.

This section requires that the Attorney General obtain the assent of the appropriate United States district court to the transfer of offenders on probation.

A probationer transferred to the United States is treated as though he had been placed on probation by a United States district court. The United States court or probation officer will impose the appropriate conditions of probation. If the foreign court had imposed special conditions, these should be considered in the determination of the appropriate conditions. However, if the probationer violates the conditions of probation, the United States court may not reduce the term of imprisonment which was imposed by the foreign court. The safeguards surrounding the revocation of probation are applicable.

The decision of a court to undertake or not undertake the supervision of an offender on probation and to assent or not to assent to the transfer from the United States of an offender on probation is ancillary to the exercise of Executive power in the area of foreign relations, and this section prevents the review of such decisions by any court.

\$4105. Transferred offender serving sentence of imprisonment.

In accordance with the concept that a transferred offender will be subject to the rules and conditions of the United States from the time of his transfer as to the incidents of his sentence, this section provides the mechanics for the implementation and computation of a sentence of imprisonment.

(a) The foreign sentence to a term of imprisonment is translated into a term of imprisonment of precisely the same length to the custody of the Attorney General. This places a transferred prisoner in the same custody status as persons committed by United States District Courts, who are sentenced "to the custody of the Attorney General."

(b) This subsection parallels Section 3568 of Title 18, to give the transferred offender credit for all time actually spent in custody on the charges for which he is sentenced. The phrase "date of commencement of sentence" is used, to allow for the fact that sentences may be considered to commence on different dates in different countries: the date of arrest, the date of conviction, of sentencing, or of final affirmance of the conviction and sentence by the courts. The commencement date used by the foreign country will be used, but all prior custody will also be credited.

The second part of the subsection disallows detention credit if there is an official certification that the presentence custody had been fully taken into account in the length of sentence imposed. This is to avoid double crediting for the same period of time.

(c) A transferred prisoner will be credited for all good time, work credits, or other credits of similar type which are given by the foreign country up to the date of transfer. From that date forward, he will receive good time credits in accordance with federal law (18 U.S.C. 4161 and 4162) and Bureau of Prisons standards for earning good time. The two portions or allowances of good time will be combined to give a single mandatory release date (18 U.S.C. 4164), which is the date on which the prisoner must be released if he is not earlier paroled. Good time allowances may be forfeited, and forfeited good time restored in the same manner as for any federal inmate (18 U.S.C. 4165 and 4166).

Subsection (c) (2) provides for those cases where the foreign country does not have any good time credits. In those cases, the prisoner will be given the good time allowance provided by federal law (Section 4161) for the entire length of his sentence. Extra good time (Section 4162) may only be earned from the date of transfer, since it is based on evaluation of programs, institutions, and individual performance. Work time credits earned in foreign prisons will be added to such good time credits.

Subsection (c) (5) provides for the aggregation, or combination, of any new federal sentence with the foreign sentence. The intent is to treat the transferred offender in the same way as a person in custody on a federal sentence. For computation purposes, the offender shall be treated as if he is serving a federal sentence of the same length as the foreign sentence. Thus, a federal court may order a new sentence to be served concurrently or consecutively, with respect to the sentence already being served. The two (or multiple) sentences will then be aggregated according to the court's order, except for those unusual sentences which have attributes which prevent aggregation (for example, life sentences; indeterminate Youth Act or Narcotic Act sentences — 18 U.S.C. 5010, 4253). If the court is silent as to the running of the new federal sentence, current sentencing law will apply — i.e. the sentences will run concurrently, since the defendant is in federal custody.

All good time, work time, and other credits may be forfeited and restored, as if the sentence had been imposed by a court of the United States.

§4106. Transfer of offenders on parole; parole of offenders transferred.

(a) The Attorney General will assign any prisoner on parole in a foreign country who is transferred to the United States to the jurisdiction of the Parole Commission for supervision of the remainder of his sentence.

(b) This subsection establishes that the United States Parole Commission shall possess the same authority and responsibility over a prisoner or parolee returned under a treaty to serve a sentence of imprisonment as it does over a prisoner or parolee serving a sentence imposed by a court of the United States. General powers of the Commission over such prisoners or parolees are recognized by this provision, including the authority to grant or deny parole, to impose reasonable conditions on the parole of such a prisoner, and to modify or revoke the parole of any prisoner released by the Commission. This subsection also provides that any proceeding pursuant to these actions is to be conducted in accordance with applicable federal law relating to parole.

(c) This subsection provides that an adult prisoner returned under the treaty serving a sentence of more than one year is eligible for parole consideration after having served one-third of his sentence; or in the case of a prisoner sentenced to life or more than 30 years, after serving ten years of his term. However, the subsection would also apply any stricter United States parole eligibility law to any case where the crime, the status of the offender, or any other factor would result in the application of such a law if the offense occurred in the United States.

The subsection makes the eligibility of parole subject of section 4205(h) of Title 18. This provision is intended to provide for a situation in which under United States law a prisoner is not eligible for parole. The reference to section 4205(h) does not mean that a person who is not eligible for parole under a foreign law is not eligible under United States law. Consideration was given to eliminating the reference to section 4205(h), but since Congress may at a future date provide that certain offenders may not be eligible for parole, it was deemed desirable to retain the reference to section 4205(h).

(d) This subsection provides that a prisoner under the age of 22 at the time of his conviction and returned under the treaty is eligible for parole consideration at any time. It does not make mandatory the application of any other feature of United States laws relating especially to youthful and juvenile offenders.

§4107. Verification of consent of offender to transfer from the United States.

Neither the Mexican nor Canadian treaty explicitly mentions verification of consent by the transferring country. However, the Mexican treaty requires the transferring country to obtain the "express consent" of the offender to the transfer. The Canadian treaty provides that the transfer shall be commenced "by a written application" of the offender. Therefore, it was deemed advisable to provide a procedure for the verification by the United States when it is the transferring State. The record of such verification proceedings will be most helpful in the event of the institution of proceedings in the courts of the United States challenging the consent. The verification proceedings require that the offender personally appear before the verifying officer.

The verification is to be by a "Federal magistrate" as defined in rule 54(c) of the Federal Rules of Criminal Procedure" that is "a United States magistrate as defined in 28 U.S.C. §§631-639, a judge of the United States or another judge or judicial officer specifically empowered by a statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates."

The choice of a Federal magistrate was to enable judges as well as United States magistrates to perform the verification.

The consequences of the transfer which must be brought to the attention of the offender are the direct consequences. This provision was patterned on Rule 11 of the Federal Rules of Criminal Procedure. Information as to detailed indirect consequences which may result from the transfer should be obtained from counsel. Since all indirect consequences which might flow from a transfer would result from the direct consequences, a consent to transfer given with knowledge of the direct consequences satisfies the intent of the treaties that the consent be given voluntarily and with full knowledge of the consequences thereof.

The legislation does not specifically provide for verification by the receiving State. If either Mexico or Canada desires to exercise its right as a Receiving State to verify the consent, suitable arrangements will be made to enable it to do so.

§4108. Verification of consent of offender
to transfer to the United States.

The Mexican and Canadian treaties provide that the Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, through an officer designated by the laws of the Receiving State, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences. To minimize the litigation problems which may arise it has been deemed desirable for the United States to verify the consent in each case and to have the verification procedure included in the implementing legislation. The verification proceedings

require that the offender personally appear before the verifying officer.

This section provides that the verification should be by a United States magistrate (28 U.S.C. 631-639), rather than a Federal magistrate as provided in section 4107. It is unlikely that a federal judge would be available to act as the verifying official. The section also authorizes the verification to be made by a United States citizen specifically designated by the Attorney General. This alternative would permit the designation of retired judges or any other citizen. The function of verifying the consent of the offender was deemed to be such a function that authorizing the Attorney General to designate the verifying official would not raise any conflict of interests.

As with the procedure under section 4107 the direct consequences of the transfer must be brought to the attention of the offender.

The proposed legislation does not include a provision requiring that there be a verbatim recordation of the proceedings. However, it is intended that there be such a recordation.

\$4109. Right to counsel, appointment of counsel.

The ramifications of the offender's consent to transfer are such that it is imperative he have an opportunity to consult with counsel before final consent to the transfer. If the offender is financially able to obtain counsel, he may do so. If the offender is financially unable to obtain counsel, counsel should be supplied. It is not intended to convert the verification into an adversary proceeding. The consent must be given by the offender personally not through an attorney.

For the offender who is being transferred from the United States, this section authorize the utilization of the Criminal Justice Act to supply counsel.

For the offender who is being transferred to the United States, the obligation to furnish counsel is imposed on the Department of State. This is an adjunct of the duties of that Department to protect Americans abroad. The Attorney General in the exercise of his prosecutorial duties may be charged with the subsequent prosecution of an offender transferred to the United States, and therefore should have no role in the appointment of counsel.

§4110. Transfer of juveniles.

This section provides that, as appropriate, the federal provisions concerning the treatment of juveniles shall be applicable to a transferred juvenile. Because of the complex problems which may be encountered with regard to juveniles, future treaties or special agreements relating to juveniles may require deviations from the provisions of 18 U.S.C. 5031 to 5042.

§4111. Prosecution barred by foreign conviction.

This section provides the offender transferred to the United States the same protection against double jeopardy that he would have had he been sentenced by a court of the jurisdiction seeking to prosecute him.

For example, a transferring offender who was sentenced in Mexico for a substantive narcotics violation could be prosecuted for a conspiracy involving the transaction of which the conviction for the substantive offense was based only if he could be prosecuted for that conspiracy had the substantive conviction been by a court of the jurisdiction seeking to prosecute.

If in the sentence issued by the Mexican court the offender had been found not guilty of one or more offenses, but guilty of one or more other offenses with which he had been charged, the acquittal would operate as a bar to further prosecution to the same extent as it would had it been by a court of the jurisdiction seeking to prosecute. The word "conviction" in this section means the "sentence" upon which the transfer was based.

The provisions of this section are not intended to adversely affect the rights of an offender under the laws of any state which are more favorable to the offender. Thus, if state A has a law which prohibits a prosecution based upon the same transaction for which an offender was convicted in a foreign country, that law is not affected by this section.

§4112. Loss of rights, disqualification.

This section insures that an offender transferred to the United States will not lose any right or be subject to any disqualification because of the transfer.

However, this section does not affect any loss of rights or disqualification incurred under existing federal or state law by virtue of the conviction in the foreign country.

§4113. Status of alien offender transferred to foreign country.

Under the immigration and Nationality Act (Title 8, U.S.C.) an alien who has been granted voluntary departure by the Immigration and Naturalization Service and who voluntarily leaves the country within the specified time avoids the consequences of an order of deportation. Aliens who are under outstanding orders of exclusion or deportation from the United States execute those orders by departing the United States of their own volition. The purpose of section 4113 is to maintain the status quo with respect to the immigration laws by treating aliens transferred under this legislation the same as other aliens who have left the United States of their own volition. Consequently, aliens transferred under the legislation who have been granted voluntary departure will be considered to have voluntarily departed from the United States while those who are under orders of exclusion or deportation will be considered to have executed those orders by departure from the United States.

§4114. Return of transferred offenders.

Neither the Mexican nor Canadian treaty has an express provision concerning the return of a transferred offender in the event it is not possible for the Receiving State to execute the sentence of the Transferring State. However, the transfer of an offender is conditioned upon the Receiving State executing the sentence, if it is unable to do so there is a breach of the condition and the Receiving State is obliged to the extent that it can to restore the parties to the status they possessed prior to the transfer.

Section 4114 only treats of one instance under which the United States would return the transferred offender, that is if a court of the United States decides finally that the transfer was not in accordance with the treaty or the laws of the United States and orders the offender released from serving the sentence in the United States. This could occur if the offender were found not to have properly consented to the transfer. Section 4114 provides the procedure for the return of such an offender, if the country in which the sentence was imposed requests his

return. The section incorporates the procedures for the extradition of fugitives with certain modifications. These are that the offense for which the offender was sentenced shall be considered as being included in the list of extraditable offenses and the sentence shall constitute sufficient evidence of probable cause to warrant the extradition. The return of an offender under these procedures does not confer on the offender the rights of a person who is extradited. Upon his return he is subject to the criminal jurisdiction of the State to which he is returned for all purposes. The principle of extradition that a person extradited may be tried only for the offense for which he was extradited (i.e. the principle of speciality does not apply. The proceedings for the return of an offender must be commenced, i.e. the complaint must be filed within 60 days from the date on which the decision ordering his release becomes final.

The return of the offender is conditioned upon his being given credit towards service of the sentence for time spent in the custody of or under the supervision of the United States.

The use of the modified extradition procedure protects the offender from improper return. A court will determine the fact that the person to be returned is identical with the person sentenced and transferred. The Secretary of State will review the entire proceedings before issuing the Surrender Warrant to insure that they have been proper.

Section 2

Section 2 of S.1682 (H.R. 7148) would amend 28 U.S.C. 636 by adding a new subsection (f) authorizing a federal magistrate to conduct verification proceedings within the United States. It further authorizes a judge of any United States district court to assign a United States magistrate to conduct verification proceedings outside of the United States.

The authority of a verifying magistrate abroad is limited to conducting the verification proceedings.

Section 3

Section 3 of S.1682 (H.R. 7148) delineates the jurisdiction of the courts, state and federal, over matters which may arise from the treaties and implementing legislation.

It does not suspend the writ of Habeas Corpus.

It provides that exclusive jurisdiction of any proceeding seeking to challenge, modify, or set aside convictions or sentences shall be in the country in which the offender was convicted and sentenced.

It further provides that proceedings by or on behalf of an offender transferred from the United States seeking to attack the conviction or sentence must be in the court, state or federal, which would have had jurisdiction of such proceedings if the offender had not been transferred.

All litigation in the United States, other than an attack on a sentence of a state court, must be brought in the federal courts.

The venue provisions for federal litigation conform generally to existing law.

This section does not preclude a transferred offender from challenging the constitutionality of the provisions of the treaties and legislation which preclude the courts of the United States from modifying or setting aside the sentence of a foreign court.

This section does not deprive the United States courts of their supervisory jurisdiction over activities of United States law enforcement agents, even abroad.

This section also has no effect on civil suits by the offender against individuals.

A transferred offender may challenge the manner of the execution of his confinement by United States authorities.

Finally, it should be noted that although the treaties and implementing legislation are legislative acts which affect a specified group of individuals and there is no judicial trial in the United States, they do not constitute bills of attainder because neither the treaties nor the legislation inflict punishment. They merely make available to certain offenders convicted abroad the option of serving in the United States a binding sentence of a foreign court. The conferring of this option cannot be equated to punishment. See United States v. Lovett, 328 U.S. 303 (1946); Barenblatt v. United States, 360 U.S. 109 (1959); United States v. Brown, 381 U.S. 437 (1965).

Section 4

Section 4 amends chapter 48, title 10, United States Code by adding the following section:

§955. Prisoners transferred to or from foreign countries.

Subsection (a) would simply permit the transfer of foreign citizens who had been convicted by United States courts-martial of offenses other than purely military ones and would otherwise have been eligible to be transferred abroad under a treaty. Due to the ruling in O'Callahan v. Parker, 395 U.S. 258 (1969), there will not be many persons in this category but cases may arise occasionally, particularly overseas.

Subsection (b) relates to executive agreements which contain provisions such as Article XXII, paragraph 7 (b) of the Status of Forces Agreement between the United States and the Republic of Korea, 17 U.S.T. 1677, T.I.A.S. 6127, which was authorized by Article IV of the Mutual Defense Treaty of 1953, 5 U.S.T. 2368, T.I.A.S. 3097. That provision, which has not heretofore been implemented, would permit the Secretary of the appropriate Military Department upon his request to receive a member of the United States Armed Forces from Korean custody and keep him in American facilities to serve his sentence.

The provisions of §955 supplement the provisions of the new chapter 306 of Title 18 of the United States Code which would be added by the first section of S.1682 (H.R. 7148).

A member of the United States Armed Forces convicted of an offense in a foreign country with which the United States does not have a Status of Forces Agreement, e.g. Mexico, may be transferred to the United States pursuant to a general treaty on the execution of penal sentences and the provisions of chapter 306 of Title 18.

However, if the United States is a party to an agreement on the status of forces contained in a treaty or authorized by a treaty, a member of the United States Armed Forces convicted by the courts of one of the other parties to such an agreement, pursuant to such an agreement, may be transferred to United States custody to serve his sentence.

Mr. FLAHERTY. Most of the suggested refinements are of a technical nature. Two of the more important ones concern the verification process and parole. We believe that it is important to spell out in the legislation itself exactly the procedures to be followed to assure that the verification of consent is obtained with all the constitutional safeguards. The second major suggested change would bring the parole eligibility standards into line with those presently existing for the majority of similarly situated offenders in the United States by making offenders transferred to the United States eligible for parole at any time. This change would also permit greater flexibility in parole adjustment of foreign sentences which are significantly longer than sentences for similar offenses in the United States—a situation which does not exist with respect to Mexican and Canadian sentences.

In closing, let me again stress that the Department of Justice believes that the treaties and legislation represent an extremely worthwhile opportunity to ameliorate the hardships of imprisonment far from one's family and friends, which presently result from conviction in a foreign country of violations of its criminal laws, and to enhance the rehabilitative potential of our respective criminal justice systems.

This concludes my statement, Mr. Chairman. The other Department attorneys present and I will be happy to answer any questions the committee may have.

Thank you.

Senator BIDEN. Thank you very much. I have several specific questions and several broad questions. As you know better than I do, the main concern that most people have about this legislation is its constitutionality.

Mr. FLAHERTY. Yes.

Senator BIDEN. Although you mentioned it in your statement, you did not go into much detail. Other agencies that will be testifying today, the State Department for one, discusses the constitutionality and indicates that one of the reasons they are so sure it is constitutional is because the Justice Department is sure of that.

I would like to make the record as strong as possible with the argument that it is constitutional. I wonder if you could elaborate on the constitutionality question.

Mr. FLAHERTY. First of all, we certainly understand that there are constitutional problems. We feel that they are resolved in the pending legislation. I think the main constitutional question that we foresee concerns the consent process that will take place under the treaty and the implementing legislation, that is whether the consent made by a prisoner in a Mexican jail is freely given.

Obviously, when one is faced with the coercive element of being in jail in a foreign country, the question then arises as to whether he gave his consent or did he or she have no real choice.

We think to get around this we have built into this legislation, in order to make sure that the consent is voluntarily and understandingly given, certain safeguards which will make that consent constitutional.

Senator BIDEN. Let us speak to those safeguards for a moment. As I understand it—and it is a very elaborate system that is suggested—you are going to have an attorney available and the attorney will personally consult with the American in the Mexican jail who is seek-

ing the transfer. But the bottom line is that that attorney is going to be paid for out of State Department funds; isn't he?

Mr. FLAHERTY. Yes; It could be provided by the family, however. But in the event that that is not provided by the offender or his family, then we would provide it. It would be paid for by State Department funds. I understand that some of the testimony which I have read questioned this as perhaps being a conflict. We do not think so. The mere fact of payment by an agency of the Government would not vitiate the consent.

Also we would have at the transfer point or at the correction facility a U.S. magistrate who would conduct the verification proceedings. The magistrate would also make sure that the party may speak for himself or herself to make sure that the consent is freely given.

Senator BIDEN. With regard to the parole system, the applicable parole system will be that of the receiving state.

Mr. FLAHERTY. That's right.

Senator BIDEN. Does that mean that if John Doe, the American citizen, is convicted in Tijuana, Mexico, of a crime and is sentenced to 10 or 15 years in jail in a Mexican jail, then he voluntarily consents to procedures set up under this legislation and is transferred to an American jail. He is transferred to American jail after only having been in a Mexican jail 6 months.

Does that person automatically become eligible for parole upon transfer? Theoretically he could be paroled 10 days after being transferred to an American jail.

Mr. FLAHERTY. Theoretically he would be, regardless of what his sentence is, eligible only to apply for parole under this legislation. That doesn't mean that he would be automatically paroled.

Senator BIDEN. I understand that, but I want to make it clear for the record. Many people do not know under our present Federal system you become eligible for parole only after serving of a certain portion of your sentence which is statutorily dictated. But that provision would not be applicable here. This doesn't mean you're going to get paroled. It doesn't mean that it will happen only that but you have the ability to apply.

It's been pointed out to me that most drug offenders convicted and sentenced in American courts would be eligible in the same way. But for an adult conviction, let's say a conviction for a burglary or a robbery or some other offense, many would have to serve a certain number of years before you can even make application to be paroled.

Mr. FLAHERTY. We have answered that in a proposed amendment that we are submitting. Ordinarily one must have about one-third of the sentence served before he can even apply for parole. We have taken that and amended that so that all of the prisoners who return are at least eligible to apply regardless of the length of sentence. In other words, we have taken one-third minimum out of this and put it in our proposed amendment. That does not mean that we may infer that the prisoners who come over will be automatically paroled. They will be subject to the same criteria used by the Parole Commission for review of their records.

Senator BIDEN. Prior to being here I know you have done criminal defense work. The reason I'm belaboring this is because we're going

to have a prisoner returning saying that they were told that they were eligible for parole immediately. They will say that they assumed that they were being promised that upon return to the United States they would be paroled and so on. I raise that again. There is nothing you can do about that now except when that takes place. Unless human nature has changed drastically, I suspect that is going to be one of the arguments which is going to be made. There will be requested hearings saying "I was duped when I came back. I would rather have stayed there and not had my prints on file with the FBI. I would rather have stayed in Mexico."

Mr. ABBELL. One of the ways we wish to address this problem is to have a booklet which will basically describe the parole eligibility standards and other criteria in connection with the transfer process. This booklet would clearly distinguish between parole eligibility and actual obtaining of parole. It would clearly indicate that parole eligibility means that the Parole Commission will hold a hearing, look at the person as if he had been convicted for the same offense in the United States, and apply the same criteria in determining his parole as if he had been convicted of a similar offense in the United States.

We hope to get around a lot of these objections that they were promised one thing and delivered another. This would be putting out a booklet that will clearly describe in written form and for the record precisely what the rights of the individuals would be.

Senator BIDEN. Let me follow up on that if I may for a moment. One of the main criticisms is this. The reason why this subcommittee and I suspect why the Department has gotten involved in this issue of transfer of prisoners, beyond the obvious merit of having such treaties with other countries, has been a good deal of publicity over the last 5 years, and longer, about extensive sentences that have been meted out in other jurisdictions, particularly Mexico, and about inhumane conditions in those prisons. I'm talking about comparison to American standards.

In my office as a Senator and I'm sure in your office when you were a mayor, Mr. Flaherty, you constantly had people telling you about brothers, sisters, and children, and nieces, and nephews in a jail for a minor offense getting a major sentence in a foreign country.

One of the things that we have advertised in this legislation is that we are not going to be rewriting Mexican sentences. We're going to be abiding by them. But the guidelines that you just set down, essentially, are going to put us in a position—which I am not arguing against but I think you should discuss them—of potentially being in a position of rewriting Mexican sentences; aren't they?

Mr. ABBELL. We are not going to be rewriting the Mexican sentences. We are going to say that the person will be eligible for parole at any given time and will be given parole in accordance with U.S. standards. But he will serve parole for the full time of his Mexican sentence. We are going to change that.

Senator BIDEN. For example, a young woman visiting Mexico City is arrested for possession of marihuana. Such an offense in America in almost any jurisdiction would not get a jail sentence. My jurisdiction in Delaware has automatic parole within 2 years. That person might get 2 or 3 or 4 years in prison. That person under the system, as I understand it, once transferred back to an American prison would be im-

mediately eligible to be considered for parole. The guidelines for that eligibility would be how we would treat such a crime in America. If you would never put the person in the prison in the first place we would probably parole them; is that not correct?

Mr. ABBELL. That would be correct.

Mr. FLAHERTY. Let me say, Senator, that in looking over the specific list, it is a misconception on our part, I think, that these are all, or for the most part, youngsters who have gone into Mexico and had a nominal trip or a nominal sale. A great majority involved a kilo or more of material. There are very few nominal cases that appear in the 500-and-some prisoners who are in Mexico. There are some, but under recent Mexican practices anyone who is caught with under 100 grams of marijuana or cocaine is not given prison sentences.

Senator BIDEN. We received your suggested refinements and alternatives with respect to this legislation and the section-by-section analysis.

With your permission I'd like to have the time to review these and possibly submit some questions in writing to you.

Mr. FLAHERTY. That would be fine.

[Material to be supplied follows:]

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 CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, D.C. 20510

July 13, 1977

The Hon. Peter Flaherty
 Deputy Attorney General
 United States Department of Justice
 9th & Constitution Avenue N. W.
 Washington, D. C. 20530

Dear Mr. Flaherty:

I want to express my deep appreciation to you for your testimony before the Subcommittee on Penitentiaries and Corrections concerning S. 1682, legislation to implement treaties between the United States and Canada and Mexico for the transfer of prisoners. As I indicated, there are several questions that have arisen from the hearing record, and I would appreciate it very much if you could respond to these questions.

The first has to do with a point raised by one of the witnesses, Professor M. Cherif Bassiouni, concerning the possibility of a conflict between existing federal law on extradition and the provisions of the implementing legislation. It would be an issue only in the unlikely event that the Supreme Court declares the transfer process unconstitutional. Professor Bassiouni has questioned the provision on two grounds: First, that a prisoner may have been convicted of an offense which is not covered by the extradition treaty between the United States and Mexico; and second, that the legislation would substitute a record of the Mexican conviction for the probable cause hearing which is otherwise required.

A second question concerns the characteristics of these offenders and their crime. The information available at the time this legislation was introduced indicated that approximately four out of five of these prisoners were imprisoned on drug-related charges, and that among those convicted of

Hon. Peter Flaherty
Page 2

July 13, 1977

drug violations, there are only rare instances in which the prisoners could be considered as being involved in serious crime, such as smuggling of hard drugs. In light of your statement that it appeared that many of these prisoners had dealt in substantial quantities of hard drugs, I believe that it is urgent that we have considerably more information available as to the characteristics of these offenders before work on the legislation can continue.

I do not think that either you or I want to be involved in pushing a piece of legislation on the basis that it is for the purpose of providing humane imprisonment for a group of people who are primarily young people that have made one mistake with drugs when the real population that we are dealing with are major offenders.

Again, it was good to see you and I look forward to hearing from you further regarding this legislation.

Sincerely,

Joseph R. Biden, Jr.
Chairman
Subcommittee on
Penitentiaries & Corrections

JRB/js



THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

August 8, 1977

Honorable Joseph R. Biden, Jr.
Chairman, Subcommittee on
Penitentiaries & Corrections
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Jal
Dear Mr. Chairman:

Thank you for your kind remarks regarding my testimony before the Subcommittee on Penitentiaries and Corrections concerning S. 1682, legislation to implement treaties for the transfer of prisoners.

You have requested that I respond to the question raised by Professor M. Cherif Bassiouni concerning possible conflict between existing federal law on extradition and the provisions of S. 1682. The answer is that there is not a conflict. S. 1682 does not pertain to extradition. The provisions of § 4114 of the bill authorize the return of an offender to the country from which he was transferred if he has been ordered released by a court of the United States; this is not an extradition but rather a fulfillment of our obligations under the treaties.

Section 4114 is the only vehicle to be used for the return of the offender. One of the provisions of that section requires that the foreign conviction be established before return. Since the offender to be returned will have been convicted, the record of conviction establishes his guilt beyond the requirement of probable cause.

You have also requested information concerning United States citizens held in Mexican jails, particularly the characteristics of the offenders and their crimes.

A large percentage of the Americans in Mexican jails are there for drug related offenses. Therefore, I believe that the remarks of Peter Bensinger before the Senate Foreign Relations Committee are pertinent. He described these offenders as follows:

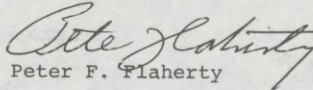
"I would finally add, Mr. Chairman, that the preponderance of the U.S. prisoners now housed in Mexico for drug violations would not be classified as major distribution elements of criminal organizations dealing with heroin, and would not be what we would call major violators, except in rare instances."

Also, I have been informed by the Department of State that the average age of the Americans held in Mexico is 31.86 years. There is attached a copy of the most recent monthly arrest reports for the Consular Posts of Ciudad Juarez, Matamoros, Mazatlan, Mexico City, Monterrey, Nuevo Laredo, and Tiajuana. The names of the offenders have been deleted in keeping with the spirit of the Privacy Act. These reports indicate the nature of the offense, status of offender, sentence imposed and report the following:

Consular Post	Total U.S. Offenders	Drug Related Offenses	Opium	Heroin
Ciudad Juarez	16	11	0	1
Matamoros	31	21	0	1
Mazatlan	68	62	2	2
Mexico City	184	165	0	0
Monterrey	38	34	0	6
Nuevo Laredo	40	26	0	8
Tiajuana	88	51	0	9
Total	465	370	2	27

Thank you for your support of this humanitarian legislation. If you desire additional information, I shall be happy to obtain it for you.

Sincerely,


Peter F. Flaherty

Enclosure

CIUDAD JUAREZ, MEXICO

<u>CHARGES (If Narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (3.2 grams of marijuana)	Consigned	
Drugs (30 kilos of marijuana)	Appealed	6 years
Drugs (30 grams of heroin)	Consigned	
Fraud	Sentenced	2 yrs. 7 mos.
Contraband	Consigned	
Drugs (350 kilos of marijuana)	Consigned	
Drugs (250 kilos of marijuana)	Appealed	7 years
Drugs (1.736 kilos of marijuana & residues of drugs)	Appealed	5 yrs. 3 mos.
Drugs (10 grams of marijuana)	Released 06-10-77	

<u>CHARGES (If Narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (328 grams of marijuana & residues of drugs)	Sentenced	6 years
Fraud	Sentenced	3 yrs. 6 mos
Drugs (750 kilos of marijuana)	Appealed	6 yrs. 3 mos
Drugs (2.400 grams of cocaine)	Sentenced	5 yrs. 3 mos
Drugs (10 grams of marijuana)	Released 06-10-77	
Contraband	Consigned	
Drugs (894 grams of marijuana)	Consigned	
Counterfeit	Sentenced	5 years
Drugs (8.6 grams of marijuana)	Sentenced	5 yrs. 3 mos
Drugs (10 grams of marijuana)	Released 06-10-77	

AMERICAN CONSULATE MATAMOROS

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>	<u>APPROX. DATE OF RELEASE</u>
Drugs (1 kilo Marijuana)	Under appeal (File No. not available)	5 yrs.7mos	04-23-81
Drugs (2 tons Marijuana)	Serving	9 yrs.3 mos.	02-21-83
Drugs (3 tons Marijuana)	Serving	5 yrs.6mos.	07-12-80
Drugs (3 kilos Marijuana)	Serving	5 yrs.2 mos.	02-12-80
Drugs (10 kilos Marijuana)	Under appeal (File No. not available)	6 yrs.	02-03-81
Manslaughter (auto accident)	Consigned		
Drugs (500 grams Heroin)	Consigned		

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>	<u>APPROX. DATE OF RELEASE</u>
Drugs (1 ton Marijuana)	Serving	6 yrs, 2 mos.	02-21-82
Drugs (Seeds)	Serving	5 yrs, 4 mos.	07-15-81
Counter,	Consigned		
Contraband	Sentenced	2 yrs. 6 mos.	01-30-79
Drugs (1 kilo Marijuana)	Under appeal (File No. not available)	5 yrs. 7 mos.	04-23-81
Drugs (44 kilos Marijuana)	Serving	5 yrs. 4 mos.	12-20-80
Theft	Consigned		
Drugs (125 kilo) Marijuana)	Serving	5 yrs. 11 mos.	10-15-81

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>	<u>APPROX. DATE OF RELEASE</u>
Drugs (25 kilos Marijuana)	Serving	6 yrs. 4 mos.	05-24-82
Drugs (25 kilos Marijuana)	Serving	6 yrs. 4 mos.	05-24-82
Drugs (22.800 Kilos Marijuana)	Under appeal (File No. not available)	7yrs. 6 mos.	10-04-84
Murder	Serving	17 yrs.	04-11-91
Theft	Serving	4 years	11-12-78
Contraband	Released	05-21-77	
Theft	Consigned		
Manslaughter (auto accident)	consigned		
Drugs (576 kilos Marijuana)	released	05-27-77	

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>	<u>APPROX. DATE OF RELEASE</u>
Drugs (21 kilos Consigned Marijuana)			
Drugs (214kilos Consigned Marijuana)			
Drugs (125Kilos Consigned Marijuana)			
Violation Fire Consigned arms Law (1 12 gauge shotgun, 295 rounds of ammo.)			
Drugs (125kilos Marijuana)	Serving	6 yrs	11-12-81
Drugs (138 Kilos Marijuana)	Under appeal (File No. not available)	7 yrs.	01-24-83
Drugs (25kilos Marijuana)	Under appeal (File No. not available).	7 yrs.6mos.	10-04-84
Contraband	Consigned		
Drugs (125 kilos Marijuana)	Consigned		

MAZATLAN

<u>CHARGES</u> (If narcotics, Kind and Amount)	<u>STATUS OF CASE</u> (If under Appeal, so state)	<u>SENTENCE</u>
Drugs (475 kilos marihuana)	Sentenced (Exp. 81/75) Appealed in Hermosillo	8 years
Drugs (200 grams marihuana)	Sentenced (Exp. 419/73)	3 yrs. 3 mos.
Drugs (8 kilos marihuana)	Consigned (Exp. number requested)	
Drugs (9 kilos marihuana)	Consigned (Exp. 127/76)	
Drugs (58.5 kilos marihuana)	Sentenced (Exp. 187/75) Appealed in Hermosillo	5 yrs. 3 mos.
Drugs (10 ounces cocaine)	Sentenced (Exp. number requested)	6 years
Drugs (100 grams extract of marihuana between two)	Sentenced (Exp. 89/75)	5 yrs. 3 mos.
Drugs (100 grams extract of marihuana between two)	Sentenced (Exp. 89/75)	5 yrs. 3 mos
Drugs (residual of leaves & seeds of marihuana)	Sentenced (Exp. 10/75) Appealed in Hermosillo	4 yrs. 2 mos.
Drugs (9.5 kilos marihuana)	Consigned (Exp. 127/76)	
Drugs (9.5 kilos marihuana)	Consigned (Exp. 127/76)	
Drugs (9.5 kilos marihuana)	Consigned (Exp. 127/76)	

MAZATLAN

<u>CHARGES</u> (If narcotics, Kind and Amount)	<u>STATUS OF CASE</u> (If under Appeal, So State)	<u>SENTENCE</u>
Drugs (21 kilos marihuana & violation of immigration law)	Sentenced (Appealed in Hermosillo) Exp. 32/75	3 yrs. 3 mos.
Drugs (12 grams cocaine)	Consigned - OVERDUE Exp. 31/76.	
Drugs (1-2 ounces of marihuana)	Consigned (Exp. 109/76)	
Drugs (1-2 ounces of marihuana)	Consigned (Exp. 109/76)	
Drugs (600 pounds of marihuana)	Sentenced (Appealed in Hermosillo) Exp. 50/75	6 yrs. 6 mos.
Drugs (600 pounds of marihuana)	Sentenced (Appealed in Hermosillo) Exp. 50/75)	6 yrs. 6 mos.
Drugs (20 kilos marihuana)	Sentenced (Exp. 276/74)	3 yrs. 11 mos
Drugs (1-2 ounces of marihuana)	Consigned (Exp. 109/76)	

M A Z A T L A N

<u>CHARGES</u> (If narcotics,	<u>STATUS OF CASE</u> (If under	<u>SENTENCE</u>
Drugs (100 kilos marihuana)	Sentenced (Exp. 61/75)	5 yrs. 4 mos.
Drugs (140 kilos marihuana)	Sentenced (Exp. 49/75)	5 yrs. 4 mos.
Drugs (110 grams marihuana between two)	Sentenced (Exp. 37/76) Appealed in Hermosillo	5 yrs. 3 mos.
Drugs (2 grams cocaine)	Sentenced (Exp. 179/75)	5 yrs. 3 mos.
Murder	Sentenced (Exp. number requested)	21 yrs. 6 mos.
Drugs (25 kilos marihuana)	Sentenced (Exp. 112/75)	5 yrs. 4 mos.
Drugs (110 grams marihuana between two)	Sentenced (Exp. 37/76) Appealed in Hermosillo	5 yrs. 3 mos.
Drugs (450 kilos marihuana)	Consigned (Exp. 124/76)	
Drugs (1-1/2 ounces heroin)	Sentenced (Exp. 27/76) Appealed in Hermosillo	6 years
Drugs (1 ounce heroin)	Sentenced (Exp. 27/76) Appealed in Hermosillo	6 yrs. 3 mos.
Drugs (973 lbs. marihuana)	Sentenced (Exp. 23/75)	3 yrs. 10 mos.
Drugs (5 grams hashish)	Consigned (Exp. 5/77)	

M A Z A T L A N

<u>CHARGES (If narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Murder	Sentenced (Exp. 362/73) (Amparo Mexico City)	8 yrs. 3 mos.
Drugs (66 grams marihuana)	Sentenced (Exp. 216/75)	5 yrs. 5 mos.
Drugs (180 kilos marihuana)	Sentenced (Exp. 36/75)	5 yrs. 4 mos.
Drugs (5 grams hashish)	Consigned (Exp. 5/77)	
Drugs (1-1/2 ounces marihuana)	Sentenced (Exp. 55/76) Appealed in Hermosillo	5 yrs. 3 mos.
Contraband, possession of pistol & illegal entry	Consigned (Exp. 51/77)	
Drugs (Small amount cocaine)	Consigned (Exp. 16/77)	
Murder/Drugs (300 grams marihuana)	Sentenced (Exp. 46/73)	12 years
Drugs (70 kilos marihuana)	Sentenced (Exp. 140/75) Appealed in Hermosillo	5 yrs. 5 mos.
Drugs (44 kilos marihuana)	Sentenced (Exp. 247/75)	5 yrs. 5 mos.
Contraband	Sentenced (Exp. 242/75)	6 years
Murder/Drugs (1 kilo 14 grams cocaine)	Sentenced (Exp. 288/73) Amparo Mexico City	19 years
Drugs (50 kilos marihuana)	Sentenced (Exp. 53/76) Appealed in Hermosillo	6 years.

MAZATLAN

<u>CHARGES</u> (If narcotics, Kind and Amount)	<u>STATUS OF CASE</u> (If under Appeal, so state)	<u>SENTENCE</u>
Drugs (38 kilos marihuana)	Sentenced (Exp. 217/75) Appealed in Hermosillo	5 yrs. 5 mos.
Drugs (30 grams marihuana/ cocaine)	Sentenced (Exp. 43/76) Appealed in Hermosillo	6 years
Drugs (140 kilos marihuana)	Sentenced (Exp. 164/75) Appealed in Hermosillo	6 yrs. 1 mo.
Drugs (suspicion of selling marihuana)	Consigned (Exp. 13/76)	
Drugs (46 kilos marihuana)	Sentenced (Exp. 247/75)	5 yrs. 5 mos.
Drugs (80 kilos marihuana)	Sentenced (Exp. 91/75) Appealed in Hermosillo	6 years
Drugs (30 kilos marihuana)	Sentenced (Exp. 62/75)	5 yrs. 3 mos.
Drugs (140 kilos marihuana)	Sentenced (Exp. 164/75) Appealed in Hermosillo	6 yrs. 1 mo.
Drugs (70 kilos marihuana)	Sentenced (Exp. 140/75) Appealed in Hermosillo	5 yrs. 5 mos.
Drugs (44 grams marihuana)	Sentenced (Exp. 1/76)	5 yrs. 3 mos.
Drugs (245 grams marihuana in cookies)	Sentenced (Exp. 14/76)	5 yrs. 5 mos.
Drugs (175 kilos marihuana)	Sentenced (Exp. 36/75)	5 yrs. 4 mos.
Murder/Drugs (1 kilo 14 grams cocaine)	Sentenced (Exp. 288/73) Amparo Mexico City	19 years

M A Z A T L A N

<u>CHARGES</u> (If narcotics,	<u>STATUS OF CASE</u> (If under	<u>SENTENCE</u>
Drugs (25 kilos, 50 grams marihuana)	Sentenced (Exp. 57/76)	6 years
Drugs (125 kilos marihuana)	Sentenced (Exp. 36/75)	5 yrs. 4 mos
Fraud - non payment of hotel bill	Detained (can be released upon payment of \$300.00 debt.	
Drugs (300 kilos marihuana)	Sentenced (Exp. 109/76) Appealed in Hermosillo	6 years
Drugs (121 kilos marihuana)	Sentenced (Exp. 71/74)	3 yrs. 7 mos
Drugs (3 kilos opium)	Sentenced (Exp. 81/76) Appealed in Hermosillo	5 yrs. 3 mos
Drugs (3 tons marihuana)	Sentenced (Exp. 81/76) Appealed in Hermosillo	7 years
Drugs (3 tons marihuana)	Sentenced (Exp. 81/76) Appealed in Hermosillo	7 years
Drugs (3 kilos opium)	Sentenced (Exp. 95/76) Appealed in Hermosillo	7 years

M A Z A T L A N

CHARGES (If narcotics,
Kind and Amount)

STATUS OF CASE(If
Released, give
release date)

CODE

Fraud - non payment of
hotel bill

Detained (can be released
upon payment of \$300.00
debt.

(1) (3)

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (870 grams cocaine)	Appealed	6 yrs. 6 mos.
Drugs (870 grams cocaine)	Appealed	6 yrs. 6 mos.
Drugs (10 grams cocaine)	Appealed	10 yrs. 6 mos.
Drugs (500 grams cocaine)	Appealed	6 yrs.
Drugs (5 kilos cocaine)	Appealed	6 yrs. 6 mos.
Fraud	Consigned	
Drugs (3 oz. cocaine)	Appealed	6 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1.8 kilos cocaine)	Sentenced	6 yrs.
Drugs (less than 100 grams of marijuana)	Consigned	
Drugs (2 kilos cocaine)	Appealed	7 yrs.
Drugs (1 kilo cocaine)	Consigned	
Drugs 3,86 kilos cocaine)	Sentenced	9 yrs.
Drugs (1 kilo cocaine)	Sentenced	7 yrs. 2 mos.
Drugs (800 grams cocaine)	Sentenced	6 yrs.
Illegal Vehicle importation	Consigned	
Drugs (1.8 kilos cocaine)	Appealed	6 yrs. 9 mos.
Drugs (400 grams marijuana).	Consigned	

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1 kilo cocaine)	Appealed	7 yrs. 15 days
Drugs (3.86 kilos cocaine)	Appealed	9 yrs.
Drugs (3.86 kilos cocaine)	Appealed	9 yrs
Drugs (100 grams cocaine)	Consigned	
Drugs (1.06 kilos cocaine)	Consigned	
Fraud	Consigned	
Drugs (5 tons marijuana)	Consigned	
Drugs (865 grams cocaine)	Sentenced	7 yrs. 9 mos.
Fraud	Consigned	
Illegal vehicle	Consigned	
Contraband	Sentenced	10 yrs.
Drugs (less than 100 grams of marijuana)	Consigned	
Drugs (666 grams marijuana)	Amparo	5 yrs. 3 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1 ton marijuana)	Consigned	
Drugs (3.86 kilos cocaine)	Sentenced	12 yrs.
Drugs (3.86 kilos cocaine)	Appealed	9 yrs.
Drugs (2 kilos cocaine)	Appealed	7 yrs. 4 mos.
Drugs (2 kilos cocaine)	Appealed	10 yrs.
Drugs (3.86 kilos cocaine)	Appealed	9 yrs.
False Documents	Consigned	
Drugs (1.8 kilos cocaine)	Appealed	7 yrs.
Drugs (500 grams cocaine)	Appealed	6 yrs. 2 1/2 mos.
Drugs (1.6 kilos cocaine)	Appealed	8 yrs 6 mo. (Appeal:
Drugs (15 kilos hashish)	Sentenced	9 yrs. 1 mo.
Illegal vehicle importation	Consigned	

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Contraband	Consigned	
Drugs (3,86 kilos cocaine)	Appealed	12 yrs.
Drugs (100 kilos cocaine)	Consigned	
Drugs (3,86 kilos cocaine)	Appealed	9 yrs.
Drugs (3,86 kilos cocaine)	Appealed	12 yrs.
Drugs (900 grams cocaine)	Consigned	
Drugs (500 grams cocaine)	Appealed	7 yrs. 2 mos.
Drugs (less than 100 grams of marijuana)	Consigned	
Drugs (1.4 kilos cocaine)	Consigned	

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (2 kilos cocaine)	Sentenced	7 yrs.
Drugs (Unspec- ified quantity cocaine)	Sentenced	7 yrs.
Drugs (unspec- ified quantity cocaine)	Consigned	
Drugs (900 grams cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (100 grams marijuana)	Consigned	
Drugs (100 grams marijuana)		
Drugs (2.5 kilos cocaine)	Appealed	6 yrs. 6 mos.
Drugs (100 grams Marijuana)	Consigned	
Drugs (1 kilo cocaine)	Appealed	7 yrs.
Drugs (500 grams cocaine)	Sentenced	6 yrs. 9 1/2 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (4.5 kilos cocaine)	Sentenced	7 yrs.
Drugs (1 kilo cocaine)	Sentenced	7 yrs. 1 mo.
Drugs (1.8 kilos cocaine)	Appealed	6 yrs. 9 mos.
Drugs (unspecified quantity marijuana)	Sentenced	5 yrs. 6 mos.
Drugs (500 grams cocaine)	Sentenced	7 yrs. 3 mos.
Drugs (100 grams marijuana)	Consigned	
Drugs (300 grams cocaine)	Appealed	8 yrs.
Drugs (100 grams marijuana)	Consigned	
Drugs (800 grams cocaine)	Appealed	8 yrs. 2 mos.
Drugs (500 grams cocaine)	Sentenced	6 yrs.
Drugs (Unspecified quantity cocaine)	Amparo	6 yrs. 6 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (6 kilos cocaine)	Sentenced	7 yrs. 1 mo.
Drugs (6 kilos cocaine)	Sentenced	7 yrs. 1 mo.
Drugs (100 grams marijuana)	Consigned	
Drugs (500 grams cocaine)	Consigned	
Drugs (300 grams cocaine)	Sentenced	6 yrs.
Drugs (2.3 kilos cocaine)	Sentenced	7 yrs.
Drugs (5.5 kilos cocaine)	Sentenced	7 yrs. 6 mos.
Drugs (2 kilos cocaine)	Sentenced	7 yrs. 3 mos.
Drugs (3.5 kilos cocaine)	Sentenced	6 yrs. 1 mo.
Drugs (2 kilos cocaine)	Sentenced	7 yrs. 3 mos.
Drugs (3.5 kilos cocaine)	Sentenced	6 yrs. 1 mo.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (500 grams cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (25 grams cocaine)	Sentenced	6 yrs. 8 mos.
Drugs (1 kilo cocaine)	Appealed	7 yrs.
Drugs (1 kilo cocaine)	Sentenced	7 yrs.
DrugSentenced cocaine)	7 yrs. 2 mos.	
Drugs (2.3 kilos cocaine)	Appealed	7 yrs. 3 mos.
Drugs (570 grams cocaine)	Consigned	
Drugs (unspec- ified quantity of cocaine)	Sentenced	7 yrs.
Drugs (166 grams cocaine)	Sentenced	6 yrs. 6 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (850 grams cocaine)	Sentenced	6 yrs.
Drugs (Unspecified quantity, more than 1 ton of marijuana)	Sentenced	13 yrs.
Drugs (Unspecified quantity cocaine, hashish, marijuana)	Sentenced	6 years
Drugs (90 milli-grams cocaine)	Amparo	6 yrs.
Drugs (1.5 kilos cocaine)	Sentenced	7 yrs.
Drugs (75 grams cocaine)	Sentenced	6 yrs.
Drugs (1 kilo cocaine)	Appealed	7 yrs.
Drugs (Unspecified quantity cocaine)	Appealed	9 yrs.
Drugs (500 grams cocaine)	Sentenced	6 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1 kilo cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (2.5 kilos cocaine)	Sentenced	7 yrs.
Drugs (1.5 kilos cocaine)	Appealed	13 years
Drugs (650 grams cocaine)	Sentenced	7 yrs.
Drugs (20 grams marijuana)	Sentenced	5 yrs 3 mos.
Drugs (Unspec- ified quantity cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (500 grams cocaine)	Sentenced	7 yrs.
Drugs (740 grams cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (740 grams cocaine)	Appealed	6 yrs. 6 mos.
Drugs (Unspec- ified quantity cocaine)	Appealed	6 yrs. 9 mos.
Drugs (100 grams cocaine)	Sentenced	6 yrs. 3 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1 kilo cocaine)	Sentenced	
Drugs (cocaine)	Sentenced	7 yrs.
Drugs (Unspec- ified quantity cocaine)	Appealed	6 yrs.
Drugs (5.5 kilos cocaine)	Sentenced	7 yrs. 6 mos.
Drugs (300 grams cocaine)	Appealed	6 yrs.
Drugs (1 kilo cocaine)	Sentenced	6 yrs.
Drugs 2.2 kilos cocaine)	Sentenced	6 yrs.
Drugs (50 kilos marijuana) Weapon	Sentenced	5 yrs. 6 mos.
Drugs (1,4 kilos cocaine)	Appealed	7 yrs. 2 mos.
Aerial High- jacking & Extortion	Sentenced	6 yrs. 10 mos.
Contraband	Appealed	8 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1 kilo cocaine)	Appealed	6 yrs.
Drugs	Appealed	7 yrs. 6 mos.
Drugs (760 grams cocaine)	Appealed	7 yrs. 8 mos.
Drugs (750 LSD tablets, unspec- ified quantity marijuana)	Sentenced	6 yrs.
Drugs (1 kilo cocaine)	Sentenced	7 yrs.
Drugs (700 grams cocaine)	Appealed	8 yrs. 8 mos.
Drugs (2 kilos cocaine)	Sentenced	6 yrs.
Fraud	Sentenced	7 yrs. 15 days
Drugs (438 grams cocaine)	Sentenced	6 yrs. 6 mos.
Drugs (Unspec- ified quantity cocaine)	Appealed	7 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (400 grams cocaine)	Sentenced	6 yrs. 8 mos.
Drugs (Unspecified quantity cocaine)	Appealed	8 yrs.
Drugs (1/3 kilo cocaine)	Sentenced	7 yrs.
Drugs (500 grams cocaine)	Sentenced	6 yrs. 9 mos.
Drugs (1.5 kilos cocaine)	Sentenced	6 yrs.
Contraband	Sentenced	7 yrs. 6 mos.
Drugs (Unspecified quantity cocaine)	Sentenced	9 yrs.
Drugs (200 grams cocaine)	Sentenced	6 yrs.
Murder	Sentenced	28 yrs.
Drugs (160 grams cocaine)	Sentenced	
Drugs (800 grams cocaine)	Sentenced	6 yrs.
Drugs (6 kilos cocaine)	Appealed	8 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1/2 pound cocaine)	Appealed	7 yrs. 6 mos.
Drugs (270 grams cocaine)	Sentenced	7 yrs.
Drugs (480 grams cocaine)	Sentenced	6 yrs. 6 mos.
Murder/theft	Sentenced	40 yrs.
Drugs (3 kilos cocaine)	Appealed	
Fraud	Amparo	12 yrs.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (250 grams marijuana)	Sentenced	7 yrs. 6 mos.
Drugs (Unspec- ified amount marijuana)	Appealed	4 yrs. 6 mos.
Drugs (200 kilos marijuana)	Appealed	5 yrs. 6 mos.
Drugs (3.2 kilos	Consigned	
Drugs (250 grams marijuana)	Sentenced	7 yrs. 6 mos.
Drugs (20 seeds ✓ marijuana)	Sentenced	7 yrs.
Drugs (13 kilos marijuana)	Sentenced	6 yrs. 3 mos.
Drugs (13 kilos marijuana)	Sentenced	6 yrs. 3 mos.
Drugs (13 kilos marijuana)	Sentenced	6 yrs. 3 mos.

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (1.5 kilos cocaine)	Sentenced	11 yrs.
Drugs (400 kilos marijuana)	Sentenced	5 yrs. 3 mos.
Drugs (Less than 100 grams marijuana)	Consigned	
Drugs (180 kilos marijuana)	Sentenced	7 yrs.
Drugs (350 kilos marijuana)	Consigned	
Drugs (300 kilos marijuana)	Consigned	
Drugs (Unspec- ified quantity marijuana)	Sentenced	4 yrs.
Drugs (350 kilos marijuana)	Consigned	
Drugs (350 kilos marijuana)	Consigned	

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Robbery	Consigned	
Drugs (750 grams marijuana, 370 grams seeds)	Consigned	
Drugs (300 kilos marijuana)	Sentenced	5 yrs. 9 mos.
Drugs (300 kilos marijuana)	Sentenced	5 yrs. 9 mos
Drugs (500 grams marijuana including plants)	Consigned	
Murder	Consigned	

MEXICO CITY, MEXICO

CHARGE	STATUS OF CASE	SENTENCE
Drugs (3.5 kilos cocaine)	Appealed	9 yrs. 6 mos.
Drugs (1.72 kilos cocaine)	Consigned	
Drugs (2 ozs. marijuana, 3 oz. mushrooms)	Consigned	
Drugs (57.5 kilos marijuana)	Consigned	
Contraband	Consigned	
Drugs (195 kilos marijuana)	Appealed	7 yrs. 6 mos.

MEXICO CITY, MEXICO

CHARGES	STATUS OF CASE	CODE
Suspicion of being drug smuggler	Released 5/23/77	2
Drugs	Released 5/25/77	4
Assault	Released 5/04/77	
Drugs (750 gm. marijuana)	Consigned	
No charges	Released 5/19/77	1
Drugs (300 gm. marijuana)	Released 5/19/77	1
Drugs (3.2 kilos marijuana)	Consigned	
No charges	Released 5/19/77	1
No charges	Released 5/19/77	1
Drugs (750 gm. marijuana)	Released 5/25/77	
Drugs (300 gm. marijuana)	Released 5/19/77	1

MEXICO CITY, MEXICO

DATE OF ARREST	CHARGES	STATUS OF CASE	CODE
5/24/77	Drugs (57.5 kilos	Consigned	
5/16/77	No charges	Released 5/19/77	1

AMERICAN CONSULATE GENERAL

MONTERREY, MEXICO

<u>CHARGES</u> (If Narcotics, kind and Amount)	<u>STATUS OF CASE</u> (If under Appeal, so state)	<u>SENTENCE</u>
Fraud and Illegal presence in Mexico	Consigned	
Drugs (30 kilos marijuana)	Sentenced	8yrs. 4mos.
Drugs (20 kilos marijuana)	Sentenced	4yrs. 8mos.
Attempted Homicide	Sentenced	5yrs.
Drugs (78 kilos marijuana)	Consigned	
Inflicting physical damage	Consigned	
Drugs (250 kilos marijuana)	Appealed	5yrs. 6mos.
Drugs (200 kilos marijuana & 1 gram heroin)	Sentenced	6yrs. plus 5,000 peso fine

<u>CHARGES (If Narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (100 kilos marijuana)	Sentenced	5yrs. 1mo. plus 6,000 peso fine
Drugs (66 kilos marijuana)	Sentenced	4yrs. 6mos.
Drugs (Transfer of 181.5 kilos marijuana)	Consigned	
Manslaughter	Consigned	
Drugs, conspiracy (55 kilos marijuana)	Consigned	
Drugs (200 kilos marijuana)	Appealed *	7yrs. plus 8,000 peso fine
Drugs (1 kilo heroin)	Appealed	7yrs. 6mos. plus 10,000 peso fine
Drugs (1 gram heroin)	Sentenced	7yrs. plus 7,000 peso fine
Drugs (1 gram heroin)	Sentenced	7yrs.
Drugs (78 kilos marijuana)	Consigned	

<u>CHARGES (If Narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (11 kilos marijuana)	Sentenced	5yrs. 6mos. plus 6,000 peso fine
Drugs (250 kilos marijuana)	Sentenced	4yrs. 3mos. plus 5,000 peso fine
Drugs (37 kilos marijuana)	Sentenced	3yrs. 10mos. plus 3,000 peso fine
Drugs (150 grams marijuana)	Consigned	
Drugs (37 kilos marijuana)	Sentenced	3yrs. 10mos. plus 3,000 peso fine
Drugs (1000 kilos marijuana)	Consigned	
Drugs (47 kilos marijuana)	Sentenced	5yrs. 6mos.
Drugs (10 kilos marijuana)	Sentenced	5yrs. 3mos. plus 5,000 peso fine

<u>CHARGES (If Narcotics Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (90 kilos marijuana)	Sentenced	7yrs. & 20,000 peso fine
Drugs (10 kilos marijuana)	Sentenced	5yrs. 3mos. plus 5,000 peso fine
Drugs (55 kilos marijuana)	Sentenced	5yrs. 6mos.
Drugs (27.3 kilos marijuana)	Sentenced	5yrs.
Drugs (15 kilos marijuana)	Sentenced	6yrs. plus 10,000 peso fine
Drugs (25 kilos marijuana)	Sentenced	6yrs. 6mos. plus 20,000 peso fine
Drugs (455 kilos marijuana)	Appealed	5yrs. plus 3,000 peso fine
Drugs (307 kilos marijuana)	Appealed	6yrs. 7mos. plus 10,000 peso fine

<u>CHARGES (If Narcotics, Kind and Amount)</u>	<u>STATUS OF CASE (If under Appeal, so state)</u>	<u>SENTENCE</u>
Drugs (375 grams cocaine & 100 grams coke leaves)	Consigned	
Drugs (209 kilos marijuana)	Appealed	6yrs.
Drugs & Ill. poss. arms (1.5 kilos marijuana. Heroin unknown amount)	Sentenced	8yrs. plus 5,000 peso fine
Drugs & murder (47 grams heroin & 250 grams marijuana)	Sentenced	24yrs. 6mos. plus 100 peso fine

AMERICAN CONSULATE, NUEVO LAREDO

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>
Homicide	Sentenced	24 Yrs
Drugs (15 Kilos Marijuana)	Appealed	5 Yrs 3 Mos
Drugs (1/2 Ton Marijuana)	Consigned	
Drugs (178 Grams Heroin)	Appealed	6 Years
Drugs (15 grams Heroin)	Consigned	
Drugs (1 ounce Heroin)	Sentenced	7 Years
Drugs (1 ounce Heroin)	Sentenced	5 Yrs 9 Mos
Drugs (56 Kilos Marijuana)	Consigned	
Drugs (1/2 Ton Marijuana)	Sentenced	5 Yrs 4 Mos
Drugs (140 Kilos Marijuana)	Appealed	6 Years
Drugs (220 grams Marijuana)	Consigned	
Drugs (1/2 Ton Marijuana)	Consigned	
Drugs (15 Kilos Marijuana)	Appealed	5 Yrs 3 Mos
Drugs (1 Kilo Marijuana)	Sentenced	7 Years

AMERICAN CONSULATE, NUEVO LAREDO

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>
Firearms	Consigned	
Smuggling Aliens	Appealed	2 Yrs 6 Mos
Kidnapping	Consigned	
Robbery	Consigned	
Smuggling Aliens	Consigned	
Smuggling Aliens	Consigned	
Contraband	Consigned	
Drugs (250 Kilos Marijuana)	Appealed	4 Years
Smuggling Aliens	Consigned	
Drugs (200 Kilos Marijuana)	Consigned	

AMERICAN CONSULATE, NUEVO LAREDO

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>
Drugs (600 grams Heroin)	Sentenced	6 Yrs 6 Mos
Drugs (640 Grams Heroin)	Sentenced	5 Yrs 3 Mos
• Drugs (75 Kilos Marijuana)	Appealed	6 Yrs 6 Mos
Homicide	Sentenced	6 Years
Drugs (140 Kilos Marijuana)	Appealed	6 Years
Smuggling Aliens	Consigned	
Drugs (21 Kilos Marijuana)	Appealed	
Drugs (1/2 Ton Marijuana)	Sentenced	5 Yrs 4 Mos
Drugs (600 grams Marijuana)	Sentenced	6 Yrs 6 Mos
Drugs (20 grams Marijuana & 6 grams Heroin)	Sentenced	6Yrs 10 Mos

<u>CHARGES</u>	<u>STATUS OF CASE</u>	<u>SENTENCE</u>
Smuggling Aliens	Consigned	
Smuggling Aliens	Consigned	
• Drugs (24 Kilos Marijuana)	Consigned	
Smuggling Aliens	Consigned	
Drugs (4.2 grams of Heroin)	Consigned	
Drugs (25 grams of Marijuana)	Consigned	

TIJUANA. B.C. MEXICO

June 1, 1977

Americans Within the Consulate General's Consular District

<u>STATUS OF</u> <u>CASE</u>	<u>SENTENCE</u>	<u>APPROX.</u> <u>RELEASE DATE</u>
Sentenced	8 yrs 5 mos (2 counts)	06/16/83 (2/3 = March 1980)
Consigned		
Consigned		
Sentenced	3 yrs 2 mos & 10,000 peso fine	09/05/79 (2/3 = Aug 1978)
Sentenced	5 yrs 2 mos	03/28/79 (2/3 = June 1977)
Sentenced	6 yrs 10 mos plus 7,000 peso fine	01/16/83 (2/3 = Oct 1980)
Consigned		
Note sent		
Consigned		
Consigned		
Note sent		
Sentenced	5 yrs 3 mos	07/22/80. Appealed (2/3 = Nov 1978)
Sentenced	10 yrs plus 25,000 peso fine	12/06/85 (2/3 = Oct 1982)

Alien Smuggling	Consigned	
Drugs - marijuana (1/2 lb)	Sentenced	5 yrs 6 mos plus 8,000 peso fine 12/10/80 (2/3 = Feb 1979)
Alien Smuggling	Consigned	
Alien Smuggling	Consigned	
Auto Theft/Fraud	Sentenced	5 yrs 3 mos. 03/02/79. Appeals (2/3 = March 1977)
Drugs	Consigned	
Drugs - benzedrine (300,000 pills)	Sentenced	5 yrs plus 6,000 peso fine 01/22/79 (2/3 = May 1977)
Robbery	Sentenced	4 yrs plus 2,000 peso fine 06/07/80 (2/3 = Feb 1979)
Alien Smuggling	Consigned	
Murder & Robbery	Sentenced	25 yrs 10/12/94 2/3 = April 1986)
Auto Theft	Consigned	

Drugs - hashish (4 liters)	Sentenced	7 yrs plus 5,000 peso fine	01/15/83 (2/3 = Sept 1980)
Drugs - hashish (4 liters)	Sentenced	7 yrs 6 mos plus 10,000 peso fine	07/18/83 (2/3 = Jan 1981)
Robbery	Consigned		
Drugs - marijuana (1/2 ton)	Sentenced	8 yrs 6 mos plus 12,000 peso fine	09/31/83 (2/3 = Sept 1980)
Assault, Drugs	Consigned		
Firearms	Sentenced	3 yrs 10 mos plus 6,000 peso fine	02/07/80 (2/3 = Oct 1978)
Traffic Accident	Under Inv.		
Drunk & Disorderly	Under Inv.		
Drunk & Disorderly	Under Inv.		
Drunk & Disorderly	Under Inv.		
Drugs	Under Inv.		
Drugs	Under Inv.		

Alien Smuggling	Consigned		
Alien Smuggling	Consigned		
2 grams heroin & Firearms	Consigned		
Robbery	Consigned		
Drugs - heroin (100 grams)	Sentenced	6 yrs 2 mos plus 4,000 peso fine	10/20/81 (2/3 = Sep 1979)
Car theft	Consigned		
Drugs - marijuana (susp. trafficking)	Consigned Note sent		
Rape	Consigned		
Alien Smuggling	Consigned		
Drugs - marijuana (4 cigarettes)	Consigned		
Drugs - marijuana (9 kilos)	Consigned Note sent		
Drugs - heroin (3 kilos 100 grams)	Consigned Note sent		
Drunk Driving	Sentenced	2 mos	6/19/77
Fraud	05/24/76 Sentenced	3 yrs 6 mos	11/25/79 (2/3 = Sept 1978)

Drugs - heroin (one kilo)	Sentenced	6 yrs 6 mos plus 10,000 peso fine	05/02/82 (2/3 = March 1980)
Passing Counterfeit Currency	Consigned		
Alien Smuggling	Sentenced	3 yrs	03/09/79 (2/3 = March 1978)
Fraud	Sentenced	3 yrs 6 mos plus 4,000 peso fine	02/14/79 (2/3 = Dec 1977)
Drugs - marijuana (102 kilos)	Consigned		
Drugs - marijuana (susp. trafficking)	Consigned Note sent		
12 kilos cocaine 1 kilo novocain)	Consigned Note sent		
Drugs - benzadrine (25,000 pills)	Consigned Note sent		
Drugs - marijuana (65 kilos)	Sentenced	6 yrs 3 mos plus 8,500 peso fine.	05/27/82. Appealed (2/3 = April 1980)
Drugs - heroin (2 1/2 kilos)	Sentenced	6 yrs	05/01/80 (2/3 = May 1978)
Drugs - marijuana (2 packages)	Sentenced	3 yrs	01/19/78. Appealed (2/3 = Jan 1977)
Immig. Laws	Sentenced	3 yrs 2 mos	07/16/79. Appealed (2/3 = July 1978)
Drugs - marijuana (11 kilos)	Sentenced	5 yrs 3 mos	07/21/80 (2/3 = Nov 1978)
Drugs - cocaine (50 grams)	Consigned		

Drugs - marijuana (102 kilos)	Consigned		
Drugs - marijuana (26 grams) & Illegal Explosives	Consigned		
Drugs - heroin (2 gram 500 migs)	Sentenced	5 yrs 3 mos	01/28/81 (2/3 = April 1979)
Drugs - marijuana (1,212 1/2 kilos)	Sentenced	Reduced to 5 yrs 6 mos plus 5,000 peso fine	07/29/80 (2/3 = May 1978)
Drugs - marijuana (40 kilos)	Consigned Note sent		
Drugs - amphetamines (amount unk)	Sentenced	10 yrs plus 25,000 peso fine	12/06/85 (2/3 = Oct 1982)
Drugs - marijuana (150 kilos)	Sentenced	6 yrs 4 mos plus 10,000 peso fine	02/05/81 (2/3 = Jan 1979)
Manslaughter	Sentenced	8 yrs	12/14/81 (2/3 = April 1979)
Drugs - marijuana (21 kilos)	Consigned Note sent		
Alien Smuggling	Consigned		
36 kilos marijuana & one oz cocaine	Consigned		
Drugs - marijuana (200 kilos)	Consigned		
Alien Smuggling	Consigned		

Drugs - marijuana (attempt sell 7 cigarettes)	Consigned		
Alien Smuggling	Consigned		
Alien Smuggling	Sentenced	3 yrs & 10,000 peso fine	09/30/78. Appealed (2/3 = Sep 1977)
Alien Smuggling	Consigned		
Drugs - marijuana (4 1/2 oz.)	Consigned Note sent		
Alien Smuggling	Consigned		
Drugs - marijuana (large amount)	Consigned Note sent		
Drugs - marijuana (2 kilos)	Consigned Note sent		
Alien Smuggling	Consigned		
Drugs - marijuana (large amount)	Consigned Note sent		
Drugs - heroin (3 envelopes)	Consigned		
Drugs - marijuana (32 kilos)	Sentenced	6 yrs 6 mos	04/14/81 (2/3 = Aug 1979)
Drugs - marijuana (40 grams)	Consigned		

Senator BIDEN. Again I want to apologize for being late and we appreciate your taking your time to come.

I see that Senator Bentsen has come in. Senator, we welcome you. We thank you for coming to testify. Being the major cosponsor, why don't you proceed in the way you would like.

**STATEMENT OF HON. LLOYD BENTSEN, A SENATOR FROM THE
STATE OF TEXAS**

Senator BENTSEN. I appreciate the manner in which you are expeditiously pushing this legislation. It is my understanding that the Foreign Relations Committee has reported out the treaty. I suppose most of the controversy, if there is such, will be over the treaty itself rather than the implementing legislation which I am here to support this morning in S. 1682.

I had the responsibility of being the chairman of the Senate delegation at the Inter-Parliamentary Union in Mexico last month. I was impressed by how important the Mexicans feel this piece of legislation is and the implementation of it. In the beginning I think that it might have been interpreted by some of the Mexican officials as though this might be derogatory legislation toward Mexico. But they do not seem to feel that way at all. They are deeply concerned about the transfer and the implementation of it. I will not argue over some of the specific provisions of S. 1682. It is the major thrust of the legislation that I am concerned about and want to see it passed.

There is no question in my mind but what a great number of these young people are first-term offenders. But among those down there you are going to find some hardened criminals, you will find some repeaters. I cannot say that I have much sympathy with those particular people. But these people are more than just an irritant between friendly neighboring states. Some of them constitute a humanitarian concern of the first magnitude. Many of them are young first-time offenders held under some difficult circumstances far from their friends and their families. Many are drug users. Some have been convicted of trafficking and all of them have demonstrated some bad judgment. They deserve to be punished. They are being punished. They will continue to be punished under the terms of the treaty.

I have worked quite a bit with Senator McClellan and Senator Kennedy in trying to work on the issues of sentencing reform. I believe that punishment ought to be meted out in proportion to the seriousness of the crime and the conduct of the criminal. Those who voluntarily want to stake out a claim in lawful American life should be encouraged to do so after considerations of justice have determined the appropriate type of severity of punishment. I want to reduce the propensity for future crime in these young people. You can call it rehabilitation where rehabilitation is possible.

This treaty and the implementing legislation can help move us toward that goal. Many of these young offenders are not hardened criminals. Their prospects for rehabilitation are not enhanced by confinement in strange institutions under foreign laws in a distant place, far from family and friends. Their future and ours is best served by bringing them home. This legislation will do that.

Mr. Chairman, perhaps this is a good time to remind ourselves of unfinished human rights business here in America, in our prisons and jails. Some of the recent cases that come to our attention demonstrate that we have a long way to go. Our Constitution must be evident even in the darkness of our prisons because that is the kind of society that we are and because this is the standard that we set for ourselves.

I look forward to working with you, Mr. Chairman, and the subcommittee, as you consider S. 1682. Enlightened by the experience and the wisdom of the witnesses scheduled to appear, I believe we can work together and take sound legislation to the Senate floor. This important effort can establish workable guidelines for future agreements similar to the Mexican-American and Canadian-American treaties.

I want to emphasize again how important it is to the people of Mexico that this piece of legislation be given attention. The Mexican Congress has passed it and did it in a very expeditious form.

They went to the extent of making a film of these prisoners and showing it to the members of the Inter-Parliamentary Union. They let each of these prisoners speak for themselves.

So when they put that kind of attention to it I know how important it is to the Mexican Government. Again, I want to thank you.

Senator BIDEN. Thank you. You indicated in your discussions with Mexican authorities that at first you thought they might view this as demeaning legislation. I am sure that Mexican authorities and officials are not unaware of the adverse publicity that the Mexican jails have received recently.

What has turned them around do you think? Quite frankly. I expected they would be offended.

Senator BENTSEN. I expected they would be too. I was born and reared on that border. They are sensitive people. They have a deep concern about the big brother in the United States. But I think they want to get rid of part of the publicity. The Deputy Attorney General was talking about the penalties in Mexico. As I understand it, that is the new standard for the penalties. In the past the penalties on first offenders, as compared to our standards of meting out punishment, were quite severe.

Senator BIDEN. So, I'm not sure whether you have had an opportunity to hear the testimony but it has been suggested that as part of the implementation of this legislation that anyone in a Mexican jail who, through their voluntary consent came back to America and was put in a U.S. jail, then they would be eligible for parole immediately, irrespective of how long a sentence they had. The way in which the parole board would make the determination as to whether or not they would be paroled would be to view it in terms of conviction for a similar crime in the United States. You may have heard me say that this indicates the possession of marihuana or even small amounts of cocaine or other drug offenses as normally in the United States not being that severe sentences in terms of incarceration.

Do you think—and I don't know of anyone in the U.S. Congress who would have better access to know this than you—that Mexican authorities might view such a treatment under the parole arm of our prison system as a way of circumventing sentences which they have

imposed for crimes they feel warrant such a sentence? Do you see any problem in that area?

Senator BENTSEN. No; I do not see any problem there. I think they would expect us to apply our own standards of justice and what we think should be meted out in the way of punishment, once these people are returned to this country.

Let me further state that some of them are hardened criminals. Some of them have been dealing in massive amounts of drug. We ought to take that into consideration. I am sure that we will.

But the substantial number of young people are first-time offenders. I feel that in that instance certainly we ought to see that the punishment fits the crimes as we deem it in this country.

Let me also state that as late as yesterday I was getting a report from the DEA with officials and agents from the border in south Texas testifying as to the enormous amount of drugs passing through south Texas into the United States and the amount of apprehension. A substantial amount of not just marihuana, but heroin and cocaine, is passing through that area. This is a matter of grave concern to me and I am sure to all Members of the Senate.

Senator BIDEN. It is of concern to all of us. The only thing that concerns me is this. I would not like as a member of the Foreign Relations Committee to see us in a position whereby we have been putting pressure on Mexico to get tough in the area of drug enforcement to stop trafficking—at our insistence in many instances—and then at the same time we would be openly critical of them in the international forum which would be exactly counter to that. On one hand we are saying they are too tough and on the other hand we are saying they are not tough enough. That could happen. I was worried that that could put us in an unusual position.

Senator BENTSEN. I share that with you, Mr. Chairman. That was one of the surprising results of this meeting with the Mexican officials. This was with the Speaker of the House and with the President Pro Tem of the Senate and many other officials. They were unanimously in support of it.

Senator BIDEN. There is no one I would more readily defer to in judgment on this question than you. That makes me feel better.

I have one last thing. The State Department will be testifying. They have indicated in their prepared testimony "Mexico has a long history of sensitivity to foreign interference with its legal system—one it shares with other Latin American countries." That's a back-door way of reviewing Mexican court judgment. If they would be reviewed that way I would be concerned about the effect on our foreign relations.

Senator BENTSEN. I am cognizant of what our standards are and I think they are. I think they would anticipate that we would apply parole where applicable.

Senator BIDEN. Senator, we thank you very much. We thank you for your help and encouragement in pushing me on to have these hearings. I hope we can get it through the Senate quickly.

Our next witness will be the Honorable Barbara M. Watson, Administrator of the Bureau of Security and Consular Affairs, U.S. State Department. She is accompanied by Prof. Detlev Vagts of Har-

vard Law School and consultant to the State Department; and Herbert J. Hansell, legal adviser. Would you all please come forward?

We welcome you and thank you for appearing. Ms. Watson, you may proceed in any way you would like. Anything your compatriots would like to add we would appreciate that.

STATEMENT OF BARBARA M. WATSON, ADMINISTRATOR, BUREAU OF SECURITY AND CONSULAR AFFAIRS, DEPARTMENT OF STATE, ACCOMPANIED BY PROF. DETLEV VAGTS, HARVARD LAW SCHOOL, AND CONSULTANT TO THE STATE DEPARTMENT; AND HERBERT J. HANSELL, LEGAL ADVISER

Ms. WATSON. I am pleased to have this opportunity to be with you today to discuss S. 1682, a bill to implement the Mexican and Canadian prisoner transfer treaties. The Department of State strongly supports the treaties and the legislation both as humanitarian measures to relieve prisoners' hardships and as steps to improve relations with our two neighbors. In my statement I will set forth the background to the treaties and the need for them. I will then explain how we came to the conclusion that they are constitutional.

I will not attempt to explain the details of the implementing legislation. The bill is the product of painstaking labor by the Department of Justice which possesses expertise in criminology and penology which the State Department does not have. I can, however, assure you that we have reviewed the legislation to make certain that it is consistent with the treaties which it implements and that its operation will not cause foreign relations difficulties.

First, let me give you the background. The welfare of American prisoners in foreign jails has greatly concerned the Department of State. Today approximately 2,200 are in foreign jails, nearly 600 of them in Mexico and 275 in Canada. The situation in Mexico is well known. Congressional hearings have highlighted the prisoners' problems. Prison conditions there are plainly inadequate by American standards, with respect to food, medical treatment, security against violence, and other matters.

In spite of efforts by the Mexican authorities there is still much that we find unsatisfactory. Even where there is less of a cultural difference, as in the case of Canada, there are special hardships involved in being in a prison abroad. It is difficult or impossible to maintain contact with one's family. Prisoners cannot be reintegrated into the civilian environment at the end of their term. In Mexico, and in Quebec, language problems make prison life more difficult. Comparable hardships exist for foreigners in U.S. prisons even though there is less publicity about them.

The problem of prisoners, and the publicity they generate, has been a burden on diplomatic relations. To improve the situation we negotiated treaties with Mexico and Canada to provide for transfers, with consent, of prisoners in foreign institutions. In both cases it was the foreign country that took the initiative to open negotiations. Our execution in good faith of the commitments which we have undertaken is important to our relations with our neighbors.

Now with respect to constitutionality, let me say this. The key constitutional question is that of article VI which provides that all challenges to the validity of the underlying sentence shall be addressed to the courts of the country where the sentence was handed down. Let me note that the Canadian treaty uses the words "conviction or sentence" whereas the Mexican treaty uses only the term "sentence." No difference was intended, but we were advised that there are no separate Mexican equivalents for the two terms. This clause was an essential part of the arrangement. Mexico has a long history of sensitivity to foreign interference with its legal system—one it shares with our Latin American countries. It could not accept review of Mexican judgments by an American court.

We also concluded that the Senate could not be expected to give its advice and consent to an arrangement under which Mexican courts could sit in judgment on the findings of U.S. courts. Furthermore, the problems involved in holding hearings to determine precisely what happened in a remote foreign policy station would be insurmountable. We know that the Mexican constitution provides safeguards not very dissimilar from those afforded in the United States and that the Mexican courts afford direct review and collateral review by way of the writ of amparo. Therefore, that provision was agreed to.

It is obvious that there will be challenges to the constitutionality of that provision. The treaty is, with respect to the United States, a novel one and the issue is new. We have given careful study to this question. We would not have caused the treaty to be signed if we had not concluded that it was constitutionally defensible. Both the Department of Justice and distinguished outside scholars have agreed.

Let me state briefly the grounds for that conclusion. The first ground may be called the "conflicts of law" ground and the second the "consent" ground. Under the first approach we start from the premise that the prisoner's trial was conducted in a foreign country that lawfully had jurisdiction over the offender and the offense. The courts have repeatedly said that the U.S. Constitution has no applicability to the conduct of such a trial. The U.S. action, the acceptance of custody over the offender, is only ancillary to the action of the Mexican court.

U.S. authorities have consistently been upheld in turning over persons to foreign courts for trials not consistent with our Constitution. While extradition typically involves foreign fugitives, surrenders under the Status of Forces Agreements do involve American citizens—service personnel.

It seems no greater deference to, and no deeper involvement in, a foreign criminal process to receive prisoners when the process is completed. Indeed, it involves less of an intrusion than extradition, which will subject them to a non-American trial.

In receiving foreign prisoners, we do not deprive them of any rights they have previously had; indeed, we confer on them the opportunity to serve their sentences closer to home. Many prisoners are transferred from one State to another or from State to Federal institutions without it being thought that the receiving State adopted the sentence or made it its own.

The consent argument proceeds on the basis of the fact that nobody will be transferred against his or her will. Extensive precautions have

been written into the implementing legislation to assure that the consent to transfer will be as free and as fully informed as possible.

The decisions of the Supreme Court give wide effect to guilty pleas and other choices by the accused in the criminal process. This particular choice stands on ever firmer footing. In this case the offender is offered a genuine benefit, one to which he had no prior entitlement. In return he is being asked to give up something to which he was never previously entitled—an American court review of his underlying conviction.

It has been suggested that it is analogous to the case of a conditional pardon, in which it has been held that reasonable conditions may be attached when a benefit is conferred upon a prisoner. The person accepting the pardon must take the whole package offered to him. Similarly, where the President and the Congress have together obtained a special and unusual benefit for an offender, he should not be able to repudiate his assent to the conditions which were necessary to achieve that benefit. Success in such repudiation would, of course, destroy this avenue of relief for all later cases.

For these reasons we believe that the agreement will be sustained against constitutional challenges.

I turn now to the operation of the legislation. We have examined successive drafts of the implementing legislation and are convinced that it will make possible the successful implementation of the treaties. A good deal of the necessary spade work to begin implementation of the treaty relatively promptly after congressional action is completed has been done.

State Department personnel have accompanied representatives of the Justice Department to Mexico to discuss matters with their Mexican counterparts. While the transfer of prisoners is the responsibility of the Department of Justice, the State Department will have the function of helping to make sure that cooperation between the Mexican and American penal authorities goes smoothly. I can assure you that the Department will exert its best efforts to that end.

One particular function is assigned by the legislation to the Department of State. Section 4109(b) places upon the Secretary of State the responsibility of providing counsel for indigent prisoners abroad in order that they may give their consent in a full awareness of the legal consequences of their choice. It will not be easy to fulfill that responsibility. For one thing, there are not many lawyers who know both systems of law well enough to give good advice.

However, we intend to use the resources of both legal defender systems, of the voluntary organizations that have made offers of assistance, and of any other source that comes to our attention; and we hope to be able to provide satisfactory services.

In conclusion, the Department of State has recommended without reservation that the treaties on the execution of penal sentences with Canada and Mexico be ratified. We now join the Department of Justice in urging the enactment of S. 1682 which is necessary for their implementation.

Mr. Chairman, this concludes my formal presentation. I will be pleased to try to answer any questions together with my colleagues, particularly my esteemed colleague, the legal adviser to the Department, Mr. Hansell.

Senator BIDEN. I would like to begin by discussing the parole aspect of this arrangement—the immediate eligibility of the transferred prisoners.

Do you believe that that would have any adverse repercussions in terms of foreign relations between the United States and Mexico? Would that be viewed as a review of sentences?

Ms. WATSON. No, sir, I do not believe that this would affect our bilateral relations. As a matter of fact, as I mentioned in my statement, Mexico has been extremely sensitive about the unhealthy and unpleasant publicity that has been focused on this particular problem. They, in fact, proposed the negotiation of such a treaty. They are aware that there are differences in our legal systems. They operate on the Napoleonic code, while we have a common law tradition, of course. One thing should be noted with respect to the prisoner—a benefit would have been conferred on him which he ordinarily would not have gotten were he required to stay in the jails of Mexico, since under the law of Mexico there is no such thing as parole for drug offenses. So, a benefit would be conferred on the American citizen and the Mexicans are well aware of that.

Senator BIDEN. Maybe I could ask your esteemed legal adviser this question. Maybe he could take on an unlikely role. Rather than tell me why you believe this legislation would meet the test of constitutionality, where are the weakest links in the constitutional arguments?

Mr. HANSELL. A clear weak link is that some constitutional protections which would be afforded in a trial in our courts might not have been provided to these prisoners who will be serving sentences in the United States following their transfer.

Senator BIDEN. In terms of obtaining the conviction?

Mr. HANSELL. That's right.

Senator BIDEN. We're talking about all those constitutional guarantees?

Mr. HANSELL. Yes. They might not have been available at the trial, and the claim obviously will be that it is not permissible constitutionally to incarcerate in a U.S. prison a prisoner who has not been tried in accordance with U.S. standards.

As Ms. Watson has indicated, we think that attack can be withstood. But that would be the line of argument in the challenge.

Senator BIDEN. Is there any other line of challenge to the constitutional argument that you see which we must be prepared to meet?

Mr. HANSELL. I suppose there may be others. Professor Vagts may want to speak to that.

Mr. VAGTS. One position that will also be taken is that conditions in Mexico are ipso facto so bad that any consent is a consent under duress. This claim might be made. No. 1, I don't think that is really true of Mexican conditions in general. No. 2, the procedures ought to screen out any case in which there is specific pressure in the direction of transfer being developed.

Finally, the very fact that conditions are more attractive in American prisons, which is the very factor that we're trying to achieve for people brings that argument to full circle.

Senator BIDEN. Senator Mathias?

Senator MATHIAS. I want to ask about the question the chairman discussed previously—the amelioration of sentence. As I recall, the

President of Mexico not long ago said that they want to get rid of all of the American prisoners and they don't care what happens after they get out of Mexico. Is my memory correct on that?

Ms. WATSON. That is quite correct.

Senator MATHIAS. That is a useful observation to have on the record.

Senator BIDEN. It has been pointed out to me by the staff that the weakest link may be the possibility of a U.S. agent present at the arrest and interrogation of American citizens arrested in Mexico. It could be argued that this is really a system to bypass the American courts. In other words, we have a Federal narcotics agent in Mexico working on the arrest and using methods which would not be permissibly used in the United States and obtaining the conviction and putting a trafficker in jail in Mexico and saying "they deserve to be in jail." But they are not able to put them behind bars without the use of a method that would not be condoned unless they are condoned in Mexico. Do you see that as a problem?

Mr. HANSELL. That accusation of course has been made. It was eloquently dealt with in the Senate Foreign Relations Committee hearing on the treaties by Mr. Bensinger. But that is an accusation that has been made. I suppose it could continue to be made.

I am not sure really that that is different from what was said earlier. There is a point that if American constitutional standards have not been adhered to in the arrest or conviction, then the sentence ought not to stand. This would be the argument. A distinguished newspaper columnist not long ago commenting on this put the argument that American jails are reserved for those who have received American justice. That is a shorthand way of stating the argument.

Senator BIDEN. Ms. Watson, what happens in terms of our bilateral relations with Mexico if we enter into this treaty and the implementing legislation is passed and the Mexican authorities and the Mexican Government assumes that it is finished and it's underway? But what if there is a challenge to the constitutionality of this at the outset? Let us assume that the challenge is in fact upheld and the U.S. Congress is faced with the prospect of leaving intact a law that in effect frees any trafficker in narcotics, or anything else, because as a fact of the matter, although we could get them back to the United States, there would be no authority to hold them in American jails. We end up vitiating in essence the treaty.

I do not think that is a possibility that should be discounted. Obviously I would not have introduced legislation had I thought that was going to happen. But I think we ought to consider it.

What would be the bilateral repercussions in your opinion?

Ms. WATSON. I cannot really anticipate what the effect would be on our diplomatic bilateral relations, but I think the practical result would be that Mexico would stop sending anyone. They would no longer observe the provisions of the treaty nor would there be the necessity for implementing legislation. Having challenged the treaty's constitutionality and having been sustained, then they would say, "All right we do not send anyone."

Senator BIDEN. My concern is that if we are correct about sensitivity of Mexican authorities and our Latin neighbors—as a member of the Foreign Relations Committee I'm much more concerned about Mexico

than I am about many many other countries we spend a great deal of time dwelling on in our bilateral relations. If the U.S. Supreme Court sustains the unconstitutionality of these provisions, then what in fact will the United States be saying to the whole world? It will be saying, "We do not believe Mexican standards of justice meet our minimum standards of justice"; won't we? There will be no way I know of avoiding that conclusion. Although I do not believe that will happen, and although I believe this legislation is clearly workable and clearly worth taking the chance on, I am concerned that we all be aware, at least, of having to face that possibility. I would sincerely hope—I'm not asking it this morning, however—that the State Department will fully consider that possibility. Quite frankly, I do not want to be in a position of it being said:

Were it not for that Congress, were it not for that subcommittee, were it not for those who pushed this legislation, our relationship with Mexico would not be as bad as it is now.

I think it is unlikely, but it is a possibility and we should go into it with our eyes wide open. That's what the courts would be saying. They would be saying:

Mexico, your standards of justice are below that which we think is the minimum standard required and, therefore, we are not going to followup.

Ms. WATSON. I think we are aware of the sensitive problems that might well arise. This is one of the reasons why we have been meeting regularly, holding hands, trying to understand both systems of government. The Mexicans are aware of the fact that if the President says he will do a particular thing, it is often subject to the will of the Congress. Naturally, there will be some such proposals that will be reduced or circumscribed. We will just have to be very diligent to make certain that they understand that, if something like this should happen, it has nothing to do with our basic respect for them as a sovereign nation and as a good neighbor.

Senator BIDEN. I think that is critical. I further think it is important that the old expression which apparently came back into vogue in the debates that Senator Mathias was handling was trying to reassert Congress rightful role in the area of foreign policy. The euphemism used was "If you want to be in on the landing then you have to be in on the takeoff." It's vice versa also. I want to know that you're in the same plane. If it goes down I don't want to hear that the Congress is so bad. I don't want to hear "The executive branch is very concerned and we don't understand what the Congress did." We will make it clear that we're all in here together. [Laughter.]

By the way, I think it is a sound plane. I think the takeoff will be smooth. The landing will be smooth. It will benefit Mexico and most importantly it will benefit American citizens.

But I could not let that not go on the record. I want that understood.

Ms. WATSON. We understand.

Senator BIDEN. We thank you very much for your presence here today.

Senator Mathias?

**STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A SENATOR
FROM THE STATE OF MARYLAND**

Senator MATHIAS. Mr. Chairman, I would like to share with the committee some observations on a visit that I made to American prisoners in Mexico during the earlier part of this year. I was in Mexico and had a firsthand look at the plight of these prisoners incarcerated in Mexican penal institutions. During the course of that visit I reviewed the prison situation with the U.S. Consular official. I might say while Ms. Watson is here, I found them to be fully informed. I thought they were very vigorous in their pursuit of the interest of the American prisoners there. I was very much impressed with those efforts.

I talked to the authorities of the federal prison system including the warden and staff of the Oriente Prison which is in Mexico City. At this time, on the record, I want to express my thanks to the warden and to his staff because I felt that they went out of their way to provide me with information and the opportunity to visit the prison.

The Oriente Prison itself is a modern and new prison. It is recently constructed and has recently been put into use.

I would say to Mr. Flaherty that we could do worse than to look at that prison which is an extraordinary penal institution, or at least it was at the time that I was there. I am grateful to the warden for his high degree of cooperation.

These discussions did, however, provide some persuasive arguments for support of the Mexican-United States Prisoner Exchange Treaty and for implementing legislation which we are discussing today. One of the primary factors underlying the treaty, that of relieving the hardships encountered by American prisoners in Mexico and Mexicans incarcerated here, I think, was dramatized by that visit.

I talked to about 35 Americans who were imprisoned there. I specifically asked each one whether they would want to return to prison in the United States—not to come home but to come to prison in the United States. This would be as an alternative to serving out their sentences in Mexico. The response was nearly unanimous that they would like to return to U.S. prisons.

Those in Oriente Prison, I should caution, were mainly Americans who were awaiting trial. Some of them had been awaiting trial for a very long period of time. But I think that the public here should be aware, particularly those whose families are involved, that the treaty will not reach those people who are awaiting trial. It is the adjudicated cases that are involved. This is a great difference particularly if there is going to be a waiting period of over a year just getting to trial.

So there is a gap in the treaty provisions, a gap in the benefits of the treaty so that it will not benefit people who are awaiting trial.

I do not think it is hard to understand why there was nearly a unanimous vote among the prisoners with whom I talked in favor of the treaty. Imprisonment is never an easy life. Adjustments are more difficult under those conditions being several thousand miles from home as compared to the circumstances where you have support from families closer to home.

The rehabilitation process obviously would be different. Many of the young Americans I talked to were much embittered and felt very frustrated and deserted. I think that their outlook was that the chances for return to some kind of normal life would be greater if they had been able to serve out their terms in American prisons.

Of course, as we have been discussing here this morning, this treaty and its implementation will not be without some difficulty. Without having any direct statements on the subject, the feeling that most of these prisoners had, at least in the back of their mind, was the idea of challenging their sentences the minute they got into a forum in which they could challenge them. That was in fact one of the motivations for desiring the ratification of the treaty. This gave them a chance to look for an escape valve.

The Department of State, I think agrees generally with that expectation. I think the prophecy is likely to be fulfilled. When and if they come to the U.S. prisons I think we will have petitions for writs of habeas corpus.

If they are successful, notwithstanding the consent provisions of the treaty, then we run the risk, as the chairman has pointed out, that the Mexican Government will feel that this is a breach of faith and this could have unhappy portents for the future.

In this regard I have to admit some concern on my own part about the breadth of the provisions which preclude American judicial review of foreign convictions.

Granting all of the arguments that support the prohibition, I think we have to particularly look to the interest and recognize the autonomy of foreign governments with regard to the apprehension and disposition of those who commit illegal acts within their boundaries. There is the general difficulty in extending our constitutional protections to acts which have occurred abroad.

But, at the same time, I think we have to be troubled by the severe limitations which this provision places on the writ of habeas corpus which has been so long a cornerstone of our jurisprudence. The primary difficulty is that it apparently precludes habeas corpus arrangements in cases such as those where there are allegations of gross violations of our constitutional standards by foreign authorities acting in collusion with representatives of the United States and U.S. agents. I think this does raise a very troublesome kind of case.

I think it would be contrary to our constitutional practice to hold in prison individuals whose apprehension and conviction was brought about by this kind of collusion.

So I think we do have to very carefully look at this provision in the treaty.

Incidentally, of course many of these prisoners will have already and will continue to cite that there was this kind of collusion between U.S. authorities and foreign authorities. So I think we have to review all of these aspects of the treaty very carefully.

But on balance I think it is worth a try. Having reviewed the difficulties which surround it and having recognized that they exist and having cited them on the record, then I think we ought to experiment and see if this is an advance that we can make in the relationships between nations.

Thank you, Mr. Chairman.

Senator BIDEN. Thank you, Senator Mathias. I would like to raise one point at this point prior to our next witness testifying.

One of the things that concerns me, Senator Mathias, is a prisoner making a decision whether to return to the United States under the provisions of the treaty, whether or not as a consequence of that return, their likely entry back into society as a whole, the citizen might be more damaged than enhanced. Quite frankly, as a practical matter if anyone is convicted now and serves time in a foreign jail, particularly a Mexican jail, little or no stigma is attached upon return to the United States. If anything, it is a bit of a badge of courage. It is not viewed in a way that serving time in Federal prison is viewed from the point of view of employment straight through to social contact in social relations that people have. There are no FBI fingerprints. There is no record on file. There is no requirement, as I understand it, to fill out employment forms saying that you have been convicted of a crime or whatever. There is not the convicted felon status attached like it, once a young woman or man returns to the United States and serves time in Federal prison.

I am not sure how that cuts, quite frankly, in terms of the issue that you raise, Senator Mathias, about rehabilitation and entry back into American society. I am not quite sure, assuming that the conditions were humane—and of course I am convinced that in many instances they are not—that we might not be doing a person less of a favor than we think we are doing them by bringing them back into our Federal system.

I raise that only as a thought to be considered by us in terms of whether or not we are doing a favor or not to those young prisoners.

Senator MATHIAS. I would only comment on that this way. The Oriente Prison which, is the only one I have been to, is a modern prison which was recently opened and recently put into service. As prisons go, the conditions there were not bad.

But I am advised that there are other prisons where the conditions are extremely bad.

In that case you might have to weigh the stigma which is involved in being a prisoner at a Federal penal institution as against several years which you would serve under adverse conditions in a foreign prison. You are talking about years in a person's life. It is a very hard decision to make. It's a value judgment which the consent feature of the treaty addresses itself to—whether they will make the kind of judgments which are good for their whole lives. That is open to some question. But at least there is that opportunity for them to participate in this particular aspect of the decision.

Senator BIDEN. I agree with that. I want to make it clear again that if I were back practicing law and advising my client in a Mexican jail, then I would feel compelled to raise the question I just raised with you for their consideration. Obviously it is a subjective judgment, but I do not think we should mislead parents of children in Mexican jails and young people in Mexican jails or anyone else that this is all positive. It may not be all positive. It may be that by coming back into the Federal system—the U.S. prison system—that in the long run for that particular person at that particular time, then it may not be

beneficial. I hope that is considered in the mix. As you pointed out, the provision is there for it to be considered as part of the consent provision of the treaty. But it should be considered.

Senator MATHIAS. Mr. Chairman, let me add one further word of caution. As we consider this problem we ought not to be under any illusion that these are all young people or that they are all there on drug charges. The sampling of prisoners that I talked to had some of mature years, even by my standards they were of mature years. [Laughter.]

They were not there on drug charges. They were there on very ordinary kinds of crimes that we would consider serious crimes in this country. Of course we are legislating for these people as well as for the so-called kids who have somehow gone astray on drug charges.

Senator BIDEN. I think that is a valid point. That is one which I sometimes forget and others do. The fact of the matter is that we probably would not be here doing this right now were it not for the fact that there were some kids there. We have always had other prisoners there in Mexican jails. The public sentiment has not risen to the point of doing something about it until it became convinced that there were, at least in some part, a number of kids in Mexican jails.

Our next witness is Professor Bassiouni, professor of law at De Paul University in Chicago. He is secretary general of the International Society of Penal Law. He is perhaps a leading expert in international criminal law in the United States today. Mr. Bassiouni and I have met on several occasions. These were in less formal circumstances and it is good to see you again.

We thank you for coming. We're anxious to hear your testimony.

STATEMENT OF M. CHERIF BASSIOUNI, PROFESSOR OF LAW, DE PAUL UNIVERSITY, CHICAGO

Mr. BASSIOUNI. Thank you, Mr. Chairman. Thank you for inviting me. As a preliminary statement I would like to say that I fully support the purposes of the two treaties in question and implementing the legislation. Whatever critical insight I have to provide on the subject is merely intended to strengthen them as opposed to diluting their effectiveness.

I must first start by echoing the Chair's concern about the return of offenders from any country, be it Mexico, Canada, or any other country under the guise and expectation that the conviction and sentence will be fully executed and not subject to the jurisdiction of the receiving country and suddenly the individuals are being released by the receiving state for one reason or another. My concern is increased by the fact that the implementing legislation provides for a questionable return procedures on the subject which unfortunately I heard none of the prior witnesses address themselves to. Return is a critical procedure that should have been examined in detail. If in addition to the release of such individuals they are not returned to the country of origin, which I think may be one of the considerations for the transfer, then this might indeed cause some detrimental effects on the bilateral relations of the United States and in this case Mexico and Canada.

It might be that at this stage of the game pronouncements by public officials in Mexico or even Canada may indicate that they do not have a particular interest in that outcome. However, it would seem to me that the general public in those countries, and certainly the media is very likely to pick up on that and consider releases without return to be derogatory of the legal system of the respective countries involved. This might create a certain element of pressure which may cause public officials to change their present positions on the subject.

This is a matter of concern that you have adequately voiced and should be kept in mind.

The purpose of the treaties and the legislation are certainly very laudable. They are predicated on the humanitarian grounds which have been expressed here. But they are also predicated on two additional grounds which are worth keeping in mind. There is a sound criminological policy concerning the return of an offender to his or her own national milieu for purposes of rehabilitation or resocialization. There is also the purpose of international cooperation in penal matters which I think may have some additional beneficial impact.

I might add in this respect that if one of the purposes of this entire process is to encourage international cooperation in penal matters between certain countries, then their purposes might be endangered by the concern that you have expressed if indeed the transfer of offenders is merely a way of short circuiting the foreign system.

There are several concerns with the nature of the process involved as I have stated in my written statement. I would like to ask your permission at this point to have my written statement included in the record.

Senator BIDEN. Your entire statement will be included.

[The material follows:]

HEARINGS BEFORE THE UNITED STATES SENATE, 95TH CONGRESS, 1ST SESSION, SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS OF THE COMMITTEE ON THE JUDICIARY REGARDING SENATE BILL 1682 TO IMPLEMENT THE TREATIES BETWEEN THE UNITED STATES AND MEXICO AND BETWEEN THE UNITED STATES AND CANADA FOR THE TRANSFER OF OFFENDERS AND EXECUTION OF FOREIGN PENAL SENTENCES

STATEMENT BY M. CHERIF BASSIOUNI, LL.B.; J.D.; LL.M.; S.J.D. PROFESSOR OF LAW, DE PAUL UNIVERSITY; SECRETARY-GENERAL, INTERNATIONAL ASSOCIATION OF PENAL LAW.

I—Rationale for the Proposed Legislation

The proposed legislation is to implement existing and future treaties on the transfer of offenders and execution of foreign penal sentences and the rationale for these treaties are relevant to the understanding of the purposes and scope of the proposed implementing legislation.¹

The treaties in question are:

The Treaty Between the United States of America and The United Mexican States on the Execution of Penal Sentences, signed on November 25, 1976 and;

The Treaty Between the United States of America and Canada on the Execution of Penal Sentences, signed on March 2, 1977.

The "treaties" are somewhat different but they are predicated on the same assumptions, are intended to accomplish the same objectives, are structured in the same manner and most of their conditions and requirements are the same. For these reasons, they are treated together.

¹See hearings before the Committee on Foreign Relations, 95th Cong., first sess., June 15-16, 1977, statement of M. C. Bassiouni and others.

The "treaties" purport to establish the legal basis whereby the respective signatory States can transfer to one another, and receive into custody their respective citizens (or domiciliaries) who have been convicted and sentenced in the "sending" state for the purposes of executing their sentences in the "receiving state of which they are "citizens."

The designation of the "treaties" as being for the "Execution of Penal Sentences" implies that the respective parties thereto are to mutually recognize, enforce and execute each other's respective penal judgments as if they were their own, if they fall within the terms and provisions of the "treaties" as implemented by their national legislation. On closer examination however, it is apparent that the scope of the "treaties" is much narrower. In fact, the "treaties" are only for the transfer of "offenders" and for their custody by the "receiving state" on a bilateral exchange basis. Because of such a narrow scope the "treaties" would have been more appropriately designated as for "The Transfer and Custody of Offenders."

The "treaties" are predicated on three correct assumptions:

1. That a state has an interest in the treatment of its citizens abroad;²
2. That a state has an interest in the future behavior of its citizens;³ and
3. That states have a common and mutual interest in cooperating in the prevention and suppression of criminality.⁴

1. A state's interest in the treatment of its citizens abroad is essentially a humanitarian one. Thus, its concern for the manner and conditions of their

² See, 8th Amendment to the U.S. Constitution; Article 5 of the Universal Declaration of Human Rights, General Assembly Resolution 217, U.N. Doc. A/810 (1948), Article 6 of the International Covenant on Civil and Political Rights, adopted by Resolution 2200(xxi) of the General Assembly, Dec. 16, 1966; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, Nov. 4, 1950; Council of Europe, European Convention on Human Rights: Collected Texts, Section 1, Doc. 1 (7th ed., Strasbourg, 1971); Article 5 of the Inter-American Convention on Human Rights, signed Nov. 22, 1969, O.A.S. Treaty Series No. 36 at 1-21; Also, Nationality of individuals concerned has formed the basis of two theories of jurisdiction under international law: See, Bassiouni, *International Extradition and World Public Order*, pp. 251-59 (1974); Concerns over treatment of nationals abroad, even when subject to jurisdiction of a foreign court, has been qualifiedly recognized in judicial decisions:

In *Gallina v. Fraser*, the United States Court of Appeals for the Second Circuit bowed to precedent and followed the rule of non-inquiry, but indicated that given a proper case, that rule might not be rejected. In this case, Gallina had been tried and convicted *in absentia* by the Italian courts for the crime of robbery. Gallina petitioned the federal district court for a writ of *habeas corpus*, contending that if extradited to Italy, he would be imprisoned without retrial and without an opportunity to face his accusers or conduct any defense. Judge Waterman stated:

We have discovered no case authorizing a federal court in a *habeas corpus* proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. . . . Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment too antipathetic to a federal court's sense of decency as to require re-examination of the principle set out above. [Emphasis added].

This was not such a case, however, because Gallina had been represented by counsel at his trial, and was tried along with his alleged associates who were present before the Italian court and were also convicted.

The United States courts have so far refused to undertake a factual inquiry into the individual's prospective treatment by the requesting State but in the event Judge Waterman's velvets prevail in some future case, the court might refuse to surrender the fugitive to an oppressive or arbitrary system. In this case the alternative must be to prosecute the relator in the United States. In some ways a contrasting position is taken by the Courts in refusing to examine or review a foreign extradition decision whereby surrender to the U.S. is secured [*McGann v. U.S. Board of Parole*, 488 F. 2d 39 (3d circ. 1973) following *Johnson v. Browne*, 205 U.S. 309 (1907)].

From, Bassiouni, *supra*, pp. 530-31. See also, *Peroff v. Hytlin*, 542 F. 2d 1247 (4th Cir. 1976), wherein the court states at p. 1249 "A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present . . . when it appears that, if extradited, the individual will be persecuted not prosecuted, and subject to grave injustice."

³ Rehabilitation is the heart of modern theories of criminal sanctions, and is the basis of the American Law Institute's Model Penal Code, adopted by 22 states of the United States. The importance of the rehabilitative process to the State whose nationality an offender holds arises from the general practice of returning foreign offenders to the State of their nationality once their sentences are completed. See, e.g., L. Orland, *Judgment, Punishment, the Correctional Process* (1977), M. C. Bassiouni, *Criminal Law and Its Processes* (1969) at p. 33; and Report to the Fifth U.N. Congress on Crime Prevention, Geneva, 1-12, September 1975 on "The Future of Imprisonment," M. C. Bassiouni; for a historical basis, see J. Bentham, *Principles of Penal Law*, pt. 11, Bk. J, Ch. 6 (Browning ed., 1943).

⁴ H. Grutzner, "International Judicial Assistance and Cooperation in Criminal Matters," p. 189 in M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law*, vol. 2 (1973); and European Committee on Crime Problems of the Council of Europe, *Problems Arising From the Practical Application of the European Convention on Mutual Assistance in Criminal Matters* (1971).

custodial and detentional control is warranted. Such a concern however, extends beyond this purely humanitarian aspect.

2. A state has an interest in the outcome of its citizens' custodial and detentional treatment abroad because ultimately citizens return to their country of nationality and their future behavior therein is a legitimate interest and concern thereof.

3. Improved international cooperation between states by means of transferring custody of offenders to their state of citizenship enhances the prevention, prosecution and suppression of criminality.

A sound criminological policy supports the three arguments stated above in that conditions of custody and treatment of alien offenders in any given state is not a factor in the decision to prosecute the said offenders; whereas such conditions are of interest to the state of citizenship of the offenders. The state of a citizen may manifest such an interest by placing pressures on the prosecuting state (sometimes as a response to its citizens and pressures) or make the extradition of nationals impossible or very difficult. Thus the transfer of offenders would:

1. Not place any pressure on the U.S. or foreign government at the stage of prosecuting U.S. offenders abroad;

2. Encourage the extradition of nationals to states wherein they have committed offenses for purposes of their trial in such states and their eventual transfer to the United States for the execution of their sentences;

3. The return of U.S. nationals, to their state of citizenship would enhance the deterrent and rehabilitative processes of punishment abroad;

4. It would provide a cultural context to the detention and custody of U.S. offenders which is more appropriately designed to enhance their rehabilitation and resocialization in their country of origin.

5. It would create a specific device for international cooperation in penal matters and thus enhance the climate of international cooperation in the prevention and control of criminality in the context of a more humane concern for the person of the offender in a manner consonant with national cultural values and practices.

It is therefore in the context of this rationale that the proposed legislation must be viewed and that it is most likely to be interpreted and applied.

II. The Processes of Transferring Offenders Under the Proposed Legislation

The basic purpose of the Treaties and the proposed implementing legislation is to permit persons who are under sentence of courts of a country other than their own to complete their sentences in their respective countries.

(1) The first step toward accomplishment of this purpose is for the country in which an offender is held, called the Sending State, to contact the offender's country of Nationality or residence called the Receiving State, and indicate its willingness to transfer the offender. Under the treaty with Canada, the offenders themselves apply to the Government of the Sending State to be transferred, whereas under the Mexican treaty offenders may petition the Sending State for a transfer, but it is up to the government of the Sending State whether to initiate the transfer process.

(2) The Receiving State would then indicate whether it is willing to accept the individual in question. Nothing in the Treaties requires a country to accept any offenders, and the proposed implementing legislation states that the decision on behalf of the U.S. whether to accept a proposed transfer of an individual is purely a matter of executive discretion.

(3) If the Receiving State agrees to the proposed transfer, the consent of the offender is then verified. The U.S., under the proposed legislation, would secure the consent of persons being transferred either to or from it. In the case of transfers to the U.S. a waiver would be secured from the individual of any rights he or she may have had to challenge in U.S. courts the validity of the foreign conviction and of the sentence imposed by the foreign court (The issue of consent and waiver of certain rights is a questionable one and will be discussed below).

(4) The transfer itself is accomplished upon the receipt by the Receiving State of whatever documents it may require in order for it to supervise completion of the offender's sentence. The transfer of the offender consists of the offender's being placed under the control of the Receiving State for completion of his or her sentence.

(5) While the offender is under the control of the Receiving State, the manner of completing the sentence—including such matters as probation and parole—

are governed by the laws of the Receiving State. But under the Treaties and the proposed implementing legislation, all challenges or actions to modify or set aside the conviction or sentence are exclusively under the jurisdiction of the Sending State, which imposed them. (As the following discussion in detail of the arrangements will reveal, it is not clear how jurisdiction can be divided without overlap so that the Sending State retains jurisdiction over the conviction and sentence, yet the completion of the sentence is under the laws of the Receiving State, and there is some inconsistency of language in the proposed legislation in this regard.)

(6) Should an action by or on behalf of an offender be initiated in U.S. courts seeking to have him or her released, the court would have to determine first whether it had jurisdiction to hear the matter and the jurisdictional division referred to in the preceding paragraph might be crucial. But it is possible that a challenge might be made to the Constitutionality of the Treaty or the way in which it is applied to the offender. In this case, the court would clearly have jurisdiction over the subject matter and were it to determine that the transfer of the offender was improper, he or she would be ordered released because there would be no basis for U.S. authorities to continue to hold him or her.

(7) The Treaties are silent as to what would happen were a transferred offender released before completion of his or her sentence, but the proposed legislation would provide for the return of such offenders to the Sending State. To accomplish this, the proposed legislation purports to create a return mechanism that would be a distinct modality of rendition existing as a process separate from extradition, which would make return of such offenders virtually automatic upon a request by the Sending State. (There is reason to question whether such a short cut through due process is valid and this matter is discussed below.)

(8) If the request for return of such an offender is processed as prescribed by the implementing legislation, the offender may challenge the validity of his or her return in court, and thereby obtain a court ruling on the validity of the procedure under the proposed legislation. If the decision were favorable to the offender, he or she could not be detained by U.S. authorities nor returned to the Sending State. Were the decision otherwise, the offender would be returned to the Sending State on condition that he or she be given credit for time spent under control of U.S. authorities. The offender would then complete his or her sentence in the Sending State.

III. Allocation of Subject Matter Jurisdiction Between the "Sending" and the "Receiving" States

The legislation seeks to establish concurrent jurisdiction over offenders by strictly allocating the subject matter jurisdiction of Sending and Receiving States in accordance with the terms of the Treaties with Mexico and Canada.⁵ In Canadian Article V and Mexican Article VI, the Sending State retains exclusive jurisdiction over all "proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State." (The Canadian Treaty adds that, "Each Party shall regulate by legislation the extent, if any, to which it will entertain collateral attacks upon the convictions or sentences handed down by it in the case of Offenders who have been transferred by it.") Yet, in Canadian Article IV(1) and Mexican Article V(2) it is stated "Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."

Under the proposed legislation, § 4114 Sec. 3 amending Chapter 153 title 28 U.S.C. § 2256(1) and (2) echo the Treaty provisions on Sending State jurisdiction, but under (3) the U.S., as a Receiving State, is given jurisdiction over "all proceedings . . . pertaining to the manner of execution in the United States of the sentence imposed by a foreign court," and (5) provides for U.S. jurisdiction over challenges to the validity or legality of transfers of offenders to the U.S. This allocation of subject matter jurisdiction also appears in § 4107(b)(1)(2) which provides:

⁵ For a discussion of jurisdiction in the context of international criminal law, see S. Z. Feller, "Introduction to Terms and Theories of Jurisdiction," in M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law*, vol. II, p. 5 (1973).

"(b) The consequences of consenting to the transfer which must be brought to the attention of the offender are:

"(1) only the country in which he was convicted and sentenced may modify or set aside the conviction or sentence and any proceedings seeking such action may only be brought in the courts of that country, and by his consent he waives all rights he might have had to institute proceedings in the courts of the United States seeking to challenge, modify, or set aside his conviction or sentence;

"(2) the sentence shall be carried out according to the laws of the United States and that those laws are subject to change."

It must be noted that § 4114 Sec. 3 appears inconsistent with § 4106 which grants jurisdiction to the Receiving State over parolees and § 4104 which grants jurisdiction to the Receiving State over Probationers, if Probation and Parole are deemed part of jurisdiction over the sentence and not jurisdiction over its execution.

The attempt to provide the U.S. as Receiving State with jurisdiction over questions relating to the manner of execution of sentences, while leaving jurisdiction over all challenges to validity of conviction and sentence in the Sending State leaves the status of challenges relating to eligibility of offenders for parole or probation in some doubt in that such determinations require consideration of the character of the offense committed. The difficulty of dividing jurisdiction in this manner without leaving a potential overlap in jurisdiction is demonstrated by the difficulty faced by drafters of the proposed legislation in framing § 4103 regarding applicability of U.S. laws. § 4103 provides that, "All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise." By describing jurisdiction in terms of persons covered rather than nature of proceedings covered, § 4103 departs from the framework for dividing jurisdiction created in the Treaties and under § 4114 Sec. 3 it speaks of apples whereas the Treaties and other legislative provisions speak of oranges, so that its concluding clause, "unless a treaty or this chapter provides otherwise," demands an impossible comparison.

Thus, § 4103, rather than resolving the problem of jurisdictional overlap, confounds it. Moreover, it creates a whole new issue: whether U.S. laws remain applicable to "prisoners, probationers, parolees, and juvenile offenders" should they be conveyed beyond U.S. territorial jurisdiction. (Clearly such laws apply to the return procedures under § 4114, and all procedures relating to probation, parole and related matters, by virtue of § 4103.)

The legislative intent in this form of drafting scheme was apparently chosen in order to avoid any danger that the transfer process embodied in the proposed legislation and in the treaties would be found unconstitutional on the grounds that it would deprive persons under U.S. jurisdiction of fundamental constitutional rights.

As a result of this approach the preservation of the Sending State's jurisdictional prerogative must rely not so much on the allocation of jurisdiction provided under the treaties and legislation as on the use of consent and waiver by offenders of their rights to make challenges in U.S. courts that are purportedly reserved to the Sending State's jurisdiction.

IV. Consent to Transfer and the Problems of Waiver and Right to Counsel

In keeping with the treaty and the proposed legislative scheme of allocating subject matter jurisdiction, and in order to avoid constitutional challenges to the process of transfer, the treaty and the proposed legislation seeks to avert constitutional challenges on predicating the transfer process on the "consent" of the offender transferee.

§ 4108 provides for verification of an offender's consent to transfer, and § 4109 provides for availability of counsel as an assurance that such consent shall have been given with proper advice of counsel. Each of these provisions, however, is fraught with constitutional problems.

§ 4108(a) provides for verification of consent by a U.S. magistrate "or by a citizen of the United States specifically designated by the Attorney General" including U.S. government employees. The appointment of non-judicial officers, particularly if they are public officials and more so if they are employees of any law-enforcement related branch of the U.S. government would render any verification of consent and of the resulting waiver of rights to challenge the conviction, sentence and transfer would be deemed improper because of conflict of interest on the part of the verifying officer.

The adequacy of counsel, required by the Sixth Amendment and the due process" clause of the Fourteenth Amendment in a process whereby an individual disposes of his or her Constitutional rights in criminal proceedings are jeopardized by § 4109(b).⁶

That provision states that "counsel for proceedings conducted under section 4108 shall be provided by the Secretary of State . . ." and paid by the Secretary of State. That agency of the U.S. Government is not likely to be considered a disinterested party adequately representing the interests of the individual offender. Therefore a counsel employed by the Secretary of State would not be considered as able to give totally undivided loyalty to the offender's interest because of the apparent conflict of interest arising out of that counsel's appointment. This would render such representation inadequate. As a result, any consent pursuant to such inadequate counsel would be invalid, as would any waiver of rights.

The waiver of rights provided for in § 4108 faces several other difficulties.

(1) It appears as one of the consequences of which an offender must be informed before his or her consent to transfer is obtained, under § 4108(b) (1). Its exact wording is "and by his consent he waives all rights he might have had to institute proceedings in the courts of the United States seeking to challenge, modify, or set aside his conviction or sentence." Thus, it is possible to view this language as a presumptive conclusion of law of which an offender must be advised, rather than as a waiver. As discussed above with respect to the allocation of subject matter jurisdiction, the validity of this proposition as a valid presumptive conclusion of law is questionable. Merely acknowledging that such a proposition is believed to be true would not constitute a waiver unless it would be deemed a waiver in which case the elements of "voluntariness" and "knowledge" embedded in the decisions of the U.S. Supreme Court would also have to be satisfied.⁷

Separating the waiver from the consent to transfer and putting it in a more conventional form, while requiring execution of both as a pre-condition to transfer might be an effective solution to this potential problem. Whereas no offender may be transferred without his or her consent under the Treaties, there is no requirement that a Receiving State accept all offenders who consent, and the decision whether to accept a proposed transfer is expressly made a non-reviewable decision under § 4100(e) of the legislation. Accordingly, it would be possible to condition acceptance of a transfer on execution by the offender of a waiver.

(2) In any case, a waiver of a constitutional right must not only be knowingly made with advice of competent counsel, but also be given voluntarily.⁸ Voluntariness is satisfied even where an element of coercion exists, but only where the degree of coercion is relatively small and the benefit to the person making the waiver is proportionately great and the element of coercion cannot readily be eliminated.⁹

But in the case of an offender who is imprisoned in circumstances that may be significantly below minimum U.S. standards of confinement, in a strange land, far from the society he or she knows, facing the prospect of completion of the sentence under hardship circumstances unless he or she waives any rights to challenge his or her continued confinement in the U.S. as a condition to transfer, the element of coercion would appear to create a Hobson's choice sufficient to hold the waiver involuntarily given.

As stated above, the Treaties with Mexico and Canada do not require such waivers, so that their existence is not crucial to U.S. performance of its treaty obligations but are a legislative requirement in an effort to make up for any inadequacy in the Treaties provisions on limitations of U.S. jurisdiction with respect to the conviction and sentence.

⁶ *Gideon v. Wainwright*, 372 U.S. 335, 833 Ct. 792 (1963). See also *Powell v. Alabama*, 387 U.S. 45, 535 Ct. 55 (1932), and *Argersinger v. Hamlin*, 407 U.S. 25, 195, St. 2006 (1972). For effectiveness of counsel, see *Fitzgerald v. Estell*, 505 F. 2d 1534 (5th Cir. 1974). See also 18 U.S.C. § 3006A(e) as amended in 1970. On defendant's opportunity to choose or waive counsel, see *Johnson v. Zerbst*, 305 U.S. 458, 58, S. Ct. 1019 (1937) and *Faretta v. California*, 422 U.S. 806, 95, S. Ct. 2525 (1975). See also M. C. Bassiouni, *Criminal Law and Its Processes*, pp. 425 et seq. (1969).

⁷ See, e.g., *Fay v. Noia*, 372 U.S. 391, 83, S. Ct. 822, 438-39 (1963) (waiver of right to habeas corpus relief); *Faretta v. California*, 422 U.S. 806 (1975) (waiver of right to assistance of counsel); *Boykin v. Alabama*, 395 U.S. 238, 243, 89, S. Ct. 1709, 1714 (1963) (guilty plea operates as waiver of rights against self-incrimination, to trial by jury and to confrontation of witnesses), and M. C. Bassiouni, *id.*, p. 376 et seq.

⁸ *Id.*

⁹ See *Hoffa v. Saxe*, 378 F. Supp. 1221 (D.C.D.C. 1974); *Stoner v. California*, 376 U.S. 483, 485 Ct. 889 (1964). *Bumper v. North Carolina*, 390 U.S. 986, 885, Ct. 788 (1968).

V. Collateral Challenges to Completion of Sentence

As the preceding discussion on the allocation of subject matter jurisdiction demonstrated, the Treaties provide that completion of sentences of transferred offenders shall be in accordance with Receiving State laws while creating an overlap with the purportedly "exclusive" jurisdiction of the Sending State over all challenges to the convictions or sentences of such offenders. The existence of this overlap is attested to by the language of § 4103, wherein the impossibility of separating jurisdiction over "sentence" from "completion of sentence" is demonstrated by resorting to reference to applicability of U.S. laws to "prisoners, probationers, parolees."

Thus, in a challenge to the completion of a sentence, the issue of the relation of the sentence yet to be served to the continued confinement or supervision of an offender and the conditions of his or her supervision would inevitably turn upon the character of the offender as shown in part by past behavior.¹⁰ That inquiry could lead to an administrative and even possible judicial examination of the conviction and sentence. Thus, in effect, a U.S. administrative agency or U.S. court would be weighing the conviction and sentence to determine the eligibility of the offender for parole, probation or other forms of conditional release.

The jurisdictional overlap created by the Treaties and the proposed legislation make it possible for an offender to file for a writ of *habeas corpus* as a collateral attack on the completion of the sentence.

In such *habeas corpus* proceeding, the validity of continued detention of an offender by U.S. authorities would be determined in connection with: (1) the validity of the Treaties, (2) the validity of the transfer and detention of the offender under the Treaties and (3) the validity of the transfer and detention of the offender under applicable U.S. laws, including the Constitution.¹¹

There are some issues concerning the constitutionality of the Treaties but assuming the validity of all treaty provisions, the validity of continued U.S. custody of a transferred offender is likely to cause a court to delve into an examination of the conviction and sentence imposed by the Sending State. Thus, in effect the treaty and statutory scheme of allocation of object matter jurisdiction would not foreclose a U.S. court from collaterally reviewing the foreign conviction and sentence as the necessary premise for considering the validity of U.S. detention, custody and control of the transferred offender.

VI. Conflict in Scope of Offenders Covered Between the Proposed Legislation and the Treaty with Mexico

Section 4100(b) provides that only offenders who are citizens or nationals of the U.S. may be transferred to the U.S., and that only citizens or nationals of a potential Receiving State may be transferred to such a country. Likewise, § 4102(7) encompasses only citizens and nationals.

This language is in direct conflict with Article II(2) of the Mexican Treaty's provisions for transfer of offenders on the basis of their domiciliaries of the Receiving State.

Domiciliary is defined in Article IX of the Mexican treaty as "A person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently there."

This conflict results in persons who are domiciliaries, but not citizens or nationals being eligible under the Mexican Treaty for transfer to the country of which they are domiciliaries, but not eligible for such consideration under the legislation.

The conflict is presumably the result of an oversight and should be corrected. Otherwise it would indicate a lack of good faith on the part of the U.S. to comply with the terms of the Mexican Treaty by arbitrarily and unilaterally limiting the operation of its eligibility provisions.

VII. Inadequacy of the Proposed Legislation and the Treaty with Canada with Respect to Permanent Residents

The treaty with Canada in Article II(b) provides that the transfer of offenders between the two States shall apply to their respective nationals and

¹⁰ 18 U.S.C. § 4203 (a) provides for parole of offenders if it appears "that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws . . ." Parole decisions are at the sole discretion of the Board of Parole and are not reviewable. See, e.g., *Broyles v. Commonwealth*, 267 S.W. 2d 73 (C.A. Ky. 1954).

¹¹ See, e.g., *Shapiro v. Ferrandina*, 355 F. Supp. 1155 (D.C. N.Y. 1973), mod. on other grounds, 478 F. 2d 894, cert. dismissed 414 U.S. 884, 945 Ct. 204.

citizens. While this provision differs from that of Article II(2) of the treaty with Mexico, but is consistent with § 4100(b) and § 4102(7) of the proposed legislation, it excludes permanent residents of the United States as defined in title 8 U.S.C. § 1101 I.N.A. of 1965. Considering that decisions of the U.S. Supreme Court have given such permanent residents substantially the same rights as U.S. nationals,¹² the question of their exclusion raises the issue of "equal protection" which could be the basis of a legal action by such individuals to challenge the constitutionality of the treaty and implementing legislation with regard to their arbitrary exclusion from the benefits of the procedure of transfer of offenders. Such an exclusion would be in intravention to the underlying criminological purposes of the treaty and implementing legislation as discussed above in the rationale for the process.

VIII. Legal Issues Pertaining to the "Record" in the United States of the Transferred Offender

Section 4112 echoes the provisions of Canadian Article IV(6) and Mexican Article V(6) that, "The transfer of an Offender under the provisions of this Treaty shall not create any additional disability under the laws of the Receiving State or any State or province thereof beyond those which the fact of his conviction may in and of itself already have created." Thus, no record is to be made in the U.S. of any criminal conviction by a foreign court. Yet under § 4105 and 4106 dealing with revocation of parole, a transferred offender could acquire a police record by virtue of any unfavorable action on his or her parole requests or status and thus create a record of that foreign conviction. This would operate as a disability for the offender in contravention of the Treaties and of § 4112. Furthermore, nothing in the legislation deals with the expungement of records which could be made either intentionally, inadvertently or as a result of probation and parole procedures.

A remedy to this problem would be to amend 18 U.S.C. 5017 to add to the list of records which may be expunged under that section any record deriving from proceedings relating to transferred offenders.

IX. Appeal of Revocation of Probation and Parole

There is some question as to whether § 4104(g) which does not refer to a right of appeal of revocation of Probation is intended to deny the right to appeal of revocation of Paroles. § 4103 would fill this gap. This also highlights the fact that the jurisdictional allocation contemplated by the Treaties and the proposed legislation overlap in significant areas.

X. Procedure for the "Return" of Offenders

1. *Purposes of the section.*—Section 4114 of the proposed legislation is to provide a means for returning any offenders who, after their transfer to the U.S., are released by judicial action without having completed their sentences.

The diplomatic considerations underlying these provisions are clear: such a release, if not followed by the return of such an offender, would be embarrassing to the Receiving State and would be viewed as an abuse of the Treaty by which the offender had been transferred. Return of such offenders would tend to reduce such tensions and remove any threat to continued performance under the Treaty. In fact, under certain circumstances such a return might be a duty of the U.S. under international law as a consequence of its inability to fulfill its duties to execute the foreign penal sentence as provided by the Treaty.¹³

What Section 4114 intends to accomplish is to:

(1) create a statute-based process comparable in certain respects to extradition;

(2) make possible use of this process even where the offense of which § 4114 offenders are accused are not listed as extraditable offenses in any treaty of extradition between the U.S. and the former Transferring State;

¹² A national is defined as a person owing permanent allegiance to the U.S., which excludes permanent residents who have no such status. "(A)n alien as well as a 'person' for equal protection purposes," *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971).

¹³ Article 70 of the Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, reproduced in Rosenne, *The Law of Treaties* (1970) which is essentially a restatement of the customary rules of international law respecting treaties provides that, upon termination, rights and duties of the Parties derived already from the treaty continue. The duty of the U.S. to see to it that sentences of transferred offenders are completed would suggest that such offenders must be returned if U.S. domestic law prevents the U.S. from holding them.

(3) limit the time period in which a former Transferring State's request for return of an offender would be effective; and

(4) make return of § 4114 offenders conditional upon the former Transferring State's granting credit for time the offender spent under control of U.S. authorities.

(5) eliminate the need to prove "probable" cause" for the return of the offender.

2. *Conflicting and ambiguous aspects of the proposed "return" procedure.*—It is not clear, precisely how this legislation is intended to accomplish its intended purposes, while remaining within the confines of the Constitution and avoiding conflict with other existing legislation.

If the new procedure is to be considered extradition, then the U.S. would not look into due process guarantee violations by the Sending State in connection with § 4114 returns, although there is dicta that suggests such a possibility, but U.S. courts would look at certain forms of violations if they were committed with cooperation of U.S. agents.¹⁴ On the other hand, if § 4114 return is not regarded as a form of extradition, then the question might arise whether such a statutory form would be predicated on the validity of a foreign conviction, and therefore whether a U.S. court would permit U.S. processes to be used in executing a foreign penal judgment that may have been obtained in violation of basic criminal justice standards.¹⁵

The express language of § 4114 yields at least two different interpretations. The first sentence of § 4114 (which is not a numbered paragraph [p. 17, lines 21-24 and p. 18, lines 1-4]) states that such an offender may be "returned" to the Sending State if it so requests. The second sentence states that such a return shall be governed by the "procedures" for the extradition of fugitives subject to different requirements while paragraph 4 of § 4114 states that a person so returned "shall not be deemed to have been extradited." Thus two problems arise: the first with respect to the conflicting provisions of § 4114 procedure and 18 U.S.C. 3181-3184 procedures and the second with respect to the apparent contradiction in terms between § 4114 general part and its paragraph 4. These requirements of § 4114 are in conflict with title 18 U.S.C. 3181 and 3184 which govern extradition procedures. The conflict between the two legislative texts is not reconcilable unless (1) it can be deemed that § 4114 implicitly amends §§ 3181 and 3184 with respect to this class of offenders or (2) that this process is intended to supplement extradition procedures and to constitute a new and separate modality of rendition as an alternative to extradition. The present legislation does not make clear what it purports to do in that respect as will be discussed below.

The following are the conflicting provisions of § 4114 (1), (2), (4), and (5) and §§ 3181 and 3184.

1. § 4114 paragraph (4) states that a returned offender under this section "shall not be deemed for any purpose to have been extradited," while the first sentence of § 4114 requires the application of extradition procedures contained in Title 18, Sec. 3181 *et. seq.*

2. § 4114 paragraph (1) makes any offense for which the offender was sentenced "an extraditable offense included in the treaty of extradition." Under § 3184, however, only offenses listed in a treaty are extraditable offenses.

3. § 4114 paragraph (2) states that it shall be sufficient evidence to "sustain the charge under the provisions of the proper treaty or convention" to produce a "certified copy of the sentence" imposed on the offender. Under § 3184 "probable cause" evidence is required and therefore a "certified copy of the sentence" would not necessarily and by itself constitute "probable cause."

3. *"Return" and "extradition".*—Upon careful consideration of § 4114, it appears that the "return" procedure proposed is intended to be either a form of extradition applied to a special class of persons, with modified procedures, or an alternative modality of rendition to extradition whose procedures are described by using extradition as a model.

The controlling language for deciding which of these models is sought to be followed appears in paragraph (4) whereby it is stated that a returned person "shall not be deemed to have been extradited." The interpretation of this language

¹⁴ See *United States v. Toscanino*, 500 F. 2d 267 (2d Cir. 1974), *U.S. ex rel Lujan v. Gengler*, 510 F. 2d 62 (2d Cir. 1975), and *United States v. Lira*, 515 F. 2d 68 (2d Cir. 1975).

¹⁵ See Basslouni, *Hearings supra* note 1.

would indicate that "return" is not intended to be extradition and thus gives rise to the troublesome question: What is the legal nature of a "return?"

To be sure, a "return" is what occurs when the procedures contained in § 4114 are pursued but because the term "return" is not even consistently used as a noun in that section of the proposed legislation to describe the event, and is not defined, and because the component steps of the event are described in terms of extradition-with-a-difference, judicial confusion may be expected with regard to the relationship of § 4114 and 18 U.S.C. 3181 *et seq.*

This seemingly semantic consideration may actually result in more than mere confusion, for if § 4114 were viewed as a form of extradition, its impact might be greatly blunted by judicial determination. § 3181 requires as a pre-condition for international extradition that there be a treaty between the U.S. and the Requesting State, here the former Sending State. § 3184 then requires that extradition be in accordance with the terms of that treaty. Viewed in this light, Paragraph (1) regarding extraditable offenses takes the appearance of an attempt to unilaterally modify and treaty of extradition between the U.S. and any other state with which the U.S. would also have a treaty for the execution of penal sentences, in contravention to well established U.S. law and practice.¹⁶ In this awkward way, paragraph (1) might judicially be denied its effect with the consequence that an offender whose offense was not one of those listed in the treaty could not be returned.

In other words, a court interpreting this attempt to devise a *sui generis* extradition procedure may reject it and apply all extradition procedures, thus denying effect to the inconsistent provisions of § 4114.

Bolstering the conclusion of the author that the courts may regard "return" as a form of extradition is the fact that the Mexican treaty refers expressly to the U.S.-Mexico extradition treaty,¹⁷ and though this reference is specifically with regard to political offenders, it establishes a link between the treaty on the execution of penal sentences and the treaty on extradition. The underlying basis of § 4114 is the authorization of the Executive, by purely statutory means, to surrender persons within the U.S. to foreign states. The persons transferred would be persons convicted of crimes within the Requesting State and the transfer would be for the purpose of enabling the Requesting State to punish them. This process fits precisely the definitions of extradition that have been used by U.S. courts.¹⁸

Stating that such persons shall not be deemed to have been extradited or giving a new name to this process is not likely to lead the courts to apply different legal principles to its operation. Thus, despite the drafter's concern, the process is likely to be viewed as inherently related to extradition and subject to the same constitutional strictures.

The validity of international extradition is based on its nature as a function of the foreign affairs vested by Article II, Section 2 of the Constitution in the President and the U.S. Senate.¹⁹ Such powers are joint powers of the Executive and Legislative branches, and absent a treaty or other legislative authorization, the Executive has no power to extradite.²⁰ With a treaty, the Executive may perform extradition duties in accordance with the treaty's terms, because an extradition treaty is self-executing.²¹ But the situation has never arisen where there existed legislative authorization without a treaty, and there is only dicta suggesting that a statute by itself could be sufficient basis for extradition.²² It should be noted that, as an expression of legislative authorization, a treaty requires the consent of two thirds of the Senate whereas a statutory authorization

¹⁶ That treaties cannot be modified by unilateral interpretations is a well-recognized principle of customary international law codified in Article 39 of the Vienna Convention on the Law of Treaties, *id.*

¹⁷ Treaty of Extradition Between the United States of America and the United Mexican States, Feb. 22, 1899, 31 Stat. 1818, T.S. 242; supplemented convention Apr. 14, 1941, 55 Stat. 1133, T.S. 967.

¹⁸ *Terlinden v. Ames*, 184 U.S. 270, 22 S. Ct. 484 (1902); *Stevenson v. United States*, 381 F. 2d. 142 (1967); *United States v. Rauscher*, 119 U.S. 407, 7 S. Ct. 234 (1886). See also M. C. Bassiouni, *International Extradition and World Public Order* (1972).

¹⁹ *Valentine v. U.S. ex rel Neidecker*, 299 U.S. 3, 57 S. Ct. 100 (1936); *United States v. Rauscher*, *id.*

²⁰ *Argento v. Horn*, 241 F. 2d 258, cert. den. 355 U.S. 818, 28 S. Ct. 23 (1957). See also *Valentine v. United States*, *id.*

²¹ *Re Metzger*, 5 How. (U.S.) 176 (1857).

²² See note 20 *supra*. See also, *Roberts v. Reilly*, 116 U.S. 80, 6 S. Ct. 291 (1885) and *United States v. Rauscher*, *supra* note 17.

could be approved by a simple majority in each House, so the distinction is not one without a difference.²³

Assuming that the basic premise of statutory rendition is accepted by the courts as constitutional—which appears likely—the use of some but not all of the procedural steps governing extradition would still be questionable as a violation of equal protection in that the class of persons covered by § 4114 would be treated differently than other persons in virtually identical situations, such as escapees or furlough violators from foreign states in violation of the Equal Protection Clause of the Fifth Amendment.

The political considerations mentioned above for desiring to insure easy return of such persons to the State from which they were transferred might serve to justify the establishment of a classification of persons to be “returned” as opposed to “extradited” as being unequal application of the law. The legal standard for validity of a distinct classification affecting fundamental rights is that it be based on a compelling state interest.²⁴ Because ordinary relations in extradition are protected by the requirement that probable cause be shown before they are extradited, whereas § 4114 offenders are not, the question remains as to whether a fundamental interest is violated.²⁵ The classification would have to be justified as necessitated by a compelling state interest, and it is questionable whether the interest of the U.S. in avoiding political repercussions or of the other prisoners in having the Treaty for such transfers continue in operation would satisfy this very demanding standard.²⁶

But even if this classification were upheld against an equal protection challenge, the standard of evidence itself would be vulnerable to attack as a possible violation of due process. The provision purports to do away with the requirement of a showing of probable cause as a condition for surrendering an individual to a foreign government. In extradition, the probable cause requirement is given statutory voice in 18 U.S.C. § 3184, but that the requirement is not merely statutory, since it is the embodiment of the Fourth Amendment. Thus if the government were to argue that § 4114 should apply as an alternative modality of rendition which constitutes an alternative to extradition because it applies to a different class of person. In that case, paragraph (2) waiving the requirement of probable cause would not only be deemed inconsistent with § 3184 but would also be deemed in violation of the Equal Protection Clause of the Fifth Amendment (in that it would seek to discriminate against a class of persons with respect to a fundamental right namely the guarantee of the Fourth Amendment) and in violation of the Fourth Amendment, protection against unreasonable searches and seizures. Thus paragraph (2) of § 4114 would be held unconstitutional for its violations of the Fourth and Fifth Amendments no matter how § 4114 would be characterized (extradition or no-extradition) since on its face it seeks to deprive a person of fundamental constitutional rights.

4. “Return” and “probable cause.”—In the context of § 4114’s intended impact, the issue of probable cause would arise only in a challenge to the “return” proceeding prescribed by § 4114.

The “Probable cause” standard of § 3184 requires only that there be sufficient evidence produced to provide reasonable grounds to believe that the offender has committed the crime of which he or she is accused or convicted.²⁷ The difficulties that arise in meeting this standard are: (1) the availability of evidence which depends on whether the Sending State has provided it to the Receiving State, and (2) that such evidence as is produced may be deemed constitutionally inadmissible in a U.S. court if it is derived from a violation of the Fourth, Fifth,

²³ See S. Slovin, “Congressional-Executive Agreements,” 14 *Colum. v. Trans. L.* 434, 436 (1975); and McDougal and Lans, “Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,” 54 *Yale L. J.* 255 (1944).

²⁴ See *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1942) (regarding interference with privacy and autonomy), *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973) (interference with rights to food stamps) and *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969) (right to travel interstate).

²⁵ See Bassiouni *supra* note 2, pp. 518–527 and cases cited.

²⁶ Characterized in *Printing Industries of Gulf Coast v. Hill*, 382 F. Supp. 801, 808 (D.C. Tex. 1974); *Coleman v. Coleman*, 291 N.E. 2d 530, 534; 32 Ohio St. 2d 155 (1972).

²⁷ For a definition of probable cause see *Branniger v. United States*, 338, 160, 69 S. Ct. 1302 (1949); for its reasonableness see *Beck v. Ohio*, 379 U.S. 89, 855 Ct. 223 (1964); for a distinction between “probable cause” for a seizure and proof of guilt see *Carroll v. United States*, 267 U.S. 132, 855 Ct. 223 (1964); for its violation of the Fourth Amendment see *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524 (1886) and *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961); for the inadmissibility of the “Silver Platter” practice, see *Elkins v. United States*, 364 U.S. 206, 805 Ct. 207 (1960).

Sixth and Fourteenth Amendments (prohibition against unlawful searches and seizures, self-incrimination, involuntary confessions, improper identification, lack of legal representation etc.)²⁸ Were these constitutional guarantees as interpreted by U.S. Supreme Court decisions found to be applicable, a variety of pre-trial practices in Mexico and Canada would fall into one or more of these categories of violations, resulting in exclusion of such evidence.

The drafters of the proposed legislation have sought to avoid this problem altogether by replacing the "probable cause" requirement of § 3184 with a § 4114(3) which states that a certified copy of the offender's sentence shall be sufficient evidence for return of an offender. Thus hoping to avoid opening the Pandora's Box of availability and admissibility of "probable cause" evidence which brings into question criminal justice practices in the Sending State. The proposed legislation seeks to equate the two evidentiary requirements of "probable cause" and "certified copy of the sentence" also as a means of judicial economy, avoiding protracted litigation under a "return" procedure in which the issue of "probable cause" and admissibility of evidence would be litigated.

The applicability of "due process" standards to "return" procedures however characterized are supported by § 4103 of the proposed legislation which provides that, "All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees, and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise." Thus the inevitable application to "return" procedures as are described in the proposed legislation guarantees as to "probable cause" and admissibility of evidence.²⁹

5. *Proposed amendments and a different suggested approach.*—(a) The problems inherent in § 4114 would lead the courts to the conclusion of invalidating most of the Section. It is therefore suggested in keeping with the intent of the proposed legislation, that Section 4114 be amended. The first change would be to label it "Alternative Modality for Rendition Other Than Extradition of Persons Transferred for the Execution of Foreign Sentences." The second sentence of the Section would define such "rendition" as a process distinct from extradition because of its applicability to persons convicted and sentenced by foreign states whose presence in the U.S. is the result of an effort by that State and the U.S. to effectuate our administrative transfer of offenders for the benefit of and at the request of said offenders pursuant to a treaty who would be susceptible of being returned to the custody of the Transferring States.

After these changes, the first two paragraphs of § 4114 as drafted could be inserted. Then, the paragraph beginning at line 5 of page 18 could be revised to read, "the procedural steps in the rendition of such persons shall be the same as those applied in the process of extradition, except that:

(1) there shall be no requirement that a treaty of extradition exist between the U.S. and the requesting State, but if such a treaty exists, its procedural requirements shall be applicable to the process of rendition;

(2) no substantive requirement of extradition law arising from such a treaty, including any requirement that the offense of which a person is accused or convicted must appear on a list provided in such a treaty, shall be applicable in a rendition proceeding.

(3) rendition of such persons shall be ordered upon production by the Requesting State of a certified copy of the sentence imposed upon such person which shall be deemed to constitute "probable cause,"

(4) no rendition shall be approved where a Requesting State has allowed more than sixty days to pass from the date on which the decision releasing said person before filing a request for rendition;

(5) paragraph (5) would be modified by replacing the word "return" with the word "rendition," and by adding the language, "and such condition shall be met when an appropriate official of the Requesting State has filed a signed pledge with the fearing officer that such credit shall be given."

These changes, if the intent of the framers has been properly divined, has the same effect as the language actually used was intended to have, but makes the intent and shape of the provisions clearer, thus enhancing the possibility that the purpose of that Section will have its intended effect.

²⁸ See, e.g., Miller, Dawson and Dix, *Criminal Justice Administration* (1976), and Hall, Kamisar, La Fave and Israel, *Modern Criminal Procedure* (1976 Suppl.).

²⁹ See *supra* note 27.

(b) A better approach however might have been to frame the § 4114 procedures as amendments to U.S. law governing extradition. Thus to the § 3181 requirement that there be a "treaty" there could be added the language, "except in the case of persons transferred to the U.S. pursuant to a treaty to serve a sentence arising from a foreign penal judgment who have been released by judicial action prior to the completion of that sentence, return of such persons to the foreign country where the crime was committed may be accomplished in accordance with the provisions of § 3184." And as to the § 3184 requirement, that section could be amended to provide that, in the case of such transferred persons, return would be accomplished by extradition under a treaty except that whatever their offense it would be deemed extraditable as if it had been listed as such in a treaty of extradition with the former Transferring State, and that such requests would be acted upon only if filed within sixty days of the release of such persons and if the former Transferring State had filed a pledge signed by an appropriate officer that it would credit the offender for time served under U.S. control.

It is submitted that such an approach would be the clearest drafting approach possible and would reflect the actual effect of the proposed legislation.

It may not, however provide the automatic guaranteed return mechanism apparently desired. To accomplish this, modification of the Treaties governing prisoner transfers and extradition would be needed and even then it would still be questionable.

Conclusion

The process of Transfer of offenders to execute their sentences in the U.S. is a laudable one which should be supported. The treaties in question and the proposed implementing legislation are to a large extent constitutionally sound, even though certain questionable aspects thereof are likely to be seriously challenged in the courts. The proposed implementing legislation though drafted with care and concern for the constitutional hurdles which it is certain to face needs to be amended to strengthen it in the face of the obvious obstacles it will face. To that end, this statement which supports the purposes of the proposed legislation seeks to highlight the areas in need of amendment before its passage into law. In addition, the linguistic style should be amended in order to add where appropriate the word "she" after or before the word "he."

RÉSUMÉ OF M. CHERIF BASSIOUNI

Professor of Law, DePaul University since 1964; 1970 Fulbright-Hays Professor of International Criminal Law, The University of Freiburg, Germany; 1971 Visiting Professor of Law N.Y.U.; 1972 Guest Scholar Woodrow Wilson International Center for Scholars, Washington, D.C. LL.B., The University of Cairo; J. D. Indiana University; LL.M., John Marshall Lawyer's Institute; S.J.D. George Washington, National Law Center. Also studied law at Dijon University, France; and The University of Geneva, Switzerland.

Author of six major books on Criminal Law and International Criminal Law, several monographs on Criminal Law and 41 law review articles. Active in scholarly and professional organizations, he serves as the Secretary-General of the International Association of Penal Law. Also member of the Section Council of International Law of the Illinois State Bar Association for 6 years and twice chairman of the section; chaired several committees of the Chicago Bar Association; and two committees of the ABA.

A frequent lecturer at distinguished Universities in the U.S. and abroad, he was a Consultant to the U.N. for the Fifth U.N. Congress on Crime Prevention (1975) and was elected by the U.N. delegates as Honorary Vice-President of the Congress.

Among the distinctions and awards he received are: In 1967, outstanding citizen of the year of Metropolitan Chicago, 1970 outstanding Educator of America; 1973 Men of Achievement Award (Cambridge, England); 1973, Gold Medal of the Italian Press, (Rome, Italy).

Mr. BASSIOUNI. My concerns deal with the questions of waiver and consent which are the two basic premises on which this whole process has been based. The process of consent, as the legislation is presently

drafted raise two serious questions in my mind. One is the verification of consent and the other is the right to counsel.

As I understand it from the testimony that Deputy Attorney General Flaherty gave these two points have been cured with some proposed amendments. The consent should be done by a judge or someone appointed by the judge. Second, there is some amendment, as I understand it, concerning the appointment of counsel.

Unlike what Mr. Flaherty stated, by concern in raising the question was not with who was paying the fees for counsel, namely whether it was the Department of State or any other source of public funding, but rather the appointing authority. The issue here is one of conflict of interest and not one of payment. Therefore, it would seem to me that if the availability of appointed counsel would then be more or less in the same manner as we have done in both Federal and State courts through Federal defender projects and other volunteer legal services for the indigent, then this may avoid the conflict of interest problem by having an agency of the Government interested in the outcome appoint somebody who would also represent the interest of the transferred offender.

I might also add that there is no question—and I think both the treaties and the legislation contemplate it—that there is going to be a challenge through habeas corpus petitions challenging the conviction and sentence. To assume that because the treaty merely says that the procedure is not perdictated on the recognition and enforcement of foreign penal judgment is going to be binding on the courts is very challengeable. I think that to a large extent, while it is true so far that the position of the U.S. courts has been not to apply U.S. constitutional provisions outside the United States with some reservations and exceptions, we are dealing with a novel procedure and don't know what the courts will do in response to that situation.

It is my feeling that the courts will look at it maybe by analogy to the recognition of foreign civil judgments by finding out if there is a sort of minimum due process guarantee that has been applicable, even though not all specific guarantees of our criminal justice system existed. This means that quite likely the constitutionality of the treaty and the legislation will be upheld, but the right of individual challenge and an ad hoc individual examination may also be upheld.

In that case it would seem to me that it would be very important to have available the entire record of the conviction so that the Justice Department may effectively defend such cases.

It is quite possible that the lack of availability of such documentation may mean that the case would be lost only because it would not be adequately defended due to lack of such documentation.

I think that the principal concern that I have with the legislation—

Senator BIDEN. Excuse me, does your full statement give examples of the application of minimum standards in civil cases that the courts apply?

Mr. BASSIOUNI. It did in my statement before the Foreign Relations Committee but not here.

Senator BIDEN. Fine. With your permission I would like to include that in this record.

Mr. BASSIOUNI. That would be fine.
[The material follows:]

Hearings Before the Committee on Foreign Affairs of the United
States Senate—June 15-16, 1977

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED
MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES, SIGNED ON
NOVEMBER 25, 1976; and,

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA ON THE
EXECUTION OF PENAL SENTENCES, SIGNED ON MARCH 2, 1977.

Statement by:

M. Cherif Bassiouni, M.B; J.D.; LL.M.; S.J.D.
Professor of Law, DePaul University; Secretary-
General, International Association of Penal Law;
Former Fulbright-Hays Professor of International
Criminal Law, The University of Freiburg, Germany;
Author of inter alia: Criminal Law and its Processes
(1969); A Treatise on International Criminal Law
2 Vols. (1973); International Extradition and
World Public Order (1974); International Terrorism
and Political Crimes (1975).

Statement of Support

As a preliminary matter this writer urges the Committee to act
favorably on the two "Treaties" and to recommend to the Senate
that it accord these "Treaties" their "Advice and Consent."

It is the position of this writer after due consideration and
study of the two "Treaties" and after consultation with other
experts on the subject that the said "Treaties" are not in
violation of the Constitution of the United States either by
reason of their subject matter or form, nor do they contra-
vene existing federal legislation. The "Treaties" provide an
imaginative and valuable solution to the problems of U.S.
Citizens incarcerated in foreign states and promote greater
international cooperation in penal matters between states de-
sirous of collaborating in the prevention and suppression of
criminality. The laudable purposes of the "Treaties" and their
innovative approach deserves full support. The ratification and
entry into effect of these "Treaties" will put the United States
in the forefront of the international community in this area of
International Criminal Law. Hopefully, this will augure the
opening of new initiatives by the United States in promoting
greater international cooperation in penal matters for a more

effective world-wide effort to prevent and suppress criminality. The new technique offered by these "Treaties" is to added to Extradition already practiced by the United States and hopefully other techniques, such as Taking of Testimony Abroad; Letters Rogatory; Commissions Rogatory and Transfer of Criminal Proceedings, will be developed to make more effective the prevention, prosecution and suppression of criminality.

I. Scope of the Statement

- 1 - The "Treaties" are almost identical save for minor variations in terminology. They are predicated on the same assumptions, are intended to accomplish the same objectives, are structured in the same manner and their conditions and requirements are the same. For these reasons the two "Treaties" are jointly treated in this statement and the observations made are applicable to both "Treaties."
- 2 - It is assumed that the "Treaties" do not raise any questions pertaining to Presidential or Federal power with respect to the subject matter of the "Treaties" or the Power of the President under the Constitution of the United States.
- 3 - The principal issue upon which the committee may be expected to focus is whether the federal government can recognize and enforce foreign penal judgments and execute their sentence provisions in the United States. It is to that issue and its underlying questions that this statement shall direct itself, specifically:
 1. Is there anything in the Constitution of the United States which prohibits the execution of the arrangement proposed in the "Treaties?"
 2. Is the recognition and enforcement of foreign penal judgments violative of United States laws or public policy?
 3. Is the execution of a foreign penal sentence based on a foreign penal judgment contrary to the public policy of minimum criminal justice standards of the United States?

II. Designation and Scope of the "Treaties"

- 1 - The "Treaties" purport to establish the legal basis whereby the respective signatory States can transfer to one another, and receive into custody their respective citizens who have been convicted and sentenced in the "sending" state for the purposes of executing their sentences in the "receiving" state, of which they are "citizens."
- 2 - The designation of the "Treaties" as being for the "Execution of Penal Sentences" implies that the respective parties there-to are to mutually recognize, enforce and execute each other's respective penal judgments as if they were their own, if they fall within the terms and provisions of the "Treaties" as implemented by their national legislation. On closer examination however it is apparent that the scope of the "Treaties" is much narrower. In fact, the "Treaties" are only for the transfer of "offenders" and for their custody by the "receiving state" on a bilateral exchange basis. Because of such a narrow scope the "Treaties" would have been more appropriately designated as for "The Transfer and Custody of Offenders."

III. Rationale for the "Treaties"

The "Treaties" are predicated on three correct assumptions:

1. that a state has an interest in the treatment of its citizens abroad;¹
 2. That a state has an interest in the future behavior of its citizens;² and,
 3. That states have a common and mutual interest in cooperating in the prevention and suppression of criminality.³
- 1 - A state's interest in the treatment of its citizens abroad is essentially a humanitarian one. Thus its concern for the manner and conditions of their custodial and detentional control is warranted. Such a concern however, extends beyond this purely humanitarian aspect.
 - 2 - A state has an interest in the outcome of its citizens' custodial and detentional treatment abroad because ultimately citizens return to their country of nationality and their future behavior therein is a legitimate interest and concern thereof.
 - 3 - Improved international cooperation between states by means of transferring custody of offenders to their state of citizenship enhances the prevention, prosecution and suppression of criminality.

CORRECTED PAGE

A sound criminological policy supports the three arguments stated above in that:

1. Conditions of custody and treatment of alien offenders in any given state is not a factor in the decision to prosecute the said offenders; whereas such conditions are of interest the state of citizenship of the offenders. The state of a citizen may manifest such an interest by placing pressures on the prosecuting state (sometimes as a response to its citizens and pressures) or make the extradition of nationals impossible or very difficult. Thus, the transfer of offenders would not place any pressure on the U.S. or foreign government at the state of prosecuting U.S. offenders abroad;
2. It encourages the extradition of nationals to states wherein they have committed offenses for purposes for their trial in such states and their eventual transfer to the United States for the execution of their sentences;
3. The return of U.S. nationals, to their state of citizenship would enhance the deterrent and rehabilitative processes of punishment abroad;
4. It would provide a national and cultural context to the detention and custody of U.S. offenders which is more appropriately designed to enhance their rehabilitation and resocialization in their country of origin.
5. It would create a specific device for international cooperation in penal matters and thus enhance the climate of international cooperation in the prevention and control of criminality in the context of a more humane concern for the person of the offender in a manner consonant with national cultural values and practices.

IV. Distinction Between: Recognition, Enforcement and Execution of Sentences

- 1 - The term "Recognition" means that a foreign penal judgment's legal existence and validity is recognized.⁴ It does not necessarily imply that the foreign penal judgment shall be enforced in whole or in part, nor that by its enforcement certain facts thereof shall be executed as if it were a national penal judgment. Thus a foreign penal judgment can be recognized for its juridical existence and validity, but not enforced or executed. However, a foreign penal judgment cannot be enforced or executed unless it is first recognized. Recognition is therefore the critical legal prerequisite for the enforcement and execution of a foreign penal judgment.
- 2 - Enforcement means the use of a state's power processes to give effect to a foreign penal judgment.⁵ In that respect, a state can do so on behalf of the rendering state or domesticate the judgment and act on it as if it had been rendered by its own tribunals.

- 3 - The execution of a penal sentence is a form of enforcement of a foreign penal judgment whose validity has been recognized. However, it is a specific process whereby the executing state uses its power processes as if it were acting either on behalf of the rendering state (as an agent thereof) or on its own behalf as if the foreign penal judgment had been domesticated by the executing state (which is thereby executing the sentence as if it were its own national judgment).
- 4 - A question arises as to whether the transfer of custody of detainees by one state to another constitutes an enforcement of the foreign penal judgment of the sending state by the receiving state and an execution of the sentence of the said judgment, or whether it is merely a custodial compact for the neutral administrative benefit of the parties. This question arose with respect to compacts between states within the U.S. and between states and municipal authorities and federal authorities for the housing, detention and custody of offenders.⁶ Invariably, such compacts or contracts (between states or between federal and state or municipal authorities) have been considered as administrative arrangements for the use of facilities and the physical handling of the detainees. There has never been the inference that the state or municipality receiving custody of an offender convicted in another state or by the federal judiciary would be enforcing or executing the sister state's penal judgment or that of the federal courts. In fact, the full faith and credit clause of the Constitution does not mandate the recognition or enforcement of the Penal Judgments of sister states (or the federal judiciary) and the practice throughout the history of the U.S. has been not to acknowledge the recognition and enforcement of such penal judgments.

V. The Recognition and Enforcement of Penal Judgments: Within the U.S. and as between the U.S. and Foreign States.

- 1 - A confusion has traditionally existed in the legal literature with respect to the terms "Recognition" and "Enforcement" of a foreign judgment whether it be civil or penal, as between sister states and as between the U.S. and foreign states. The confusion has led to the generally held belief that the U.S. and states within the U.S. do not "recognize" let alone "enforce" the penal judgments of foreign states or sister states.⁷ This belief is erroneous. In fact, the U.S. and states within the U.S. have always recognized the existence and legal validity of foreign or sister state penal judgments and have used their power processes to give such judgments some form of enforcement.
- 2 - This practice has been known as "extradition"⁸ which has existed as between sister states and as between the U.S. and foreign states since Jay's Treaty of 1791.⁹ Extradition is the process by which one state demands from another state the surrender of an individual located within the territory of the requested

state because the said individual is accused of or has been found guilty of the commission of a crime in the requesting state. In that latter case, the basis for the extradition request rests on the recognition given to the requesting state's penal judgment and thus to some extent, its enforcement by virtue of the requested state's use of its power processes to surrender the convicted offender so that he or she may be made to execute the prescribed sentence. This may explain why the "Treaties" contain conditions very similar to those found in extradition treaties.

Clearly, in Extradition the requested state who surrenders a person to another state does not "execute" the sentence, but it partially enforces it by using its coercive powers to seize the individual sought and surrender him forcefully to the authorities of the requesting state.

- 3 - Since the process of Extradition has been considered Constitutional,¹⁰ it must be concluded by analogy that the transfer and custody of offenders can also be held constitutionally valid if it were to satisfy the same general requirements of Extradition, namely: ¹¹

1. The existence of a treaty, whether bilateral or multilateral; and,
2. The existence of implementing federal legislation.

The essential conditions embodied in such treaties are:

1. The accused or convicted offender has committed a violation of the criminal laws of the requesting state; and,
2. The crime in question is listed in the treaty or constitutes a crime in the laws and jurisprudence of both states.

The "Treaties" establish the same essential conditions.

VI. Precedents in the United States

- 1 - The "Full Faith and Credit" clause of Article III of the U.S. Constitution does not apply to the judgments of foreign states.¹² In civil matters foreign judgments have been recognized and enforced on the basis of reciprocity or comity.¹³ The Uniform Foreign Money Judgment Recognition Act¹⁴ provides that such a judgment, which is predicated on notice and opportunity to be heard and minimum contacts between the rendering state and the case and the parties thereto, shall be recognized and enforced. Foreign Penal Judgments which are not entitled to "Full Faith and Credit" have not been given formal recognition

and enforcement in any state of the United States, nor by the federal judiciary. Furthermore, such judgments have not been granted formal recognition and enforcement on the basis of reciprocity or comity. But, Foreign penal judgments have been implicitly given recognition and enforcement through the process of extradition, where a requesting state's penal judgment is at the basis of its request. In those cases, subject to the existence of a treaty and compliance with inter alia the rule on "double criminality," the federal judiciary has conceded extradition by using its power processes to seize and deliver the requested person located in the United States.

- 2 - Sister state penal judgments have not been construed as falling within the purview of the "Full Faith and Credit" Clause,¹⁵ but have been given implied recognition and enforcement in two ways:

1. Through extradition when based on the penal judgment of a sister state by virtue the Interstate Rendition Compact;¹⁶ and,
2. By giving credit in some states to the penalty received and executed in sister states or in federal sentences for crimes punishable in the respective legal systems (which crimes arise out of the same criminal transaction.)

While these two forms of recognition and enforcement do not contemplate the execution of the respective penal judgments, they nonetheless indicate that recognition and enforcement of penal judgments though disclaimed in the literature and judicial opinions is nonetheless practiced and is in fact the object of specific state and federal legislation.

- 3 - The existence of prison compacts between states and as between states and municipalities and the federal government (separate sovereign) for the detention and custody of offenders (adults and juveniles) clearly establish a practice, in some cases supported by legislation, for the administrative execution of sentences. This practice though never characterized as being for the execution of foreign penal judgments has been invariably treated as an administrative custodial arrangement for the benefit of the sending authority whereby the receiving authority is either providing space and services or is acting as the agent of the sending authority.
- 4 - In recent times more specific examples are found supporting the concept of recognition and enforcement of foreign states' penal judgments. Three specific instances are:
 1. The enforcement in the U.S. of penal sanctions imposed by foreign consular officers,¹⁸

2. The Agreement between the United States and the Republic of Korea on the status of U.S. Armed Forces in Korea,¹⁹
3. The specific recognition by the court of appeals of the tenth federal judicial circuit in 1975 of a foreign penal judgment.²⁰

These three specific instances constitute valid precedents supporting the constitutionality of the "Treaties" in addition to the other arguments stated above. It must be observed that nothing in the Constitution of the United States or federal legislation specifically prohibits the recognition and enforcement of foreign penal judgments.

VII. United States Public Policy in Minimum Standards of Criminal Justice and the Recognition and Enforcement of Foreign Penal Judgments and The Execution of Foreign Penal Sentences.

- 1 - It is a well settled principle of private international law that no state shall recognize or enforce the judgments of other states if they are contrary to the public policy of the recognizing and enforcing state.²¹ This principle has been applied in the United States with respect to the recognition and enforcement of foreign civil judgments.²² It is also applicable as between sister states notwithstanding the "Full Faith and Credit" Clause of the Constitution.²³
- 2 - The question arises therefore as to whether certain minimum standards of criminal justice as embodied in the meaning of the "Due Process" clauses of the Fifth and Fourteenth Amendments to the Constitution and those specific rights enunciated in the Bill of Rights which have been incorporated in the "Due Process" clauses, must be observed in the process leading to a foreign penal judgment.
It must be noted that nothing in the Constitution requires that only systems of criminal justice which are similar to that of the United States be given recognition. In fact, the position of the United States Supreme Court on extradition²⁴ and on the constitutionality of Status of Forces Agreements²⁵ has been to respect other criminal justice systems even though they may be very different from that of the United States.
- 3 - However, a distinction between such instances and the matter of executing a foreign penal judgment in the United States must be made whereas the United States would not deny surrendering jurisdiction over a person who is requested by a foreign state for the commission of a crime within the jurisdiction of the requesting state, it is a different matter altogether for the United States to use and make available its power processes to execute in its territory a foreign penal judgment which may have been rendered by virtue of a judicial process which may be potentially offensive or obviously contrary to minimum standards of criminal justice. There is

clearly a public policy in the United States with respect to minimum standards of criminal justice. The execution of a foreign penal sentence rendered in potential violation of such standards would contravene the public policy of the United States and would warrant its reflection. However, such issues can only be determined on an ad hoc basis since the denial of such minimum standards to a given individual would depend on the facts and circumstances of each case.

- 4 - There is nothing in the criminal justice system of Canada which is so alien to the Common Law system which is the foundation system of the United States to warrant a general denial of its compliance with the public policy of minimum criminal justice standards of the United States.²⁶ Thus clearly with respect to the treaty with Canada nothing on the face of existing laws and practices in that State would support the contention that its legal system is per se potentially offensive to the public policy of the system of the United States.
- 5 - With respect to Mexico, that State's criminal justice system represents a greater variation from that of the United States than Canada's. Notwithstanding such differences, the Mexican system of criminal justice offers certain minimum guarantees which make it not so incompatible with the minimum justice standards of the United States so as to render the whole system per se patently offensive to the public policy of the United States. The Mexican Criminal Justice system affords an accused: the right to be adequately apprised of the charges; the right to counsel; to open and public hearings conducted by an impartial judge; proof of guilt by competent testimony; the right to appeal.²⁷ Thus, on its face the criminal justice system of Mexico is not violative of the public policy of the United States.
- 6 - There is therefore no reason to find that with respect to either Canada or Mexico the Supreme Court of the United States would find that either criminal justice system is on its face patently offensive to the minimum standards of criminal justice of the United States for purposes of recognition and enforcement of these states' penal judgments and the execution of their sentences in the United States. This conclusion is reached because of the assumption that the execution of the sentences of Canada and Mexico as is required by the "Treaties" extends only to the transfer and custody of offenders and to nothing more, and that the alternative to such an arrangement would not enhance the position or rights of United States Citizens in the custody of these two States.

VIII. International Precedents for the Execution of Foreign Penal Sentences

The policy represented by these "Treaties" has been shown to be both desirable and Constitutionally valid. It is appropriate at this point to add that other modern States have found comparable arrangements desirable and feasible and have put into operation international conventions for such purposes. Of particular interest are the arrangements of the Council of Europe, the Benelux countries, the Nordic States, and French Community States.

The European Convention on the International Validity of Criminal Judgments ²⁸ provides for recognition of foreign penal judgments among sixteen European States, plus Turkey. Enforcement is likewise provided for, with considerable attention being devoted to reconciling the public policies of the various signatories in the convention's application.

Among the Benelux countries, a convention relating to recognition of foreign criminal judgments has been in force for 25 years relating to violations of customs and excise tax laws. ²⁹

The Scandinavian Act of Enforcement of May 22, 1963, a parallel legislation in the five Scandinavian countries, ³⁰ provided for recognition and enforcement of a wide range of criminal judgments.

A fourth arrangement, which represents cooperation among States of substantially different systems of justice, is that maintained by France and certain of her former colonies. An example of this is the bilateral Judicial Convention signed by France and Cameroun in 1960, ³¹ under which nationals of the respective States are to be transferred to the State of their nationality to serve sentences of imprisonment.

Accordingly the "Treaties" now before the committee are not unique in international experience and in fact are a logical extension of a growing trend for States to provide for recognition and enforcement of the criminal judgments of neighboring States with whom they have considerable interaction.

IX. EXTRA TERRITORIAL APPLICATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES

It is a commonly held belief that neither the Constitution nor the laws of the United States apply extra-territorially.³² To a large extent this view is correct, however certain provisions of the Constitution and several U.S. laws apply extra-territorially.³³ With respect to the Constitution those provisions dealing with citizenship obligations such as Treason apply extra-territorially. U.S. laws concerning treasonous action and related offenses (e.g. sedition, espionage, sabotage, aiding the enemy, etc.) apply to U.S. citizens no matter where they are. This is known in theories of jurisdiction as the "Active Personality Doctrine."³⁴ Similarly, a variety of U.S. laws apply to citizens and non-citizens of the U.S. (whether individuals or business entities) whose conduct outside the U.S. may have a prohibited impact within the U.S. (e.g., Anti-trust laws, trade laws and regulations; securities and exchange laws and regulations; currency laws; anti-dumping laws; tax laws, etc.) This is known in theories of jurisdiction as the "Protected Interest Doctrine."³⁵

The protections of the "Bill of Rights" as they have been embodied in the meaning of the Fifth and Fourteenth amendment "due process" clauses have not however, been extended extra-territorially. The United States Supreme Court faced that issue with respect to two subject-matter areas (to which to extend these constitutional rights to U.S. citizens abroad but restricted it). They are:

- (1) Status of Forces Agreements and (2) Unlawful seizure of persons abroad.

Note —
direction

(1) The "Status of Forces Agreements" between the United States and certain foreign countries wherein United States troops are stationed, provide for prosecution of U.S. military persons who have committed a crime in the host country.³⁶ The Supreme Court held that even if the criminal justice standards of the host country were different or by implication even contrary to those of the United States, nothing in the Constitution prohibited such a treaty provision or its execution (i.e., delivering the person as a United States citizen to a foreign country for prosecution according to their system irrespective of the fact that it did not afford the minimum criminal justice standards offered in the United States.³⁷ Thus, the principle of nonapplicability of Constitutional guarantees to minimum criminal justice standards abroad has been established even where the United States uses its power processes to aid and assist in submitting a United States citizen to the jurisdiction of a foreign country.

(2) Unlawful seizure of United States citizens abroad which constitutes a more serious problem than relinquishment of jurisdiction over United States servicepersons who committed crimes in the host country, have been sanctioned by the Supreme Court. Indeed, since 1883³⁸ the position has been that the constitutional protections of the fourth, fifth, sixth and fourteenth Amendments do not apply to United States citizens even when these violations

were committed in order to secure the presence of such persons before a United States Court.

The Supreme court has consistently held since then that a Court has jurisdiction over the person of an accused defendant irrespective of how such presence was secured.³⁹ While this writer strongly disagrees with this position, it has been consistently upheld on the assumption that such violations were not committed by United States officials, even though U.S. law enforcement ultimately benefits therefrom. However, recent decisions of United States Circuit Courts indicate a possible change, particularly where United States officials are directly involved in the abduction or other constitutional violation against United States citizens abroad.⁴⁰

The conclusion remains, however, that as a general proposition the Constitution and its criminal justice guarantees do not apply to United States citizens abroad. They could however, be deemed extra-territorially applicable if the violations of citizens' rights are committed by United States officials.

Nevertheless, the question arises as to whether the Supreme Court may find the execution of a foreign states' penal sanctions patently offensive to minimum standards of criminal justice in the United States. It must be emphasized that this issue is not to be construed as meaning that the United States will or should refuse to give any recognition or enforcement to a foreign penal judgment which is rendered by a system that does not offer the same criminal justice guarantees as ours, but whether the power processes of the U.S. will be employed to effectuate a result which would be predicated on a legal basis patently offensive to the minimum standards of criminal justice as perceived in this country and in particular as applied to its citizens.

X. CONCLUSIONS AND RECOMMENDATIONS

- 1 - It is very unlikely that the United States Supreme Court would hold the "Treaties" to be unconstitutional because they purport to recognize, enforce and execute the penal sentences of a foreign state whose minimum criminal justice standards are per se patently offensive to United States standards, if for no other reason than to avoid facing the question of ranking constitutional sources of law. In that respect however, I defer to experts in Constitutional law.
- 2 - What the court is likely to consider is whether on an ad hoc basis the foreign conviction of a United States citizen transferred to the United States under the terms of the "Treaties" for execution of a sentence has been secured in a manner so patently offensive to U.S. minimum standards of criminal justice that the further detention of such a person by the United States would be contrary to its public policy. Thus, the concern should not be over the constitutionality of the "Treaties" but over the criteria of minimum standards of criminal justice which the United States Supreme Court would hold to be applicable to United States citizens abroad as a condition to the use of the power processes of the United States to execute the sentences of a foreign penal judgment, and the manner to ascertain the facts and apply these criteria thereto.
- 3 - It is the belief of this writer that the United States Supreme Court is most likely to hold that:
 - a. The "Treaties" are not violative of or in conflict with the Constitution (although it is possible for the court to evade that question altogether);
 - b. That the United States does recognize and enforce in some ways foreign penal judgments (e.g., extradition);
 - c. That to execute a foreign penal sentence is either (i) an administrative matter akin to the interstate and federal compacts on detention and custody of prisoners or (ii) that it is the ultimate in enforcement of a foreign penal judgment and therefore the United States shall only use its power processes in the event that the foreign judgments meet certain minimum standards of criminal justice;
 - d. That certain minimum standards of criminal justice had to have been applied in the original conviction of the relator and that such standards are: Notice, opportunity to defend, fair and impartial trial, right to counsel, proof of guilt by competent evidence not secured through unreasonable means (though not necessarily measured as in the U.S.), right to appeal;

- e. That a determination of whether or not such standards have been followed or unreasonably denied is a judicial, factual determination which will depend on the facts and circumstances of each case.

- 4 - The outcome of such a decision would be to let the "Treaties" stand, but to open the door to litigation by each and every relator who would then have access to all criminal justice guarantees available in the United States to U.S. citizens which include inter alia: right to court appointed counsel, free transcript, discovery of the government's evidence and right to appeal. Thus, it must be anticipated that each transferred relator will add another case to United States dockets and will pursue all avenues of appeal. In addition, in each case the government may have to produce a record, transcript, or abstract of the entire conviction rendered by the foreign states. The United States must therefore expect that the judicial impact of these treaties is likely to be quite significant considering that only in Mexico at this point in time there are almost 630 likely transferrees. In addition, to which the impact of the transfer of several hundred persons on the already strained correctional system of the United States will be noticeable. The economic consequences of the "Treaties" should therefore be taken into consideration for budgetary purposes otherwise the "Treaties" will enter into effect but their effective implementation and success will be thwarted.
- 5 - A final problematic issue remains with the "Treaties," namely the "return" ⁴¹ of the relator to the "Sending State" if the "Receiving State's" judiciary finds the detention and custody invalid, unlawful or contrary to public policy. The issue of "return" is in the opinion of this writer the most sensitive and difficult one, sensitive because in the event that a relator is released by a United States court and his or her "return" to the "Sending State" is denied it would undoubtedly constitute a serious offense to the national dignity of the "Sending States." Considering also, the freedom with which some United States courts express themselves, an embarrassing situation can occur. However, assuming that no embarrassing language is employed in any court decision, the outcome may still be the release of the relator and the question of "return" would arise. That question is difficult because it can only be answered in light of the proposed implementing legislation which was well thought out and carefully drafted. There is however one flaw in the process of "return" which in the opinion of this writer, cannot be cured by the implementing legislation, namely to consider the relator as subject to extradition and to presume that the offense for which the relator is requested is an extraditable offense irrespective of whether it is a treaty offense between the United States and the requesting state. ⁴² Existing United States law and practice hold that only a treaty offense is extraditable and the "Treaties" with Mexico and Canada do not:

- a. Specifically require extradition, or
- b. Specifically refer to extraditable offenses, or
- c. refer to the bilateral extradition treaties (U.S.-Mexico and U.S.-Canada), or mention that these treaties are complementary with respect to the issue of "return" which would become extradition (under the proposed implementing legislation) and therefore subject to the extradition treaty and U.S. laws and practices.

6 - It is the specific recommendation of this writer that an amending protocol to these "Treaties" be made to state specifically that the "return" of the transferee is to be deemed an act of "extradition" and that the Protocol is to serve also as an amendment to the bilateral extradition treaty between the two respective countries whereby the special procedures set forth in the proposed implementing legislation can be included in the Protocol and thus become enforceable by treaty.

Failure to amend the "Treaties" as suggested is likely to result in the judicial release of the relator in the United States and the inability to "return" them to the "Sending States" to the embarrassment of all countries concerned and a likely deleterious effect on their respective friendly relations.

FOOTNOTES

1. See, 8th Amendment to the U.S. Constitution; Article 5 of the Universal Declaration of Human Rights, General Assembly Resolution 217, U.N. Doc. A/810 (1948), Article 6 of the International Covenant on Civil and Political Rights, adopted by Resolution 2200(XXI) of the General Assembly, 16 December 1966; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 November 1950; Council of Europe, European Convention on Human Rights: Collected Texts, Section 1, Doc. 1 (7th ed., Strasbourg, 1971); Article 5 of the Inter-American Convention on Human Rights, signed 22 November 1969, O.A.S. Treaty Series No. 36 at 1-21; Also, Nationality of individuals concerned has formed the basis of two theories of jurisdiction under international law: See, Bassiouni, International Extradition and World Public Order, pp. 251-59 (1974); Concern over treatment of nationals abroad, even when subject to jurisdiction of a foreign court, has been raised in judicial decisions:

278 F. 2d, 77 (2d. Cir., 1960), cert. den.
364 U.S. 851, 81 S. Ct. 97 (1961).

In Gallina v. Fraser, / the United States Court of Appeals for the Second Circuit bowed to precedent and followed the rule of non-inquiry, but indicated that given a proper case, that rule might not be rejected. In this case, Gallina had been tried and convicted *in absentia* by the Italian courts for the crime of robbery. Gallina petitioned the federal district

court for a writ of *habeas corpus*, contending that if extradited to Italy, he would be imprisoned without retrial and without an opportunity to face his accusers or conduct any defense. Judge Waterman stated:

... (W)@ have discovered no case authorizing a federal court in a *habeas corpus* proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition . . . Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment too antipathetic to a federal court's sense of decency as to require re-examination of the principle set out above. [Emphasis added]. p.78

"This was not such a case, however, because Gallina had been represented by counsel at his trial, and was tried along with his alleged associates who were present before the Italian court and were also convicted.

The United States courts have so far refused to undertake a factual inquiry into the individual's prospective treatment by the requesting State but in the event Judge Waterman's views prevail in some future case, the court might refuse to surrender the fugitive to an oppressive or arbitrary system. In this case the alternative must be to prosecute the relator in the United States or to have the relator transferred back to the U.S. for the execution of the sentence," Bassiouni, *supra*, pp.530-31.

See Also, Peroff V. Hylton, 542 F. 2d. 1247 (4th Cir., 1976), where in the court states

"A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present... when it appears that, if extradited, the individual will be persecuted not prosecuted, and subjected to grave injustice." p. 1249.

2. Rehabilitation is the heart of modern theories of criminal sanctions, and is the basis of the American Law Institute's Model Penal Code, adopted in some modified version by 22 states of the United States, See Bassiouni, "The Sources and Limits of Criminal Law in the United States," 46 Revue Internationale de Droit Penal 301 (1975). The importance of the rehabilitative process to the State whose nationality an offender holds arises from the general practice of returning foreign offenders to the State of their nationality once their sentences are completed. See, e.g., L. Orland, Judgment, Punishment, the Correctional Process (1977), M.C. Bassiouni, Criminal Law and its Processes (1969) at p. 33; and Bassiouni, Report to the Fifth U.N. Congress on Crime Prevention, Geneva, 1-12 September 1975 on "The Future of Imprisonment;" For an historical basis see, J. Bentham, Principles of Penal Law, pt. 11, Bk. J, Ch. 6 (Browning ed., 1943).

3. H. Grutzner, "International Judicial Assistance and Cooperation in Criminal Matter," p. 189 in M.C. Bassiouni and V.P. Nanda, A Treatise on International Criminal Law, Vol. 2 (1973); and European Committee on Crime Problems of the Council of Europe, Problems Arising from the Practical Application

of the European Convention on Mutual Assistance in Criminal Matters (1971), and G.O.W. Mueller and E.H. Wise, International Criminal Law (1965) p. 479 reprinting, Pye, "The effect of Foreign Criminal Judgments within the United States," 32 Kan. L. Rev. 114 (1964).

4. See, A. Ehrenzweig, Treatise on the Conflict of Laws p.215 (1962).
5. D. Oehler, "Recognition of Foreign Penal Judgments and Their Enforcement" in M.C.Bassiouni and V.P. Nanda, supra note 3.
6. Arrangements of this kind, based on such federal legislation as 14 Stat. 484 (March 2, 1867), have been found valid and discretionary in character despite complaints by the party imprisoned. Brede v. Powers, 263 U.S. 4, 44 S. Ct. 8 (1923); Ex parte Henderson, 93 U.S. 405, (1876); Ex parte Karstendick, 93 U.S. 396, (1876).
7. In The Antelope, 10 Wheat. 66, 123 (U.S. 1825), Chief Justice Marshall declared: "The courts of no country execute the penal laws of another."

It may be noted that the penal sentences involved in the U.S.-Mexico and U.S. Canada treaties do not include fines or criminal sanctions other than restraints on liberty-confinement, probation, parole, some form of supervision. But see, Cooley v. Weinberger, 518 F. 2d. 1151 (10th Cir. 1975) wherein an Iranian conviction for the murder of her spouse was given legal effect in the context of determining a woman's eligibil-

ity to receive social security benefits, discussed in M.A. Foran-Rogers, "Recognition of Foreign Countries' Penal Judgments," The Globe, vol.14 No.6, ISBA Newsletter (1977), M.C. Bassiouni, ed.

8. See e.g., M.C. Bassiouni, International Extradition and World Public Order (1974).
9. Discussed in S.F. Bemis, Jay's Treaty: A Study in Commerce and Diplomacy (2d ed. 1965).
10. See, U.S. v. Rauscher, 119 U.S. 407, 7 S. Ct. 234 (1886).
11. See, Bassiouni, supra note 8 at 24-44; and I.A. Shearer, Extradition in International Law (1971).
12. Ehrenzweig, supra note 4 at 160.
13. Id. at 161-166. See also, Homburger, "Recognition and Enforcement of Foreign Judgments," 18 A.M.J.Com.L. 367 (1970); See also, Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895) and Ritchie v. McMullen, 159 U.S. 235/(1895), 16 S. Ct. 281, Johnston v. Compagnie Generale Transatlantic, 242 N.Y. 381, 152 N.E. 121 (1926); for an excellent discussion see, Cherun V. Frishman, 236 F.Supp. 292 (D.C.D.C. 1964).
14. 9B Uniform Laws Annotated (1957).

15. See, Ehrenzweig, supra note 11 at 204.

16. Uniform Extradition Act., 9B Uniform Laws Annotated (1957), e.g., Ill.Rev.Stat. Ch.60, §18 (1977).

17. Interstate Corrections Compact, e.g., Ill.Rev.Stat. Ch.38, §1003-4-4 (1977), and §709 American Law Institute, Model Penal Code, (Proposal Official Draft, 1962).

18. See, Gordan B. Baldwin, "Report on Prisoner Exchange Agreements," Department of State, 20 July 1976, who refers to various U.S. precedents on the enforcement of foreign criminal penalties such as: Sec. 5 of the "Service Courts of Friendly Forces Act," Act of 30 June 1944, 58 Stat. 643, 22 USC 705, which authorizes confinement in Federal facilities of persons serving sentences imposed by foreign courts-martial and the enforcement in the U.S. of criminal sanctions imposed by foreign consular officers, 22 USC 256-258a, upheld in Dallemagne v. Moisan, 197 US 169, 25 S. Ct. 422 (1905).

19. 17 U.S.T. 1677; T.I.A.S. 6127, signed at Seoul 9 July 1965, effective 9 February 1967.

20. Cooley v. Weinberger, supra note 7.

21. A.A. Ehrenzweig, Private International Law (1973).

22. Ehrenzweig, *supra* note 4, at 204 and Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 244 (1892).

23. Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y. 2d. 9, 254 NYS 2d. 527, 203 N.E. 2d. 210; Paulsen and Sovern, "Public Policy in the Conflict of Laws" 56 Colum. L. Rev. 969 (1956); E. Stimson, Conflict of Criminal Laws, p. 20 *et seq.* (1936) and H.F. Goodrich and E.F. Scales, Conflict of Laws (9th ed. 1964) p. 14-15.

24. See, supra note 8.

25. Wilson v. Girard, 354 U.S. 524, 77 S. Ct. 1409 (1957).

26. A. Hooper, Cases and Material on Canadian Criminal Procedure (1974); P.M. Bolton, Procedure and Practice in Canadian Criminal Trials (1974); R.E. Salhany, Canadian Criminal Procedure (1972); A.E. Popple, Criminal Procedure Manual (1956).

27. All constitutional guarantees of the "Constitucion Politica de los Estados Unidos Mexicanos" are expressly made applicable to foreigners by virtue of Article 33 thereof. The relevant guarantees are:

Article 14 - Prosecution before "previously established tribunals in which the essential formalities of procedure shall be complied with and in conformance with laws..."

Article 16 - Arrest orders will be issued only by competent judicial authority upon a complaint supported by an affidavit of a reliable person, except when the crime occurs in the presence of a detaining officer.

Article 19 - No detention may exceed three days unless there is a formal judicial order stating the crime alleged, its elements, and establishing a prima facie showing of responsibility.

Article 20 - A person may not be compelled to testify against
(II) himself nor held incommunicado in order to coerce him.

Article 20 - A prisoner shall be told in a public hearing within
(III) 48 hours of formal detention the name of his accuser and the nature of the charges.

Article 20 - The prisoner has a right to confront and cross
(IV) examine witnesses against him.

Article 20 - An accused may call his own witnesses and is
(V) entitled to court assistance in procuring them.

Article 20 - An accused is entitled to a public trial by a
(VI) judge or a jury of his peers if the sentence faced is more than one year in prison.

Article 20 - An accused has the right to be represented by
(IX) counsel of his choice or by a public defender.

Article 20 - Time served prior to sentencing is subtracted from
(X)
from the sentence.

Article 25 - Excessive and unusual penalties are forbidden.

See, R. Miller, "Mexican Jails and American Prisoners," 51
L.A.B.J. 439 at 442-43 (1976); and G. Colin Sanchez, Derecho
Mexicano de Procedimientos Penales [1st ed., 1964].

28. European T.S. No. 70, May 28, 1970. The International Association of Penal Law has consistently advocated this approach, see, M.S. Harari, R.J. McLean, J.R. Silverwood, "Reciprocal Enforcements of Criminal Judgments," 45 Rev. Int. de Droit Penal 585 (1974), for a proposed convention on reciprocal enforcement of penal judgments; See also, European Committee on Crime Problems of the Council of Europe, Aspects of the International Validity of Criminal Judgments, (1968) and Explanatory Report on the European Convention on the International Validity of Criminal Judgments (1970).
29. The Convention Among Belgium, Luxembourg and the Netherlands on the Cooperation in the Field of Customs and Excises of Sept. 5, 1952, Kraelle, K., Le Benelux Commente, Textes Officiels 147, 209, 306 (1961). An additional Benelux Convention, the "Treaty on Execution of Criminal Judgments," was signed Sept. 26, 1968.
30. Reproduced in H. Grutzner, Internationaler Rechtshilfeverkehr in Strafsachen, pt. IV (1967).

31. Reproduced in 52 Rev. Critique de Droit International Prive 863 (1963), discussed in Shearer, "Recognition and Enforcement of Foreign Criminal Judgments," 47 Australian L.J. 585 (1973).

32. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). See also, 6 M. Whiteman, Digest of International Law, 889 (1968).

33. Bassiouni, "Theories of Jurisdiction and Their Application in Extradition Law and Practice", 5 Cal. West.Int. L.J. 1374 and George, "Extra-territorial application of Penal Legislation," 64 Mich L. Rev. 609, (1976) and Feller, "Jurisdiction Over Offenses with a Foreign Element," in Bassiouni and Nanda, supra note³ at p.5.

34. See, Bassiouni, supra note 8, page 40-43.

35. See, Bassiouni, supra note 8 at 47-50.

36. See, Coker, "The Status of Visiting Military Forces in Europe" in Bassiouni and Nanda, supra note 3 at 1-15.

37. Wilson v. Girard, supra, note 25. See, however, Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222 (1951), and also Holmes v. Laird, 459 F. 2d. 1211, cert. den. 409 U.S. 869, 93 S.Ct. 197 (1972).
38. Kerr v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509 (1952).
39. Bassiouni, "Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition," 7 Vanderbilt J. Trans. L. 25 (1973) reprinted in M.C. Bassiouni, International Extradition and World Public Order (1974), p. 121-201.
40. U.S. v. Toscanino, 500 F. 2d. 267 (2d. Cir. 1974), (subsequently limited in U.S. ex rel. Lujan v. Gengler, 510 F. 2d. 62 (2d Cir. 1975) and U.S. v. Lira 515 F. 2d. 68 (2d Cir. 1975).
41. Proposed implementing legislation, Title 18 U.S.C., Ch.303, §4114.
42. See, Bassiouni supra note 8 at 1-85.

Mr. BASSIOUNI. The main concern that I have in the legislation presented is the return procedure. The treaties do not deal with the question of return. It might be assumed that at this point in time both Mexico and Canada is not necessarily sufficiently interested in the return in the event people are released in the United States. Nevertheless it appears in the legislation and it may be that there is concern for return of released offenders. I do not know what the diplomatic record indicates as far as the negotiations for inclusion of that provision in the legislation. The problem of that provision is that it starts by saying that the return is going to be governed by extradition procedures, and then it follows by saying, "However, it shall not be considered a matter of extradition."

I have serious concerns about whether or not such a return procedure will not be considered by the court as merely another form of extradition, even though the legislation seeks to call it something else. If that is the case, then there are some provisions which I believe will be considered unconstitutional or at least will be subject to challenge.

One is those is the question of probable cause. In accordance with the present legislation, an exception to the probable cause requirement in title 18, section 3184, is the introduction into evidence of the certified record of the conviction and sentence. That should take the place of the inquiry into probable cause.

If this procedure is deemed to be a procedure of extradition, it seems very likely that this provision will be held to be in conflict with 3184 and is not likely to be deemed to supersede it and will not be accepted by the courts; 3184 will be followed instead of 4114 of the proposed legislation.

If that is the case, then I think the Government should be ready to defend probable cause hearings and thus to have available the necessary records in order to defend them.

In addition to that, the legislation provides that the offense shall be deemed an extraditable offense in the extradition treaties. It seems to me that it is rather incongruous that we should attempt to amend the extradition treaties of Mexico and Canada by this type of legislation. Considering in particular that title 18, section 3181 requires an extradition treaty and require that the procedure for extradition be in conformity with the treaty provisions—namely the existence of extraditable offenses listed therein.

I think those two provisions should be looked at with a great deal of attention.

There is here an opportunity to explore further and try to develop a new procedure, a sort of an alternative modality of rendition other than extradition under this new *sui generis* return procedure. In that case I would suggest that it be redrafted to avoid many of the references to extradition procedures so that the courts not consider that to be extradition by another name. I would doubt very much the constitutionality of such a process and would feel much more comfortable if it would squarely be considered a matter of extradition by amending sections 3181 and 3184 to say for example:

In the extradition of a certain class of offenders namely those transferred for the execution of sentences, probable cause shall not be required and only the certified copy of the conviction shall be sufficient.

I doubt very much if this would withstand the challenge of applicability of the fourth amendment, but I think it would probably be more successful than the other approach.

Senator BIDEN. You doubt it?

Mr. BASSIOUNI. Yes; I doubt it. I think that the embodiment of the probable cause requirement in section 3184 was in response to fourth amendment requirements.

As to the question of the minimum criminal justice standards employed in any of the countries from which people shall be transferred, I think there are two questions that merit consideration here. One is the manner in which the conviction was secured and the other one is whether or not U.S. public officials were involved in securing it.

We do have dicta in *U.S. v. Toscanino* about the possibility of requiring certain constitutional limitations on U.S. public officials abroad. Thus, the involvement of U.S. public officials in securing the evidence upon which the conviction was based or in being participants in the conviction itself may, in my opinion, it would be grounds for vitiating that conviction and allowing the court to overturn it.

On the other hand, I am sure that the courts will consider the application of certain minimum criminal justice standards to any country. In that respect again I emphasize the importance for the Government to have adequate records available as to each and every individual transferred, particularly with relationship to the circumstances leading to the arrest, and the evidence secured upon which the conviction was based.

With that, Mr. Chairman, maybe I can end my oral presentation and be available for any questions you may have.

Senator BIDEN. A question was raised by Senator Mathias earlier which was not encompassed in this proposed legislation. This was with regard to those awaiting trial in a Mexican jail.

What method is available to us? I realize this is not encompassed in this legislation but it is a concern that I have. What is the method available to us, if any, to provide for the transfer of those prisoners prior to a hearing or trial in that country? In other words, is it possible for an American citizen to be tried in an American court for an offense committed in a foreign country?

Mr. BASSIOUNI. Yes; it is. The Council of Europe has experimented with the possibility of a European treaty on that subject concerning the transfer of criminal proceedings. I think it would be very possible to draft a treaty whereby there would be a transfer of the criminal proceedings of one awaiting trial in a particular country to be tried in another country. In that case we would apply by analogy the same approach that the Federal courts would be applying sitting in State courts; namely, the substantive law of the country wherein the offense was committed and the procedural rules wherein the adjudicating court would be sitting.

Senator BIDEN. Could that be done and meet constitutional tests of the United States? We could do that by treaty in terms of getting an agreement from other countries, but you have no doubt that we could draft a treaty that would meet all constitutional requirements in the United States for trying a person arrested, let's say, in Mexico, on a criminal charge in Mexico but holding the entire trial in the United States? You believe that could be done?

Mr. BASSIOUNI. I believe that if we satisfy the requirement of double criminality, which is also the basis of this particular process, and have the consent of the transferee, we certainly would be able to do that. I think the biggest problem in terms of constitutionality as it is with the existing treaties are matters of procedure as opposed to matters of application of the substantive law of the particular country.

By transferring the criminal proceedings our problem would be essentially a jurisdictional one. But if the jurisdiction is consented to by the transferee and we would apply U.S. criminal procedures with the same safeguards available here, then I think that might probably be more successful as an approach than the approach which is predicated on the recognition of a foreign penal judgment and its enforcement in the United States.

Senator BIDEN. Have you had an opportunity to glance over the proposed amendments of the Justice Department?

Mr. BASSIOUNI. Yes.

Senator BIDEN. Do you feel that the major point concerning the use of the judicial officers to verify the voluntariness of the consent is satisfactorily met in these amendments?

Mr. BASSIOUNI. Yes; I believe so.

Senator BIDEN. We have apparently a large group of Americans in Mexico who are anxious for this transfer, at least it appears that way. Beyond this group, do you see that this effort to exchange prisoners would have much use in the future? Obviously we have one group that is waiting. If Mexico has altered their penal system or their criminal code to apply much less severe sanctions for violations which have caused the uproar in the United States, then do you see where implementation of this treaty, this legislation, would be widely used?

Mr. BASSIOUNI. Yes; I do. I might indicate this. In several decisions of the U.S. court of appeals, particularly the dicta in the one case I'm referring to is *Gallina v. Fraser* which is a landmark case. The courts seemed to indicate that the traditional rule of noninquiry with respect to extradition proceedings whereby a court would not look into the treatment received by the relator once he is transferred to another country might be reexamined if the conditions would constitute the equivalent, let's say of cruel and unusual punishment.

While this is only a matter of dicta at this point, it would seem to me that if we had such agreements with other countries, then we could enter into conditional extradition agreements or conditional extradition warrants with respect to a given individual whereby that individual would be transferred to the requesting country for purposes of trial but then by agreement returned to the United States for execution of the sentence.

This would apply in a situation, for example where a particular country's criminal justice system may be deemed on its face so offensive that a court may reject the rule of noninquiry in saying "notwithstanding the crime for which the individual is requested, the criminal justice system there or the prison conditions there are so inhumane that we will just refuse to allow extradition."

Such a treaty would then obviate this if the extradition could be conditional.

Senator BIDEN. Professor, I have several more questions but under the Senate rule I must stop this hearing at 10:30 because we cannot meet beyond that point because the full Judiciary Committee will begin meeting at that time.

Consequently, anything that we put on the record from that point on is challengeable as not having been on the record and can be expunged. So, what I would like to ask you is this. I know you have been through this before both in the Foreign Relations Committee and in here. You have been a great help to our staff and the staff of both committees. I would like to continue to call on you in this regard.

Mr. BASSIOUNI. Thank you Mr. Chairman, I will be glad to be of assistance.

Senator BIDEN. Further I would like to explore the possibility of drafting legislation beyond this legislation to meet the initial concern that was raised by Senator Mathias about people awaiting trial. There are a number of other countries which I will not name specifically now where the main criticism is not that sentencing after a conviction is in fact too severe or that the jails are too inhumane, but that the time or process awaiting trial is so long and so uncertain that it does bring upon families and individuals an incredible amount of pressure. They do not have any idea whether or not they are going to get to trial and whether anybody even knows they are there or whether or not they have been forgotten.

I would like very much for us to attempt to address that question also. So I would like to explore that with you if I may.

Mr. BASSIOUNI. I would be delighted.

Senator BIDEN. We thank you very much for your testimony. I appreciate your coming.

Before we adjourn this morning, we will continue these hearings tomorrow morning. The witness list will include several people, most of whom are either former prisoners in foreign jails or parents of prisoners in foreign jails. This is in addition to U.S. District Court Judge Oliver Gasch. We will have seven witnesses tomorrow. The hearings will begin tomorrow at 10 a.m. So we will recess until tomorrow at 10 o'clock.

[Whereupon, at 10:25 a.m., the subcommittee stood in recess.]

TRANSFER OF OFFENDERS AND ADMINISTRATION OF FOREIGN PENAL SENTENCES

THURSDAY, JULY 14, 1977

U.S. SENATE,
SUBCOMMITTEE ON PENITENTIARES AND CORRECTIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 6226, Dirksen Senate Office Building, Senator Joseph R. Biden, Jr. (chairman of the subcommittee) presiding.

Staff present: James G. Meeker, staff director; and Judith E. Snopek, chief clerk. Also present: Jerry Doherty, Katrina Lantos, Michael Klipper.

Senator BIDEN. The subcommittee will come to order.

I am pleased to convene the second day of hearings on S. 1682, legislation to implement treaties signed by the United States and Canada and Mexico for the transfer of prisoners. One of the principal questions surrounding these treaties and this legislation is whether or not this transfer fits within the framework of our Constitution, because it would require us to imprison people who have not been convicted of violating our laws, but the laws of another nation.

The legal arguments and expert opinion to which this subcommittee has been exposed have a predominant theme—that in the preponderance of cases the transfer would meet the standards of our Constitution, so long as the consent to transfer and the waiving of rights is freely and knowingly given.

Although the main focus of our hearing this morning is the prisoners themselves, and hardships which they and their families have suffered, we will also explore the adequacy of the waiver proceedings. U.S. magistrates and the public defender organizations which serve our courts would have key roles in these proceedings.

In order that the subcommittee build the best possible record as to the legal and constitutional questions, I ask unanimous consent to insert in the hearing record three legal memorandums on this point.

[The material follows:]

NOTE

CONSTITUTIONAL PROBLEMS IN THE
EXECUTION OF FOREIGN PENAL SENTENCES:
THE MEXICAN-AMERICAN PRISONER TRANSFER TREATY

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CONSTITUTIONAL PROBLEMS IN THE EXECUTION OF FOREIGN PENAL SENTENCES: THE MEXICAN-AMERICAN PRISONER TRANSFER TREATY

In the summer of 1976, the Mexican government proposed that Mexico and the United States study the possibility of transferring prisoners.¹ Acting on that initiative, the Department of State entered into negotiations which culminated in the Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences.² The proposed treaty³ would permit some Americans held in Mexican prisons to elect, with approval of both nations' authorities, to serve the remainder of their sentences in United States facilities.⁴ Mexicans imprisoned in this country would have the option to serve their sentences in Mexican prisons.⁵ A prisoner is eligible for transfer, however, only if he is convicted of an offense "which would also be generally punishable as a crime in the Receiving State."⁶ Those held for political, immigration, and military offenses are also excluded from the transfer program.⁷ Nor will transfer be approved while an appeal or collateral attack on the prisoner's conviction or sentence is pending or before the expiration of the period in which an appeal may be taken.⁸

¹ N.Y. Times, June 14, 1976, at 11, col. 1; *Mexico Plans to Let Foreigners Serve Prison Terms at Home*, *id.*, Sept. 6, 1976, at 3, col. 2.

² Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, reprinted in *TREATY WITH MEXICO ON THE EXECUTION OF PENAL SENTENCES*, S. EXEC. DOC. D, 95th Cong., 1st Sess. (1977) [hereinafter cited as Treaty].

³ The Treaty was submitted to the Senate on Feb. 15, 1977, where it now awaits the Senate's advice and consent. 123 CONG. REC. 2763 (1977) (remarks of Sen. Byrd).

⁴ Treaty art. IV, paras. 2 & 3. The Treaty specifies that transferred offenders shall be received into federal custody. *Id.* para. 5.

⁵ *Id.* art. I, para. 2.

There are approximately 1,200 Mexicans in federal prisons in this country. The number in state prisons is uncertain. Interview with William Kenney, Criminal Division, Legislation and Special Projects Section, Dep't of Justice, in Washington, D.C. (April 5, 1977).

⁶ Treaty art. II, para. 1.

⁷ *Id.* para. 4. The exclusion of immigration offenders is significant because approximately 600 of the 1,200 Mexicans in United States federal prisons have been convicted of immigration offenses. Interview with William Kenney, *supra* note 5.

⁸ Treaty art. II, para. 6.

The Treaty is not entirely clear about the way in which the process for transfer is to be initiated. Article II, para. 6 speaks of a "petition," suggesting that the prisoner is expected to take the initiative. Article IV, para. 1, on the other hand,

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A principal feature of the Treaty is its reservation to the transferring state of exclusive jurisdiction "over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts."⁹ This clause prompts questions about the nature of the right to habeas corpus within our own system and about its primary functions. Even more fundamental are the problems it poses concerning the status of due process claims that transferred Americans may press in American courts with regard to their original convictions. Does the Constitution require the discharge of American transferees if their treatment in the Mexican system did not satisfy American due process standards? If so, may Congress nevertheless prevent American courts from scrutinizing the process afforded Americans in Mexico when transferees petition for habeas corpus?

Resolution of these questions will determine more than the fate of Americans in Mexican prisons.¹⁰ Problems surrounding the imprisonment of Americans abroad can generate tensions which complicate other aspects of United States relations with the imprisoning country.¹¹ As a palliative to those tensions, this Treaty may test the efficacy of a new instrument of United States diplomacy.¹² More importantly, questions about the con-

states that "[e]very transfer under the Treaty shall be commenced by the Authority of the Transferring State."

⁹ Treaty art. VI.

¹⁰ There are approximately 600 Americans in Mexican detention (both awaiting trial and under sentence). See *N.Y. Times*, June 14, 1976, at 11, col. 1 (580 Americans in Mexican jails); *U.S. Citizens Imprisoned in Mexico: Hearings Before The Subcomm. on International Political and Military Affairs of the House Comm. on International Relations* (pt. III), 94th Cong., 2d Sess. 22 (1975-1976) (603 Americans in Mexican jails) [hereinafter cited as *House Hearings*].

¹¹ There are more than 3,000 Americans in foreign prisons. Interview with William Kenney, *supra* note 5.

For evidence of the diplomatic tensions related to the detention of Americans in Mexico, see Letter from Secretary of State Henry Kissinger to the Speaker of the House of Representatives (Nov. 10, 1976) (reporting that the United States Embassy in Mexico had sent "nine diplomatic notes to the Mexican Government protesting alleged mistreatment of detained American citizens"). The prisoner transfer proposal was evidently an attempt by Mexico to defuse such tensions. See *N.Y. Times*, Sept. 6, 1976, at 3, col. 2. Article IV, para. 4 of the Treaty suggests, however, that prisoner transfers are intended to enhance prospects for the rehabilitation of offenders.

¹² This treaty may be a forerunner of other, similar agreements; a second prisoner transfer treaty, with Canada, has been signed and submitted for Senate approval. *N.Y. Times*, March 3, 1977, at 7, col. 1.

Agreements of this sort are not entirely new in American experience. Article XXII (7)(b) of the United States' Status of Forces Agreement (SOFA) with the Republic of Korea, July 9, 1966, 17 U.S.T. 1677, 1697-98, T.I.A.S. No. 6127, provides that South Korea is to give "sympathetic consideration" to any United States request to take custody of United States citizens sentenced by Korean

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stitutionality of this Treaty¹³ demand an examination of the elusive notion of due process and of the foundations of federal jurisdiction. Posed generally, these are provocative and far-reaching questions; yet their unusual genesis warns against approaching them solely in terms of familiar doctrinal categories. A prudent court will avoid the broadest constitutional challenges to the Treaty, and will instead consider its political implications, as well as its limited effect, as reasons to decide the Treaty's fate on more narrow grounds.

This Note will argue that an American whose Mexican sentence is executed in the United States has a cognizable due process claim against an unreliable conviction, although he may assert no right to release on the basis of invasions of his privacy that do not undermine the reliability of the Mexican trial. Asserting a constitutional requirement that *some* court be available to hear due process claims, the Note will argue that the Treaty's denial to American courts of jurisdiction to entertain due process challenges to Mexican convictions is constitutionally suspect. Finally, it will propose that the constitutional deficiency may be overcome by requiring as a condition of transfer that a prisoner waive all right to challenge his Mexican conviction in an American court.

I. THE RIGHTS OF AMERICANS WHOSE FOREIGN PENAL SENTENCES ARE EXECUTED IN THE UNITED STATES

The denial to American courts of jurisdiction to review the criminal process underlying the convictions of American trans-

courts under the terms of the Agreement. That provision has never been implemented, however. Letter from John E. Kelley, First Secretary, United States Embassy, Seoul (Feb. 4, 1977) (on file at the Harvard Law School Library).

Indeed, the idea is an old one. See, e.g., Swiss Federal Act of Jan. 22, 1892, quoted in Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261-62 (M. Bassiouni & V. Nanda eds. 1973). The recent proliferation of prisoner transfer agreements, especially in Europe, underlines their usefulness as instruments of diplomacy. See, e.g., European Convention on the International Validity of Criminal Judgments, May 28, 1970, Europ. T.S. No. 70; Scandinavian Act of Enforcement of May 22, 1963, cited in Oehler, *supra*, at 263 n.3. See also De Schutter, *International Criminal Cooperation—The Benelux Example*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW, *supra*, at 249, 254-58. See generally Hulsman, *The Role of Sentences Passed in the Absence of the Accused in Arrangements for the Enforcement of Foreign Criminal Sentences*, in ASPECTS OF THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS 29 (European Comm. on Crime Problems, Council of Europe, Strasbourg, 1968).

¹³ The treaty power of the federal government is limited by the Constitution and especially by the requirements of the Bill of Rights. See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (dictum); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 137-56 (1972).

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feres poses a constitutional problem only if a Mexican procedural defect can support an American due process claim. If it cannot, then the question whether some court must be available to hear such claims becomes moot.

Strictly speaking, it is impossible for Mexican authorities to violate the American Bill of Rights. While the Constitution prescribes the elements of due process for American courts, it has no legal effect upon the procedures of a foreign system.¹⁴ Because the prisoner transfer bifurcates the criminal process between two nations, however, the simplicity of this constitutional territoriality is destroyed. The constitutional limitations upon the role of the United States in that process are therefore susceptible of alternative conceptualizations. Under the first, the limited extent of United States participation is emphasized in order to suggest that no constitutional infirmity exists because all possibly objectionable acts are done by Mexican officials beyond the reach of the Constitution.¹⁵ The second view denies that the process can be so segmented, and instead perceives the United States and Mexico as joint venturers, each fully responsible for the acts of the other at any point before, as well as after, the transfer.¹⁶ In deciding whether either of these conceptual models assists analysis of the due process rights of transferred prisoners, it may be useful to consider three situations in which more than one sovereign participates in the criminal process.

¹⁴ See *Neely v. Henkel*, 180 U.S. 109, 122 (1901); *In re Ross*, 140 U.S. 453, 464 (1891); cf. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) (Marshall, C.J.) (dictum) ("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself."). It is a basic principle of international law that each nation has exclusive jurisdiction over crimes committed within its territory. See, e.g., *The SS "Lotus,"* [1927] P.C.I.J., ser. A, No. 9 at 18; Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1046-47, 1053-54 (1957).

¹⁵ It is assumed that no United States government agent has participated in any act in Mexico which would have infringed constitutional rights if done under color of American law. But see *House Hearings* (pt. I), *supra* note 10, at 5 (statement of Hon. Fortney H. Stark) (alleging that American Drug Enforcement Agency officers were present while American prisoners were tortured). Proof of participation by a United States agent would present a strong case for the applicability of United States constitutional guarantees, if that participation rose to the level of a "joint operation" with foreign authorities, *Stonehill v. United States*, 405 F.2d 738, 744 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), or if the United States official "induced foreign police to engage in conduct that shocked the conscience," *Birdsell v. United States*, 346 F.2d 775, 782 n.10 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965). See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

¹⁶ The implication of this view is that, theoretically, any violations of the Mexican Constitution by American authorities prior to or during execution of a transferred American's sentence would be cognizable in Mexican courts as violations by Mexico itself.

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Courts considering whether to incorporate prior foreign convictions into American sentences through so-called multiple offender statutes¹⁷ have felt obliged to consider the fairness of the process by which the earlier convictions were obtained.¹⁸ Insofar as many of these cases dealt with convictions obtained in sister states of the United States, the mutual subordination of the states to the Constitution arguably renders those cases inapposite to the Treaty. But, in fact, courts have declined to distinguish non-American and sister state convictions in the multiple offender context, reasoning that in both cases "the utilization in a state of an unconstitutional conviction to increase a sentence works to the prejudice of the party claiming the protection of our Constitution."¹⁹

The circularity of this reasoning obscures the critical difference between prior American and prior foreign convictions in which due process violations are alleged to inhere: the former, but not the latter, would be per se constitutional violations. More importantly, the rationale of the multiple offender cases in either setting makes them irrelevant to the due process problem presented by the Treaty. As Judge Friendly has pointed out, the multiple offender cases address the use of prior convictions "as a requirement compelling a longer sentence *ex proprio vigore*."²⁰ Whereas under the Treaty an American court merely executes the foreign conviction and thereby imposes no additional cost upon the prisoner, in the multiple offender cases the foreign conviction actually serves as the predicate for an increased sentence for the second offense.

The United States traditionally has given direct assistance to foreign criminal law enforcement in the form of extradition, and the courts have found no barrier to the extradition of Americans for foreign trial²¹ in allegations that foreign procedures fall short

¹⁷ See, e.g., Multiple Offender Law of New York, N.Y. PENAL LAW § 1941 (McKinney 1967).

¹⁸ See, e.g., *Burgett v. Texas*, 389 U.S. 109 (1967); *United States ex rel. Savini v. Jackson*, 250 F.2d 349 (2d Cir. 1957); *United States ex rel. Smith v. Jackson*, 234 F.2d 742 (2d Cir. 1956). For an analysis of the standards by which foreign convictions are applied in the multiple offender context, see Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U.M.K.C. L. REV. 114, 127-32 (1964).

¹⁹ *United States ex rel. Foreman v. Fay*, 184 F. Supp. 535, 539 n.15 (S.D. N.Y. 1960) (Kaufman, J.); see *United States ex rel. Dennis v. Murphy*, 265 F.2d 57 (2d Cir. 1959).

²⁰ *United States ex rel. LaNear v. LaVallee*, 306 F.2d 417, 420 (2d Cir. 1962).

²¹ It was established early that American citizens qualify as extraditable "persons" under the terms of particular extradition treaties, and that the United States therefore will extradite its own citizens when required to do so by treaty. See *Charlton v. Kelly*, 229 U.S. 447, 465 (1913); *United States v. Robins*, 27 F. Cas.

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of American due process standards. In *Neely v. Henkel*,²² the Supreme Court held that fundamental constitutional guarantees "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."²³ A similar result has been reached in cases reviewing the surrender of American servicemen to foreign courts under Status of Forces Agreements.²⁴ Yet *Neely* and its progeny evince a subtle concern that the trial process of the receiving state be basically "fair."²⁵ Nor have any of the extradition or military cases presented a situation in which delivery of an American to a foreign judicial system would have placed him *in extremis*.²⁶

Whether constitutional analysis should focus upon the criminal process as a series of segments or as a seamless unity was an implicit problem in the development of the "silver platter" doctrine.²⁷ Until *Elkins v. United States*,²⁸ decided the year before the exclusionary rule was extended to the states,²⁹ the Supreme Court consistently said that the fruits of state searches and

825 (D.S.C. 1799) (No. 16,175). See generally R. RAFUSE, *THE EXTRADITION OF NATIONALS* 11-31 (1939); Kuhn, *Extradition from the United States of American Citizens Under Existing Treaties*, 31 AM. J. INT'L L. 476 (1937).

²² 180 U.S. 109 (1901).

²³ *Id.* at 122.

²⁴ See, e.g., *Wilson v. Girard*, 354 U.S. 524 (1957); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972).

²⁵ The *Neely* Court ordered extradition after taking note of the fact that it would occur under the auspices of a treaty which required that extradited persons receive a "fair and impartial trial." 180 U.S. at 123 (quoting treaty). A decade after *Neely*, in *Glucksman v. Henkel*, 221 U.S. 508 (1911), Justice Holmes affirmed the *Neely* doctrine in broad outline, but betrayed a lingering concern for the fairness of the system to which extradited persons were sent, saying, "We are bound by the existence of an extradition treaty to assume that the trial will be fair." *Id.* at 512. The same concern was forcefully expressed in *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) (dictum): "We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment, so antipathetic to a federal court's sense of decency as to require reexamination of the principle [that federal courts will not inquire into the sufficiency of foreign due process] . . ."

²⁶ Indeed, the military cases arise under Status of Forces Agreements (SOFA's) which provide extensive procedural safeguards for the foreign trials of American servicemen. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 9, 4 U.S.T. 1792, 1802, T.I.A.S. No. 2846. Courts passing on the legality of surrendering Americans for foreign trial under the SOFA's have found these guarantees significant. See, e.g., *Holmes v. Laird*, 459 F.2d 1211, 1223 & n.92 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972). See also Note, *supra* note 14, at 1066.

²⁷ See *Lustig v. United States*, 338 U.S. 74, 78-79 (1949); Kamisar, Wolf & Lustig, *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

²⁸ 364 U.S. 206 (1960).

²⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

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seizures which would have been unconstitutional if perpetrated by federal officials were admissible in federal courts.³⁰ At a time when federal limitations did not bind the states, therefore, the Court was willing to cabin due process principles within the stages of the criminal process, thus implicitly rejecting a holistic conception of that process as one in which all participating authorities are joint venturers.³¹ Justice Brandeis believed, on the other hand, that the judicial system was debased when it relied upon evidence gained in a manner which would "shock the common man's sense of decency and fair play," although not necessarily in violation of any constitutional mandate.³² Brandeis thus conceived of courts as partners in the entire process of law enforcement, coresponsible for constitutional violations at any stage.

Neither the holistic nor the segmented model of the criminal process is a priori conclusive;³³ certainly the text of the Constitution does not sponsor one or the other. It therefore is more fruitful to analyze the substantive concerns animating the procedural guarantees of the Constitution in order to apply one model or the other in particular contexts. The question whether transferees may bring due process claims in this country predicated on events in Mexico should thus be addressed by considering what interests the fourth, fifth, and sixth amendments embody.

These interests fall into two broad categories: those that

³⁰ See *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (plurality opinion of Frankfurter, J.) (dictum); *Byars v. United States*, 273 U.S. 28, 33 (1927) (dictum); *Weeks v. United States*, 232 U.S. 383, 398 (1914). The "silver platter" doctrine was overturned in *Elkins v. United States*, 364 U.S. 206 (1960). But cf. *United States v. Janis*, 428 U.S. 433 (1976) (evidence seized in violation of fourth amendment by state officers in good faith reliance on a warrant is admissible in a federal civil proceeding); *id.* at 460-64 (Stewart, J., dissenting).

³¹ Much the same notion appears to underlie the rule that evidence obtained through private searches and seizures will not be excluded at trial, even if the search procedure did not comport with the requirements which the fourth amendment imposes upon government agents. See *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Eisentrager v. Hocker*, 450 F.2d 490, 492 (9th Cir. 1971). The *Burdeau* rule in effect compartmentalizes the criminal process by permitting the fruits of intrusive conduct by a private party at a prior stage to be utilized at a later point in time by the Government.

³² *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting); see *Olmstead v. United States*, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting).

³³ The same indeterminate duality has created some confusion in the recognition of foreign civil judgments cases. Compare *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423, 432 (1813), with *Banco Minero v. Ross*, 106 Tex. 522, 537, 172 S.W. 711, 714-15 (1915). Indeed, the leading case of *Hilton v. Guyot*, 159 U.S. 113 (1895), reflects this tension in establishing a general policy of *res judicata* for foreign civil judgments while recognizing that special circumstances may require nonenforcement. See Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 785-95, 800 (1950).

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respond to a concern about the *reliability* of the criminal process as a factfinding instrument, and those which bespeak a desire to protect individual *integrity* from invasive government action.³⁴ The reliability concern — manifest, for example, in constitutional commandments to afford counsel,³⁵ an opportunity to confront and cross-examine witnesses,³⁶ and, perhaps for historical reasons, trial by jury³⁷ — urges that a sanction is justified only if imposed after a full and impartial search for the truth.³⁸ The integrity concern, on the other hand, relates to less instrumental values, such as dignity and privacy.³⁹ Integrity concerns are deontological rather than teleological: unlike failures in the reliability of the process, which are worrisome insofar as they may result in unjustified penalties, assaults on integrity are constitutionally “bad” *per se*.

The criminal process is primarily a truth-seeking endeavor.⁴⁰ Especially in the early stages of investigation, however, that process necessarily affects many of the integrity values protected by the Constitution. Any entity which implements the criminal process must therefore guard integrity values at the same time as it seeks the truth. Those are, indeed, the twin responsibilities of the judicial system. As constitutional bodies, courts superintend the conduct of all actors in the criminal law system by denouncing unduly intrusive actions in particular cases. But not every criminal case involves practices which invade the integrity of the defendant. The hortatory function served by the court when such values *are* at stake may be seen as, in some sense, ancillary to the criminal court’s main task — to ensure that the basis for punishment is a fair and rational inquiry.⁴¹ Thus, the essential difference between the reliability concern and the in-

³⁴ See Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957); Schneckloth v. Bustamonte, 412 U.S. 218, 241-42 (1973); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

³⁵ U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

³⁶ U.S. CONST. amend. VI; Pointer v. Texas, 380 U.S. 400, 403-05 (1965).

³⁷ U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); J. FRANK, COURTS ON TRIAL 108-10 (Princeton ed. 1973) (varying views of the function of the jury).

³⁸ To voice that imperative is not, of course, to confound a right to fair process with a right to truth. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446-49 (1963).

³⁹ See generally Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

⁴⁰ Cf. Bator, *supra* note 38, at 441-43 (search for truth as basic component of criminal process).

⁴¹ See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

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tegrity concern is that protection of the former is the *raison d'être* of the entire criminal process, whereas the latter is implicated in that process only because all government activity — including criminal investigation and prosecution — is potentially threatening to integrity values.

In cases under the Treaty, therefore, claims attacking the reliability of the underlying foreign conviction will present the court with the possibility that the predicate for the American detention was not obtained in a manner calculated to determine guilt or innocence fairly. If the reliability concern embedded in the Bill of Rights demands a fair process as a precondition to punishment, then the absence of such process renders the detention unconstitutional. That result does not ensue, however, if it is found that conduct by Mexican officials intruded upon integrity interests. Insofar as the behavior of domestic law enforcement authorities may abrogate individual integrity, courts properly regulate the criminal justice system to enforce propriety. But this regulation is always incidental to the core function of the criminal process, and is justifiable only in terms of its practical prophylactic effect or the symbolic value of a judicial "clean hands" precept. When foreign authorities violate personal integrity, however, neither rationale applies. Not only can an American court's action have no prophylactic effect,⁴² but the rectitude of American conduct hardly is denigrated by excesses committed by Mexicans in Mexico.⁴³

Determining whether a specific incident of misconduct poses

⁴² See *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir. 1967) ("Neither the fourth nor the fourteenth amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico."); cf. *United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970) (dictum) (*Miranda* rule inapplicable to arrest and interrogation by Canadian authorities), *cert. denied*, 401 U.S. 939 (1971).

⁴³ Although foreign integrity violations will not properly support due process claims against the United States, extreme forms of integrity abuse perhaps ought to be grounds for discharge under some "shocks the conscience" test. Cf. *Rochin v. California*, 342 U.S. 165, 172 (1952) (excluding evidence obtained by "conduct that shocks the conscience"); L. HENKIN, *supra* note 13, at 443 ("[I]t is unlikely that the courts would tolerate any exercise in the United States of a foreign criminal jurisdiction that entailed violations of fundamental fairness or 'shocked the conscience.'"). It may be that many abuses of this sort create reliability problems in any case and that courts should therefore deal with them as with any allegation of unreliability in the conviction procedure.

Any truly outrageous Mexican police conduct which invades only integrity values could also, perhaps, be the ground for discharge as "cruel and unusual punishment" under the eighth amendment. It could be argued, for example, that continued detention in the United States following a particularly onerous period of imprisonment in Mexico would be cruel and unusual punishment.

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a reliability problem or constitutes an invasion of integrity is never easy; the difficulty is compounded when foreign procedures must be evaluated in the light of transnational legal differences. Does, for example, the substitution in the civil law systems of magisterial inquiry for adversarial cross-examination of witnesses derogate from the reliability of convictions under that system?⁴⁴ A reliability standard that is fettered by the peculiar historical development of Anglo-Saxon procedures is too rigid to serve as the basis for evaluating civil law convictions — indeed, it would result in wholesale invalidation.⁴⁵ Rather, a court scrutinizing the reliability of a foreign judicial process should be sensitive to the efficacy of various means to a fair trial.⁴⁶

A court will be encouraged to adopt a nonparochial attitude by reference to the somewhat amorphous law of international due process. The decisions of international tribunals, diplomatic practice, and international agreements have over time generated minimum standards for the judicial treatment of aliens.⁴⁷ Thus, both Mexico and the United States, participating early in this century in a claims commission, treated the assistance of counsel,⁴⁸

⁴⁴ See P. EDER, *COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* 38, 150-51 (1949); G. WILLIAMS, *THE PROOF OF GUILT* 28-32 (3d ed. 1963); Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO ST. L.J. 467, 488-91 (1960).

⁴⁵ See Reese, *supra* note 33, at 796; Von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1662-63 (1968).

⁴⁶ American courts, however, have demonstrated a parochial tendency "to require dogmatic adherence to the absolutism of 'American due process.'" Pye, *supra* note 18, at 130; see Mueller, *International Judicial Assistance in Criminal Matters*, in *INTERNATIONAL CRIMINAL LAW* 410, 428 (G. Mueller & E. Wise eds. 1965) ("Unfortunately, American courts have excelled in unfriendly attitudes toward all questions relating to foreign criminal proceedings, in the erroneous belief that ours alone is a system which guarantees fairness to a criminal defendant.").

⁴⁷ The literature of international due process law is voluminous. Among the most useful studies are R. ELLERT, *NATO FAIR TRIAL SAFEGUARDS, PRECURSOR TO AN INTERNATIONAL BILL OF PROCEDURAL RIGHTS* (1963); A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938); Orfield, *What Constitutes Fair Criminal Procedure Under Municipal and International Law*, 12 U. PITT. L. REV. 35 (1950); Wise, *Note on International Standards of Criminal Law and Administration*, in *INTERNATIONAL CRIMINAL LAW* 135 (G. Mueller & E. Wise eds. 1965).

The vagueness of the standards has been both approved and decried. Compare Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations — A Study*, 10 U.C.L.A. L. REV. 1041, 1086 (1963), with R. ELLERT, *supra*, at 18.

⁴⁸ Parrish Case (United States v. Mexico), [1926-1927] *Opinions of Commissioners Under Convention of Sept. 8, 1923*, at 477, 4 R. Int'l Arb. Awards 314, 316 (1927). See also 2 C. HYDE, *INTERNATIONAL LAW* § 269 (2d ed. 1945).

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disclosure of the charges,⁴⁹ and an adequate opportunity to confront opposing witnesses⁵⁰ as essential to due process. Any international rules applied by American courts will be suggestive rather than imperative.⁵¹ Nevertheless, those rules may be useful as an aid in assessing the protective value of civil law procedures and their due process coefficients under the Constitution. Moreover, resort to international standards may make any American judgments on the fairness of Mexican procedure more palatable to Mexico.⁵²

II. MAY CONGRESS PREVENT COURTS FROM HEARING DUE PROCESS CLAIMS?

The approach developed in Part I raises the possibility that some of the transferred American prisoners will be able to state colorable due process claims on the basis of the unreliability of their Mexican convictions.⁵³ Thus, an American court reviewing the Treaty ultimately may have to determine whether the Treaty's prohibition of challenges to Mexican sentences in American courts runs afoul of a constitutional requirement that *some* court be available to pass on due process complaints.

Article III of the Constitution empowers Congress to "ordain and establish" inferior federal courts.⁵⁴ With rare exceptions,⁵⁵ that provision has not been construed as a mandate that Congress do so.⁵⁶ Given that fact, it makes little sense to contend *solely on the authority of article III* that Congress, having established the federal courts, lacks the power to disestablish them or to curtail their jurisdiction.⁵⁷

⁴⁹ Chattin Case (United States v. Mexico), [1926-1927] Opinions of Commissioners Under Convention of Sept. 8, 1923, at 422, 433, 4 R. Int'l Arb. Awards 282, 290 (1927).

⁵⁰ *Id.* at 434, R. Int'l Arb. Awards at 291.

⁵¹ See Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959).

⁵² See text at notes 106-108 *infra*.

⁵³ See N.Y. Times, May 23, 1976, at 22, col. 1 (allegations of pretrial mistreatment). Claims of pretrial torture may be plausible in light of reports that extorted confessions have become more common in Mexico. AMNESTY INTERNATIONAL REPORT ON TORTURE 193-94 (1973); see Letter from Secretary of State H. Kissinger, *supra* note 11 (reporting "unresolved . . . the problem of physical abuse of some prisoners at the time of arrest and interrogation"); *House Hearings* (pt. II), *supra* note 10, at 9 (statement of Hon. Fortney H. Stark).

⁵⁴ U.S. CONST. art. III, § 1.

⁵⁵ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-31 (1816); *Eisentrager v. Forrester*, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵⁶ See *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551-52 (1962) (Harlan, J.).

⁵⁷ See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("And the juris-

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A stronger argument for compulsory access to judicial review can be inferred from the structure of the Constitution and the supremacy clause.⁵⁸ In *Marbury v. Madison*,⁵⁹ Chief Justice Marshall found authority for the courts' role as final arbiters of the Constitution in the limited nature of the representative government,⁶⁰ in the supremacy clause,⁶¹ and in the obligation of judges to support the Constitution.⁶² The first of these arguments certainly is incomplete: since the whole of the federal government is limited, there is no obvious reason to single out the judicial branch for the ultimate responsibility of defining those limitations.⁶³ What Judge Learned Hand termed the necessity to "prevent the defeat of the venture at hand,"⁶⁴ however, may supply the content of Chief Justice Marshall's logical omission. Were the legislative branch empowered to pass on the constitutionality of its own measures, the policy of limited government — embodied both in the idea of a constitution and in the idea of a

diction having been conferred may, at the will of Congress, be taken away in whole or in part . . ."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (repeal by Congress of appellate habeas jurisdiction of Supreme Court); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

⁵⁸ U.S. CONST. art. VI, cl. 2.

A number of courts have suggested, without elaboration, that the structure of the Constitution demands some judicial review. See, e.g., *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring); *Eisentrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (*semble*); *Cortright v. Resor*, 325 F. Supp. 797, 810 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). See also Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). Another theory that has been offered to support a right of judicial review is that such a right is inherent in the notion of "due process." See *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

⁵⁹ 5 U.S. (1 Cranch) 137 (1803).

⁶⁰ *Id.* at 176-77.

⁶¹ *Id.* at 180.

⁶² *Id.*

⁶³ See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 3-4 (1962); L. HAND, *THE BILL OF RIGHTS* 10-11 (1958).

⁶⁴ L. HAND, *supra* note 63, at 14. Judge Hand saw judicial review as a "practical condition" of the operation of the Constitution, not as a "logical deduction" from the document — therefore the principle was to be accorded less weight. *Id.* at 15. The distinction which Hand made, however, partakes of a mode of constitutional construction that is hardly tenable in light of modern linguistic philosophy, which rejects the notion that meaning can be "deduced" from words. See W. QUINE, *WORD AND OBJECT* at ix (M.I.T. ed. 1960); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I para. 81 (3d ed. G.E.M. Anscombe trans. 1958); *id.* at para. 206 ("The common behaviour of mankind is the system of reference by means of which we interpret an unknown language."); *id.* at para. 559 ("The function must come out in operating with the word.").

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separation of powers⁶⁵ — would be in instant danger of defeat.⁶⁶ On the other hand, subjecting the actions of each branch to scrutiny by one or both of the others would result in a paralysis of government directly contrary to the Framers' intention to strengthen the palsied Union created by the Articles of Confederation.⁶⁷ It might well lead, moreover, to incompatible interpretations of the Constitution, leaving no authority competent to resolve the dispute. With these considerations in mind, it would have been eminently sensible for the Framers to single out the courts as the umpires of the constitutional system, especially if they shared Hamilton's perception of the judiciary as the "least dangerous" of the branches,⁶⁸ and Marshall's view of judges as best qualified "to say what the law is."⁶⁹

To say that some court must be available to hear constitutional challenges — a species of which are due process claims — is not, however, to say which one. The Supreme Court certainly has a claim to the status of umpire in the constitutional system; not only does article III dictate that the "judicial power" of the

⁶⁵ The first prominent modern expositors of the concept of separated powers were Locke and Montesquieu, both of whom saw a diffusion of authority as the most effective means of checking tyranny. See J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 143, in TWO TREATISES OF GOVERNMENT 382 (P. Laslett ed. 1960); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, at 149-82 (rev. ed. T. Nugent trans. 1899); 1 J. PLAMENATZ, MAN AND SOCIETY 210, 218, 282-98 (1963). American thinkers were highly influenced by those theories. See B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967).

Debates at the Constitutional Convention indicate the Framers' strong belief in the necessity of dividing government. James Madison and Gouverneur Morris spoke repeatedly on the need to check "legislative encroachments." J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 399-401 (1895) (remarks of J. Madison and G. Morris); 5 J. ELLIOT, DEBATES IN THE FEDERAL CONVENTION 344-47 (1901) (same) [hereinafter ELLIOT'S DEBATES]; see J. MADISON, *supra*, at 536 (remarks of J. Wilson); Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention*, in 3 RECORDS OF THE FEDERAL CONVENTION 108 (M. Farrand ed. 1966).

⁶⁶ While Judge Hand contended that the principle of separation of powers militated against the notion of judicial review, see L. HAND, *supra* note 63, at 4, that principle may as easily sustain the contrary position. The fundamental purpose of separating the powers of government was to avoid the danger of tyranny inherent in monolithic government. Yet to be an effective check on that danger, the branches of a divided government necessarily have to possess the ability to prevent one department from establishing itself in practice as supreme. Were the legislature, for example, to be permitted to rule with finality upon the validity of its own acts, it would in substance, if not in form, be the repository of all the powers of government.

⁶⁷ J. MADISON, *supra* note 65, at 34; 1 C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 309 (1927); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 359-61 (1969).

⁶⁸ THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

⁶⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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United States — including the power to adjudicate cases “arising under” the Constitution⁷⁰ — be vested in the Court,⁷¹ but pragmatism suggests that the confusion which would result from allowing each federal branch to define the Constitution in its own way would also attend a judicial system lacking a decisive voice. The Supreme Court, however, has primarily appellate jurisdiction,⁷² a fact which necessitates the existence of a court of original jurisdiction if constitutional claims are to be entertained. Were lower federal courts the only forums open to those claims, the possibility of their nonestablishment or disestablishment at the direction of Congress⁷³ would conflict with the asserted requirement that some court be available. No conflict arises, however, as long as state courts remain open to hear federal constitutional cases.

Much turns, then, upon the appropriateness and the availability of state courts as vindicators of the constitutional system. Despite the received wisdom that federal courts are the primary guarantors of federal rights,⁷⁴ it would not have been strange for the founders of the Republic to view state courts as principal bulwarks against encroachments by the central authority.⁷⁵ It is clear, at any rate, that for nearly a century state courts did play a significant role in that respect.⁷⁶ Indeed, it is reasonable to contend that, in subordinating state judges to the Federal Constitution, the supremacy clause expressly imposed a duty of constitutional exposition upon them.⁷⁷ Furthermore, the existence

⁷⁰ It has, indeed, been argued that the “arising under” clause extends the judicial power to constitutional review of laws. *See id.* at 178-79; *Eisentrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *But cf.* A. BICKEL, *supra* note 63, at 6 (“This is the strongest bit of textual evidence in support of Marshall’s view, but it is merely a hint.”).

⁷¹ U.S. CONST. art. III, § 2, cl. 1.

⁷² *See id.* cl. 2.

⁷³ U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

⁷⁴ *See Steffel v. Thompson*, 415 U.S. 452, 463-65 (1974); *Zwickler v. Koota*, 389 U.S. 241, 247 (1967); F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 65 (1928).

⁷⁵ Thus, for example, John Rutledge, who proposed the successful motion to strike from article III a requirement that federal courts be established, argued “that it was making an unnecessary encroachment on the jurisdiction of the states” to mandate a federal judicial tribunal of the first instance. 5 ELLIOT’S DEBATES, *supra* note 65, at 158-59 (debate of June 5, 1787).

⁷⁶ *See Zwickler v. Koota*, 389 U.S. 241, 245-46 & n.6 (1967); F. FRANKFURTER & J. LANDIS, *supra* note 74, at 64. Indeed, lower federal courts were not granted jurisdiction over constitutional questions until 1875. Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 640 (1942).

⁷⁷ *See Hart, supra* note 58, at 1364, 1401; *cf.* *Testa v. Katt*, 330 U.S. 386 (1947) (under the supremacy clause, state courts may not decline to enforce federal statutory rights).

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of state courts — and hence their availability to hear constitutional challenges — is not subject to absolute congressional control. Had Congress failed to establish federal courts, therefore, state courts alone would have had original jurisdiction to entertain such claims. By the same token, the latter are endowed with general jurisdiction to adjudicate the propriety of any congressional attempt to preempt their exercise of jurisdiction over federal constitutional questions.⁷⁸ Even the acceptance of mandatory judicial review, then, entails no corresponding requirement that federal courts at *nisi prius* be afforded for that purpose.⁷⁹

The foregoing interpretation rests upon the supposition that state courts are able to play a full constitutional role. It may be argued that that role was circumscribed by the Supreme Court's ruling in *Tarble's Case*,⁸⁰ in which a state court was denied jurisdiction to inquire, upon a writ of habeas corpus, into the legality of a federal soldier's enlistment. Despite broad language asserting a lack of state judicial authority over federal officials,⁸¹ *Tarble's Case* should be perceived as resting upon the con-

Learned Hand read the latter portion of the supremacy clause, which teaches state judges that federal law supervenes state law, as indicating that state courts were to function as interpreters of federal constitutional law only when the validity of a state law was drawn into question. L. HAND, *supra* note 63, at 5-6, 28. Such a reading is by no means self-evident; the clause may also be understood as declaring that state courts are guardians of the Federal Constitution irrespective of any limitations imposed upon that role by state law. Assuming, moreover, that some court of original jurisdiction must be available to entertain constitutional cases, it does far less violence to the constitutional text to construe it as according state courts that task than to find a mandatory grant of such jurisdiction to lower federal courts in the face of explicit language elsewhere authorizing Congress to create federal courts at its discretion. U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

⁷⁸ Congressional preemption of state court jurisdiction over federal questions could be accompanied by an identical instruction from state authorities. Even then, however, state courts would probably retain jurisdiction to adjudicate the constitutionality of any such preclusion in light of the supremacy clause declaration that state judges are bound by the Constitution where the latter is incompatible with state law. See *Employees of the Dep't of Pub. Health & Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring); *Testa v. Katt*, 330 U.S. 386 (1947); *Robb v. Connolly*, 111 U.S. 624, 637 (1884); Hart, *supra* note 58, at 1401. One might posit, of course, the abolition by state governments of the general jurisdiction of their courts so as to prevent the constitutional question from being reached. Apart from questions concerning possible residual jurisdiction of common law courts, however, this scenario entails the implausible supposition that the federal government and all the states dismantle their judicial systems, so that no court remains anywhere in the United States.

⁷⁹ "In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." Hart, *supra* note 58, at 1401.

⁸⁰ 80 U.S. (13 Wall.) 397 (1872).

⁸¹ *Id.* at 405-06.

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temporaneous fact that Congress had empowered federal courts to exercise habeas jurisdiction.⁸² Absent the federal forum, therefore, it is doubtful whether the same ruling would have been given.⁸³ Moreover, the suggestion that the supremacy clause requires state courts to defer to federal authorities when the former are enforcing federal constitutional law is illogical: the clause subordinates state judges to the United States Constitution and federal law, not to lawless action by federal officials. State judicial action pursuant to the Constitution is therefore adequate to bind federal officials, and state courts are appropriate constitutional tribunals.⁸⁴

Thus, article VI of the Treaty is unconstitutional insofar as it prohibits *any* American court from responding to transferees' colorable due process claims by making the necessary inquiry into the basis for their Mexican convictions.⁸⁵ At the least, state courts must be open to prisoners seeking such relief. Indeed, the procedural fact that review of the foreign conviction would be initiated by habeas corpus petition may lend additional support to that proposition. The Constitution prevents Congress from suspending "[t]he privilege of the Writ of Habeas Corpus,"

⁸² The Court was careful to note that "[t]his limitation upon the power of state tribunals and state officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States . . . courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases . . ." *Id.* at 411. Strictly speaking, therefore, the Court did not reach the issue of state power over federal officials where federal courts are closed. And, in light of the argument that some court must be open, *Tarble's Case* should be given the most limited reading possible. See generally 1972 WIS. L. REV. 276, 285.

⁸³ See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 428 (2d ed. 1973) (asking rhetorically whether it is "a premise of the holding . . . that the federal courts were open on habeas corpus") [hereinafter cited as HART & WECHSLER]; Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1390 (1964) (same rhetorical question).

⁸⁴ See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 91 (2d ed. Supp. 1977) (arguing that though Congress may foreclose access to a lower federal court to test the validity of a deprivation of life, liberty, or property by a federal official, if it does so it cannot prevent a state court from taking jurisdiction, notwithstanding *Tarble's Case*).

⁸⁵ If that finally is the determination of the Supreme Court, this will be the first United States treaty to be declared unconstitutional in that Court. See L. HENKIN, *supra* note 13, at 137; McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 755 (1958). But cf. *Burdell v. Canadian Pac. Airlines, Ltd.*, No. 66 L. 10799 (Ill. Cir. Ct. Nov. 7, 1969), noted in 63 AM. J. INT'L L. 339 (1969) (holding the venue and damage limitation provisions of the Warsaw Convention unconstitutional).

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except in times of emergency.⁸⁶ In light of the unfettered discretion of Congress to establish federal courts, however, it cannot be contended that the suspension clause either confers habeas jurisdiction on the federal courts by itself or commands Congress to effect such a conferral.⁸⁷ State courts of general jurisdiction,

⁸⁶ U.S. CONST. art. I, § 9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

⁸⁷ In *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 95 (1807), Chief Justice Marshall said in dictum that absent a congressional grant of federal judicial jurisdiction to issue the writ, it would have been unavailable in federal court. See *Shirakura v. Royall*, 89 F. Supp. 713, 714 (D.D.C. 1949); R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND THE WRIT OF HABEAS CORPUS 127 (1858); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952). But see *Eisentrager v. Forrestal*, 174 F.2d 961, 965-66 (D.C. Cir. 1949), *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950); Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605. See also *McNally v. Hill*, 293 U.S. 131, 135 (1934) (dictum) ("The use of the writ of *habeas corpus* as an incident of federal judicial power is implicitly recognized" in the suspension clause). Recently, the Court of Appeals for the District of Columbia Circuit declined to delineate "the boundaries of congressional control over federal jurisdiction *vis-a-vis* the suspension clause," acknowledging it to be an unresolved and difficult question. *Palmore v. Superior Court*, 515 F.2d 1294, 1301-04 (D.C. Cir. 1975) (en banc), *vacated and remanded*, 97 S. Ct. 305 (1976). See also *Swain v. Pressley*, 45 U.S.L.W. 4281 (U.S. Mar. 22, 1977).

The contention that the suspension clause itself mandates federal court jurisdiction to issue writs of habeas corpus is refuted both by the language of the clause and by its position in the text. The suspension clause is negative in form; the history of its inclusion in article I indicates, if nothing else, that the Constitutional Convention was offered and refused an alternative articulation as a positive command. See R. HURD, *supra* note 87, at 122-23 (motions of C. Pinckney, May 29 and Aug. 20, 1787); *id.* at 124 (motion of G. Morris). More significantly, article I, § 9, cl. 2 was considered after article III had been discussed. Had the Framers intended to mandate federal jurisdiction in habeas corpus, they would certainly have included some provision to that effect in article III.

Furthermore, it is unlikely that the Framers envisioned a common law habeas corpus jurisdiction, given the fact that they established a scheme of statutory jurisdiction for whatever inferior federal courts Congress chose to create. And, while the Supreme Court has jurisdiction over the essentially appellate function of issuing writs of habeas corpus, see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Congress may make exceptions to the Court's appellate jurisdiction. U.S. CONST. art. III, § 2; see *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97-99 (1869); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

This does not imply, however, that the suspension clause is a nullity. The clause specifically protects the "privilege of the writ" of habeas corpus, "privilege" referring not to the jurisdiction of courts entertaining writs of habeas corpus, but to the power of the court to discharge after an inquiry into the legality of a detention pursuant to a petition. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866) (dictum); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265-66 & n.18 (1970). This suggests that the Framers may have had in mind a prohibition against congressional interference with the power of state courts to inquire into the legality of detentions when they already possessed

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on the other hand, draw their habeas power from state sources and not from congressional grant — thus even the negative form of the clause acts as a sufficient protection of the privilege of the writ which state courts afford. The suspension clause, therefore, offers further evidence that *Tarble's Case* should not be read to preclude state courts from granting habeas relief when federal courts are not open for that purpose.

The core constitutional notion of the "privilege of the writ," however, is obscure. The original purpose of the privilege was to protect against executive detentions by ensuring that detention had been authorized by a court of competent jurisdiction.⁸⁸ From that perspective, the suspension clause mandate would not collide with the Treaty's prohibition of challenges to the judgment of a Mexican court. On the other hand, it is arguable that the substantive protection of the writ would be eviscerated if the habeas court were not permitted to inquire, at a minimum, into the basic reliability of the sentencing court's process.⁸⁹ If the latter is the constitutional requirement, then it sustains with particularity the general constitutional principle that some American court must be permitted to pass on claims by transferred Americans that their Mexican convictions are inherently unreliable.⁹⁰

jurisdiction to do so. The implication is that, as in the more general case of judicial review, the state courts' extant jurisdiction was to be relied upon.

⁸⁸ See *Brown v. Allen*, 344 U.S. 443, 532-33 (1953) (Jackson, J., concurring); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451, 468 (1966).

⁸⁹ See *Lunsford v. Hudspeth*, 126 F.2d 653, 659 (10th Cir. 1942). Thus, at a minimum, habeas corpus inquiry might focus on the existence of a reliable process for the adjudication of guilt. See *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976); Bator, *supra* note 38; Friendly, *supra* note 41; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 219 (1976).

In *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court construed the original ambit of habeas corpus very broadly, as a roving commission to "remedy any kind of governmental restraint contrary to fundamental law." *Id.* at 405. But the "history" recounted in *Fay* has been discredited and repudiated. See *Swain v. Pressley*, 45 U.S.L.W. 4281, 4284 (U.S. Mar. 22, 1977) (Burger, C.J., concurring); *Stone v. Powell*, 428 U.S. 465, 474-82 (1976); Friendly, *supra* note 41, at 170-71; Oaks, *supra* note 88, at 459.

⁹⁰ If the Constitution does not permit Congress to preclude state court review of the transferees' due process claims, the Treaty should not be interpreted to bar review in federal court. Cf. HART & WECHSLER, *supra* note 83, at 324 (suggesting that if Congress could not prevent state courts from passing on due process questions concerning the Portal-to-Portal Act, then "the Act should not be read as denying the same power to the federal courts"). Indeed, there may be reason to prefer a federal forum for cases under the Treaty, since federal courts are likely to be more responsive to those sensitive and uniquely national considerations which dictate that matters of foreign relations be handled exclusively by the federal government. See *Zschernig v. Miller*, 389 U.S. 429, 432, 440-41 (1968);

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III. PRACTICAL AND POLITICAL OBSTACLES
TO REVIEW OF MEXICAN CONVICTIONS

Supporters of the Treaty need not fear that compliance with the constitutional requirement of some judicial review in an American court will result in wholesale reversal of Mexican convictions. The Mexican Constitution provides criminal trial safeguards well designed to ensure a reliable finding of guilt. Indeed, while fundamental differences in Mexican and American criminal procedure do exist,⁹¹ certain provisions of the Mexican Constitution are strongly reminiscent of the American Bill of Rights.⁹² Transferred Americans' due process claims, therefore, will probably arise out of behavior by Mexican officials which deviates from the prescriptions of Mexican law. The practical difficulties of an inquiry into such failings, as well as sensitivity to the political problems created by a court's entanglement in foreign policy questions, are reasons for an American court to "move with circumspection"⁹³ in investigating complaints about Mexican justice.

A. Practical Difficulties

Problems of competence always are posed when an American court applies foreign law. But when the court seeks to investigate discrepancies between the mandate of Mexican procedural law and its application in practice, these problems become more acute. The function of interpretation, for example, may vary from legal system to legal system: the lack of a doctrine of precedent in civil law jurisdictions can thus hinder American understanding of the nuances of the foreign law.⁹⁴ In addition, custom may play a significant but unarticulated role in defining the operation of the Mexican criminal process.⁹⁵ Sensitivity to these

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); text at notes 105 to 108 *infra*.

⁹¹ See H. CLAGETT, *ADMINISTRATION OF JUSTICE IN LATIN AMERICA* 125 (1952); P. EDER, *supra* note 44, at 150-51; R. SCHLESINGER, *COMPARATIVE LAW* 238-39 (2d ed. 1959).

⁹² See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS arts. 1-29 (Mex.) [hereinafter cited as MEXICAN CONSTITUTION], translated in J. WHELESS, *COMPENDIUM OF THE LAWS OF MEXICO* (2d ed. 1938); Clagett, *The Mexican Suit of "Amparo"*, 33 GEO. L.J. 418, 419 (1945).

⁹³ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

⁹⁴ The relative unimportance of the principle of stare decisis in the Latin American civil law jurisdictions has been noted. See P. EDER, *supra* note 44, at 12-14; McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353, 372 (1956). For the restricted function of precedent in Mexico, see H. CLAGETT, *supra* note 91, at 125.

⁹⁵ That is not, however, to make the mistake of saying that custom is a source of law in the Latin American systems. See P. EDER, *supra* note 44, at 11.

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subtle influences on the law in a foreign setting is necessary, yet difficult to acquire.

Moreover, the evidentiary obstacles to an assessment of charges of Mexican misconduct will be nearly insuperable. In almost every case, allegations of pretrial torture, for example, will be undocumented. Arrest and trial records⁹⁶ may substantiate a failure to appoint counsel, but, again, will not prove that counsel was grossly inadequate. In all such situations, an American court would need either the testimony of Mexican authorities themselves or the cooperation of those authorities in securing non-testamentary evidence.

It is difficult to obtain foreign judicial assistance, even under the best of circumstances. Letters rogatory, the customary means of obtaining testimony from recalcitrant witnesses abroad,⁹⁷ sometimes are not honored even in foreign nations with legal systems closely related to that of the United States.⁹⁸ Noncooperation will be even more likely when the evidence is sought specifically to impugn the foreign judicial system whose help is solicited.

Additional problems, inherent in the transnational setting of cases occasioned by the Treaty, arise from the fact that a successful petition for habeas corpus usually culminates in a new trial.⁹⁹ It is plainly impracticable for American courts to remand prisoners for a Mexican trial *de novo* in accordance with the requirements of the American Constitution. Conversely, international conflict-of-laws principles militate against any attempt by an American court to retry transferred prisoners under Mexican law.¹⁰⁰ A finding that the original Mexican trial was un-

⁹⁶ The Treaty stipulates that documentation of the transferee's offense and sentence, as well as any other information the receiving state considers necessary to implement the Treaty, is to be transmitted by the transferring state. Treaty art. IV, paras. 7 & 8.

⁹⁷ See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 840 (2d ed. 1976).

⁹⁸ See, e.g., *Radio Corp. of America v. Rauland Corp.*, [1956] 1 Q.B. 618; H. STEINER & D. VAGTS, *supra* note 97, at 840. Conversely, American courts have not been quick to assist foreign criminal courts. See Mueller, *supra* note 46, at 415.

⁹⁹ See *Rogers v. Richmond*, 365 U.S. 534, 547-48 (1961). The power of a habeas court to order a new trial derives from the statutory requirement that the "court . . . summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U.S.C. § 2243 (1970).

¹⁰⁰ The rule was given by Chief Justice Marshall in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825): "The courts of no country execute the penal laws of another country." *Id.* at 123. The rule has been consistently followed. See, e.g., *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119 (1927); *Atchison, T. & S.F. Ry. v. Nichols*, 264 U.S. 348 (1924); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). Despite the frequency of its enunciation, however, there is some uncertainty as to its rationale. *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 41(1) (1965) [hereinafter cited as *RESTATE-*

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reliable, therefore, would require the prisoner's release — a drastic remedy, particularly in the context of collateral attack.¹⁰¹

B. Political Problems

The act of state doctrine militates against adjudicating the legality of foreign sovereign acts.¹⁰² Although that doctrine may not be dispositive in the present case,¹⁰³ its rationale is apposite: "courts should abstain from any action that might hinder the executive branch . . . in the conduct of foreign relations."¹⁰⁴ Two considerations in particular urge American courts to avoid aggressive scrutiny of Mexican criminal convictions: possible embarrassment of the executive branch, and possible embarrassment to Mexico itself.

MENT OF FOREIGN RELATIONS] states that the rule rests on "policy" or "restrictions imposed by domestic law." A basis has also been found in the common law. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 195 (1932). Others suggest that the rule expresses a wish not to intrude upon the sovereignty of other states or nations. See *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring); Stoel, *The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L COMP. L.Q. 663 (1967). The sovereignty-intrusive concern of the *Antelope* doctrine also militates against any attempt to retry transferees according to American law.

¹⁰¹ Should a transferee be released on habeas corpus, questions may arise as to whether he would be subject to extradition back to Mexico under the United States' extradition treaty with Mexico. That would not be possible, however, since the extradition treaty provides that extradition shall not take place "[w]hen the extradition is demanded on account of a crime or offense for which the person demanded is undergoing or has undergone punishment in the country from which the extradition is demanded . . ." Treaty on Extradition, Feb. 22, 1899, United States-Mexico, art. III, para. 4, 31 Stat. 1818, T.S. No. 242. Any released transferee automatically would qualify as one who had "undergone punishment in the country from which the extradition is demanded."

¹⁰² See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 428 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 96-106 (1964).

¹⁰³ Acts of state typically involve expropriations. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 100, § 41, Comment d (1965). A judgment of a court may in some circumstances be an act of state, but "[u]sually it is not, because . . . court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests." *Id.* Moreover, acts of state generally are regarded as being executed within the territory of the foreign sovereign. See *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918); RESTATEMENT OF FOREIGN RELATIONS § 43; Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 COLUM. L. REV. 805, 830 (1964). But see *United States v. Pink*, 315 U.S. 203 (1942) (applying act of state doctrine to a wholly extra-territorial act of the Soviet Union).

¹⁰⁴ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 100, § 43, Comment e.

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The traditional deference which courts have shown to the executive in the area of foreign policy should guide them in defining the scope of review which is appropriate in cases under the Treaty.¹⁰⁵ For courts to engage in substantial contact with Mexican authorities in the course of their review of Mexican convictions may upset unified policies formulated and pursued by the President and the Department of State.¹⁰⁶ Despite the fact that these contacts would relate to matters of primarily judicial concern, their effects may redound upon other, more explicitly political, interests.

It is also hard to deny that there is at least potential for political embarrassment to Mexico in any refusal to recognize one of its judgments as facially valid.¹⁰⁷ First, there exists the possibility that the prospect of release after transfer may undermine the deterrent effect of Mexican law. On a more intangible level, when a foreign criminal conviction is refused recognition, the foreign state's interest in controlling its internal public order is affronted. Indeed, the American court's review might be perceived in Mexico as a criticism of the quality of Mexican justice. Resentment of that criticism may be intensified by the fact that the transfers of prisoners will occur only with Mexican cooperation: for an American court then to make critical comments may seem ungenerous.

Assessment of the foreign relations impact of transnational judicial review must ultimately be left to the Department of State. Apart from constitutional considerations, however, article VI of the Treaty may be presumed to reflect a considered view of the

¹⁰⁵ See, e.g., *Romero v. International Terminal Operating Co.*, 385 U.S. 354, 383 (1959); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). But cf. L. HENKIN, *supra* note 13, at 210 ("As in domestic affairs, the Supreme Court has been more willing to scrutinize foreign affairs actions alleged to violate individual rights, although national interest in foreign relations . . . no doubt weighs heavily in the balance of competing claims."); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 516, 584 (1966) (to the same effect). See generally Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1152-56 (1956); Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79 (1948).

¹⁰⁶ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-32 (1964); Henkin, *supra* note 103, at 832 ("For their part, the courts are not equipped or competent to make foreign policy, or to judge the impact of their rulings in occasional cases on the vital concerns of the nation.").

¹⁰⁷ There is complete agreement in Latin America on the proposition that "the final judgments of the courts of justice of a country are entitled to respect as self-evident legal truths." Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 390-91 (1944); see Mex. C. Pro. Civ. (Distrito Federal) art. 608. See also Von Mehren & Trautman, *supra* note 45, at 1662.

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imprudence of entangling one nation's courts in the judicial processes of another. American courts would be well advised, therefore, to approach requests for close inspection of Mexican judgments with caution.¹⁰⁸

IV. RECONCILING THE TREATY WITH THE CONSTITUTIONAL REQUIREMENT OF JUDICIAL REVIEW

The Constitution recognizes transferred Americans' right to review in some American court of claims that their Mexican convictions were unreliable.¹⁰⁹ Yet that review will entail the practical and political difficulties discussed in Part III.¹¹⁰ This dilemma may be avoided, and the Treaty preserved, either by judicial construction of other Treaty provisions or by effective implementation of the provision requiring a prisoner's consent as a precondition to transfer.

A. Treaty Construction

Two clauses of the Treaty might be read to mitigate the transferring state's retention of exclusive jurisdiction over attacks on its convictions. Under article V, the receiving nation may manage completion of a prisoner's sentence according to its own laws, "including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."¹¹¹ Courts could construe "otherwise" to permit judicial review in the receiving nation of the original conviction. Article V also specifies that transferred offenders' "civil rights in the Receiving State" shall not be prejudiced except to the extent that such rights ordinarily are impaired by the fact of conviction.¹¹² That provision might be interpreted as reserving to the transferee his American "civil right" of a hearing on due process claims.

It is true that treaties, when ambiguous, are to be construed liberally to preserve individual rights.¹¹³ But that rule may be qualified by the Supreme Court's admonition in another context in *Whitney v. Robertson*¹¹⁴ that the language of a statute or treaty

¹⁰⁸ Compare *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423, 432-34 (1813) (Marshall, C.J.), with *United States ex rel. Dennis v. Murphy*, 184 F. Supp. 384, 386 (N.D.N.Y. 1959).

¹⁰⁹ See text at note 85 *supra*.

¹¹⁰ See text at notes 94 to 108 *supra*.

¹¹¹ Treaty art. V, para. 2.

¹¹² *Id.* para. 6.

¹¹³ *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

¹¹⁴ 124 U.S. 190 (1888).

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is not to be violated by judicial construction.¹¹⁵ The Treaty deals expressly in article VI with the problem of challenges to the transferring state's sentence, and it would therefore be wrong to subordinate that clear language to an exegesis of the vague provisions in article V. That article VI allows transferred prisoners to exercise collateral remedies continuously available in the sending state further buttresses the conclusion that the Treaty was designed to prevent review of the convictions in the receiving state.¹¹⁶ In the case of Americans convicted under Mexican law, the writ of *amparo* will permit the exercise of collateral remedies;¹¹⁷ affording overlapping habeas corpus relief in the United States would thus have been redundant under the Treaty's scheme.

B. Consent

The Treaty requires the prisoner's "express consent" as a precondition to his transfer.¹¹⁸ Article V, paragraph one of the Treaty demands further that this consent be given "voluntarily and with full knowledge of the consequences thereof."¹¹⁹ While the Treaty does not detail precisely what these consequences are to be, if prisoners are specifically warned that transfer to the United States will not occasion collateral review, they may be deemed to have waived their right to such review.¹²⁰ Since it is possible to waive all constitutional and statutory claims¹²¹ —

¹¹⁵ *Id.* at 194.

¹¹⁶ Treaty art. II, para. 6 prescribes that no transfer shall occur during the pendency of any appeal or collateral attack, or prior to the expiration of any limitations period for *appeal*. It thus recognizes that Mexican *collateral* remedies — as distinguished from appeals — may continue to be available to transferred American prisoners. See Letter from Prof. Detlev Vagts, Counselor on International Law, Office of the Legal Adviser, Dep't of State (April 28, 1977) (on file at the Harvard Law School Library).

¹¹⁷ Articles 103 and 107 of the MEXICAN CONSTITUTION, *supra* note 92, provide the basis for the constitutional writ of *amparo*. The constant availability of the writ as a remedy against official acts which "infringe any personal guarantees" is made explicit in the Law of Amparo, arts. 22-24 (as amended), reprinted in A. URBINA & J. BARRERA, *NUEVA LEGISLACIÓN DES AMPARO — DOCTRINA, TEXTOS Y JURISPRUDENCIA* (26th ed. 1974). For a good general discussion of the writ, see Clagett, *supra* note 92. See also Gual Vidal, *Mexican Amparo Proceedings*, 1941 A.B.A. SECTION OF INT'L L. REPS. 82.

¹¹⁸ Treaty art. IV, para. 2.

¹¹⁹ *Id.* art. V, para. 1.

¹²⁰ The classic definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹²¹ See, e.g., *Fay v. Noia*, 372 U.S. 391, 438-39 (1963) (waiver of right to habeas corpus relief); *Faretta v. California*, 422 U.S. 806 (1975) (waiver of right to assistance of counsel); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea waives privilege against compulsory self-incrimination, right to trial by jury, and right of confrontation).

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with the exception of attacks on the jurisdiction of the court¹²² and review of the voluntariness of the waiver itself¹²³ — consent to transfer will obviate any constitutional difficulties raised by the Treaty's preclusion of challenges to Mexican convictions.¹²⁴ In order to assure the validity of the waiver under the most exacting scrutiny, however, prudence advises the adoption of the practice employed with respect to guilty pleas — requiring that the consent be rendered in the presence of an officer of the court,¹²⁵ and after an opportunity to consult with counsel.¹²⁶

Although the right to collateral review may be waived, allowing transfer only upon the renunciation of certain due process claims may be an unconstitutional condition.¹²⁷ Admittedly, for many prisoners the choice will not be a difficult one: without surrendering any of the collateral relief afforded by the Mexican system, they may exchange Mexican cells for prison quarters in their own country.¹²⁸ Nevertheless, the government is not unrestricted in its power to require surrender of constitutional

¹²² See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974); *United States v. Spada*, 331 F.2d 995, 996 (2d Cir.), cert. denied, 379 U.S. 865 (1964). See also *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

¹²³ See *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (a coerced plea of guilty which will not support a conviction has no validity as a waiver of the right to assail the conviction and the plea on habeas corpus).

¹²⁴ Cf. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (on a challenge to a conviction based on a guilty plea, "[t]he focus of federal habeas is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.").

¹²⁵ See *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); *McCarthy v. United States*, 394 U.S. 459, 465 (1969); FED. R. CRIM. P. 11.

¹²⁶ See *Tollett v. Henderson*, 411 U.S. 258, 265 (1973) (the issue for federal court reviewing a guilty conviction on habeas corpus petition is "whether the guilty plea had been made intelligently and voluntarily with the *advice of competent counsel*") (emphasis added); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *White v. Maryland*, 373 U.S. 59 (1963). Courts usually scrutinize uncounselled guilty pleas very carefully, see, e.g., *Dorrough v. United States*, 385 F.2d 887 (5th Cir. 1967), cert. denied, 394 U.S. 1019 (1969), whereas the mere presence of defense counsel often insulates the plea from subsequent challenge, see *United States ex rel. Burk v. Mancusi*, 453 F.2d 563 (2d Cir. 1971), cert. denied, 406 U.S. 925 (1972). See generally *Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

¹²⁷ See Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

¹²⁸ The absence of forced labor and opportunities for conjugal visits and commercial activities within the Mexican prison system may persuade some American prisoners not to seek transfer. A decision not to be transferred may also be affected by considerations related to eligibility for parole in the United States. Interview with Prof. Detlev Vagts, Office of the Legal Adviser, Dep't of State, in Washington, D.C. (April 4, 1977); see *House Hearings* (pt. III), *supra* note 10, at 21.

rights as the price for conferral of a benefit or suspension of a punishment.¹²⁹

At the least, a condition is unconstitutional if its purpose is merely to encourage the relinquishment of constitutional rights.¹³⁰ The usual context in which this issue arises, however, is one in which a party is asked to trade a *vested* right for a future benefit.¹³¹ Americans in Mexican prisons, however, have no right to relief from American courts. Those who accept the opportunity presented by the Treaty therefore lose nothing by consenting to limit themselves solely to Mexican remedies after the transfer.

Cases concerning conditional presidential pardons are most apposite to this question — there, as under the Treaty, a prisoner is offered a bargain by which he can only improve his lot.¹³² In *Hoffa v. Saxbe*,¹³³ the court forged a three-pronged test: (1) the pardon must have been voluntarily accepted by its beneficiary,¹³⁴ (2) the condition must “be directly related to the public interest,”¹³⁵ and (3) the condition must not be more restrictive of constitutional freedoms than is reasonably necessary.¹³⁶ The condition imposed by the Treaty appears to satisfy each of these requirements. Voluntary acceptance of the condition may be readily inferred from the Treaty’s consent provision. The public interest will be served by eliminating the stress that collateral attack on foreign procedures may impose on international comity and the conduct of American foreign relations.¹³⁷ Finally, available evidence indicates that the Treaty — and therefore the improvement in the petitioner’s condition — would not have been negotiated without the preclusive provision of article VI.¹³⁸ For both the Treaty’s drafters and the transferees, therefore, acceptance of the condition is “an ‘all or nothing’ proposition.”¹³⁹

¹²⁹ See, e.g., *United States v. Jackson*, 390 U.S. 570, 581 (1968); *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967); cf. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95-101 (1947) (upholding the Hatch Act).

¹³⁰ See *United States v. Jackson*, 390 U.S. 570, 581 (1968); Comment, *supra* note 127, at 154-55.

¹³¹ See, e.g., *United States v. Jackson*, 390 U.S. 570 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958); *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967).

¹³² See *Schick v. Reed*, 419 U.S. 256 (1974); *Birzon v. King*, 469 F.2d 1241 (2d Cir. 1972).

¹³³ 378 F. Supp. 1221 (D.D.C. 1974).

¹³⁴ *Id.* at 1242 (citing *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856)).

¹³⁵ 378 F. Supp. at 1236.

¹³⁶ *Id.*

¹³⁷ See text at notes at 105 to 107 *supra*.

¹³⁸ See Letter, *supra* note 116.

¹³⁹ *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1242 (D.D.C. 1974).

V. CONCLUSION

The Treaty's prohibition of collateral review of Mexican convictions appears to be unconstitutional unless each prisoner waives all access to such review as a condition of his transfer. The viability of the Treaty therefore depends on ensuring that this waiver be procedurally unexceptionable.

Courts normally indulge every reasonable presumption against the waiver of fundamental constitutional rights.¹⁴⁰ Since a prisoner, in consenting to transfer, waives various fundamental due process rights, the safe course would be to execute the transfer consent before an officer of the court.¹⁴¹ To convey a prisoner in Mexican custody to an American court for this purpose, however, would be impracticable. Congress should therefore enact legislation to accompany the Treaty which will authorize a federal court to designate a United States magistrate who will validate consents in Mexico.¹⁴²

To ensure that the consent to transfer is fully informed, potential transferees should have the benefit of adequate counsel.¹⁴³ Justice or State Department attorneys will be less than satisfactory for this purpose because of a possible conflict of interest that may arise should the prisoner later challenge the validity of his waiver. Thus, Congress should provide for private attorneys to be made available to those prisoners who are without independent access to counsel. Furthermore, since waiver never will be presumed "from a silent record,"¹⁴⁴ arrangements should also be made for a notary or court clerk to keep a clear and comprehensive record of each consent proceeding, and to witness that record. Providing a magistrate, a counsel, and a recorder will assure that the consent to transfer is a valid waiver.¹⁴⁵

¹⁴⁰ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁴¹ This, of course, is the practice with guilty pleas, which also represent waivers of all nonjurisdictional defects in the criminal proceeding. See note 125 *supra*; Note, *The Guilty Plea as a Waiver of "Present But Unknowable" Constitutional Rights: The Aftermath of the Brady Trilogy*, 74 COLUM. L. REV. 1435, 1436-37 (1974).

¹⁴² See generally 28 U.S.C. §§ 631, 636 (1970); Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975).

¹⁴³ See note 126 *supra*.

¹⁴⁴ *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

¹⁴⁵ Assurance of the validity of the waiver is especially important since treaties are binding in international law even when invalid under the domestic law of one of the signatories, unless the other parties were aware or should reasonably have been aware of the constitutional defect. See W. BISHOP, *INTERNATIONAL LAW* 107 (2d ed. 1962); H. STEINER & D. VAGTS, *supra* note 97, at 282-84. Notwithstanding the Treaty's unconstitutionality in the absence of a valid waiver of



DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM OF LAW

The Treaty Between the United States and
the United Mexican States Providing
for the Transfer of Penal Sanctions

The following memorandum describes the basic provisions of the Treaty with Mexico signed on November 25, 1976 providing that offenders may serve their sentences in the country of their nationality. It also explores the question of its consistency with the Constitution of the United States.

I. Description of the Treaty.

The Treaty is intended both to relieve the special hardships which fall upon prisoners incarcerated far from home and to make their rehabilitation more feasible and also to relieve diplomatic and law enforcement relations between the two countries of the strains that arise from the imprisonment of large numbers of each country's nationals in the institutions of the other. It constitutes part of an ongoing effort to improve relations between the two countries. It is also part of various efforts to establish closer international cooperation in law enforcement activities. It is without a direct analogy in United States practice, except for the Status of Forces Agreement with South Korea, but there is precedent for such an arrangement in Europe.

The basic terms of the Treaty are as follows. Each transfer would be contingent upon the consent both of the state which sentenced the prisoner (the Transferring State) and of the state which was to receive and confine him (the Receiving State). The decision to transfer would be made on the basis of the whole record of the prisoner and the authorities' estimate as to the likelihood that the transfer would be beneficial. (Article IV). In each case, the express consent of the prisoner concerned would have to be obtained; there can be no involuntary transfer under this Treaty. Certain categories of prisoners are excluded from the terms of the Treaty: (1) political and military offenders; (2) offenders who are domiciliaries of the Transferring State; (3) those having less than six months to serve when processing of their transfer begins; and (4) offenders against the immigration laws (Article II). The program is basically one between the two federal governments. Prisoners who are transferred become the responsibility of the federal government in the Receiving State. However, a state in either country which wishes to allow some of the prisoners which it holds to be transferred may exercise that option if it chooses.

When a prisoner has been transferred, the following procedures govern his treatment thereafter. The original sentence would carry over to his new confinement, preserving deductions for good behaviour in prison, labor done by him and pre-trial confinement. The Transferring State retains the power to grant pardon or amnesty. With these exceptions, the execution of the sentence is to be carried out according to the rules and practices prevailing in the state to which he is transferred (Article V(2)). In particular, the rules of the Receiving State as to parole will determine the date at which the prisoner is released from confinement. Each nation is to report to the other on the manner in which it is administering the confinement of transferred prisoners.

The Treaty provides in Article II(5) that no prisoner will be transferred until the time for leave to appeal has expired and that no proceedings by way of appeal or collateral attack be pending. It

further provides that any collateral attack on the sentence must proceed through the courts of the country which imposed the sentence (Article VI). It is to be expected that prisoners transferred from Mexico to the United States will challenge the validity of this provision and assert that they cannot be constitutionally confined by the United States on the basis of proceedings conducted by Mexico. Parts II and III of this memorandum are devoted to an analysis of those contentions, concluding that they should not prevail.

II. The Offenders' Convictions Were Products of Mexican Law and the United States Constitution does not Apply.

The offenders with whom the Treaty deals were sentenced by Mexican courts for crimes they were found to have committed within the sovereign nation of Mexico. The Mexican constitution sets forth an extensive list of procedural guarantees afforded to defendants in criminal trials and affords various avenues of relief for those who claim to have been denied such guarantees. The Treaty preserves such avenues of appeal to the offenders. With all of this the Constitution of the United States has no concern. As stated in Wentz v. United States, 244 F.2d 172 (9th Cir. 1957):

"In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore, the charge, if true, must be that the defendant was denied 'due process' in Mexico by Mexicans. If true, that is no legal concern of an American court."

Numerous other opinions have made the same points, for example, that in United States v. Toscanino, 500 F.2d 267, 280 n. 9 (2d Cir. 1974):

"The Constitution, of course, applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country."

In Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), cert. denied, 409 U.S. 869 (1972), the court pointed out the difference between a United States trial abroad, which is not legally permitted to transgress the limitations of the United States Constitution, Reid v. Covert, 354 U.S. 1 (1957), and a foreign trial:

"Obviously, the constitutional provisions appellants invoke exerted no force of their own upon the Federal Republic [of Germany] in that exercise of its sovereignty."

Thus, immediately before their transfer offenders had no basis for claiming any deprivation of rights under the Constitution of the United States.

III. The Acceptance by the United States of the Transfer of Prisoners from Mexico is not Such Involvement in the Mexican Proceedings as to Render the U.S. Constitution Applicable.

The critical question in this case is whether the receipt by the United States of prisoners transferred from Mexico under the Treaty so involves the United States as to make their continued imprisonment here somehow the unlawful fruit of the lawful Mexican trial. In Holmes v. Laird, supra, the court phrased the contention thus:

"The argument, in essence, is that a turnover of an American citizen for service of a sentence imposed in culmination of an unfair foreign trial is a governmental involvement which the Constitution does not tolerate."

The court rejected that argument, made in the context of a surrender of American citizens for trial by Germany under the provisions of the Status of Forces Agreement. Similar contentions have been made in a number of different contexts, all of which arise out of the growing interconnections between

national criminal systems in the fight against international crime. In all but one case, discussed below, the courts have rejected contentions that the United States was involved to the degree that the Constitution applied. None of the situations is precisely like this one because no treaty of this type has ever been implemented by the United States, but no reason appears to suggest that this situation should be treated differently. Indeed, it seems a less suitable case for the application of a rule of United States involvement than many others.

Extradition or Surrender by the United States.

In Holmes v. Laird, supra, the court sustained the surrender by the United States of American citizens to a foreign sovereign for trial according to procedures which the court assumed would deviate substantially from American practice. It specifically rejected the contention that the entanglement of functions made the United States responsible for the whole. It is but one of a large number of cases reaching the same result, including Wilson v. Girard, 354 U.S. 524 (1957). To like effect we have a number of cases in which persons being extradited to face foreign trials argued that it was unlawful to do so when the procedures awaiting them abroad fell below United States constitutional standards. The courts have consistently taken the position that:

"The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. Neely v. Henkel, 180 U.S. 109, 122 (1901)."

This rule has been consistently followed, so that a court could say "...we have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition." Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960).

Surrender to the United States.

In a number of cases prisoners have challenged the process whereby they were turned over to the United States authorities for trial. The general answer of the courts has been that quoted above from Wentz v. United States, 244 F.2d 172 (9th Cir. 1957), that what happened in Mexico is "no legal concern of an American court." The one exception to this line of cases has been United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), which stated that a district court should inquire into allegations that agents of the United States had not only participated in forcefully bringing the accused into the country from Uruguay via Brazil without benefit of any request for extradition, but had also been involved in torturing him. The subsequent cases, e.g., United States v. Lira, 515 F.2d 68 (2d Cir. 1975), show that this constitutes a very narrow exception to the rule of non-inquiry.

Procurement of Evidence Abroad.

In a number of cases the accused has made the claim that evidence procured by foreign police forces in violation of the rules that would be applicable to United States law enforcement agencies should be excluded from an American trial. The courts have conceded that a confession obtained abroad under extreme pressures might be untrustworthy, and hence unusable, and have further stated that if the foreign police acted so closely with United States law enforcement officials as to convert their activities into a joint venture, the results of a search might be excluded. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968). For the rest, the courts have rejected arguments that wiretapping or searches unlawful under American law is a basis for exclusion in the United States:

"...no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico." Brulay v. United States, 383 F.2d 345 (9th Cir. 1967).

The same result has been arrived at in an increasing number of cases. E.g., Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965), cert. denied, 382 U.S. 963 (1966); United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975); cf. Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 154-55 (D.D.C. 1976).

Confinement.

No case is found under which the United States confined an American citizen pursuant to an order of a foreign court -- as distinguished from pre-trial confinement pending surrender to the foreign state for trial or punishment. The one agreement under which that is called for has not been implemented, i.e., the Status of Forces Agreement with South Korea, 17 U.S.T. 1677, Article XXII(7)(b). The United States is authorized by statute and by the typical Status of Forces Agreement to enforce sentences of imprisonment handed down in its territory by the courts-martial of friendly foreign forces. In a terse per curiam opinion, the Supreme Court in Hirota v. McArthur, 338 U.S. 197 (1949), rejected an attempt to review the trial by an international war crimes tribunal of a Japanese prisoner held in United States custody. Under 22 U.S.C. § 257 foreign seamen may be confined for two months pursuant to a determination by the consul of the relevant foreign country. See Dallemagne v. Moisan, 197 U.S. 169 (1905). Citizens taken into custody abroad by reason of their insanity may, under 24 U.S.C. § 321, be transferred into American institutions. That law has been applied to a citizen who had been convicted of a crime abroad but moved to an institution for the criminally insane. De Marcos v. Overholser, 122 F.2d 16 (D.C. Cir. 1941).

While the international movement of prisoners has been rare, transfers between two states, between a state and the federal government, and between federal prisons have been quite frequent. (See 18 U.S.C. § 4002, 5003). Note that generally such transfers have been challenged in situations where the transfer was involuntary and away from the prisoner's home in contrast with those under

the Treaty. The courts have sustained such moves despite claims that the transfer constituted cruel and unusual punishment, e.g., Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969); Hillen v. Director, 455 F.2d 510 (9th Cir. 1972), although one decision did indicate that a hearing should be granted prior to transfer. Hoitt v. Vitek, 361 F.Supp. 1238 (D.N.H. 1973), modified, 495 F.2d 219 (1st Cir. 1974). The decision in Meachum v. Fano, _____ U.S. _____ (June 1976), although arising in an intrastate context, does indicate that the courts will regard the question where a prisoner is held as not a matter for judicial inquiry.

One of the consequences of the transfer of prisoners within the United States is that a prisoner tried under system "X" winds up in a prison belonging to system "Y" which has different rules as to the conduct of trials. For example, a prisoner might be transferred from a state after a conviction based on a trial based on an information so that he served his sentence in a prison managed by federal authorities who constitutionally must proceed by way of indictment. It has not been suggested that such a transfer makes the conviction a federal one and thus renders it constitutionally inadequate.

Enforcement of Foreign Judgments.

In various situations foreign criminal convictions are given significant collateral consequences by the United States legal system. Aliens convicted abroad of crimes involving moral turpitude are not admissible to the United States. In Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975) an Iranian conviction for murder was held to be a bar to a claim for social security benefits derived through the deceased. Somewhat further afield, foreign civil judgments are given enforcement here in various cases, even where the courts recognize that the foreign procedures differ from American, even to the extent of falling below United States constitutional standards. For a recent summary of the rules here see materials assembled in Steiner & Vagts, Transnational Legal Problems, pp. 767-796 (2d ed. 1976). Going one step further, one finds that

the act of state doctrine, where it applies, causes American courts to enforce expropriations of property carried out by a foreign government even though the same transaction, if carried out by the United States, would have been in clear violation of the Fifth Amendment guarantee against uncompensated takings. Banco Nacional v. Sabbatino, 376 U.S. 398 (1964). Thus, there are a wide variety of situations, of varying degrees of persuasiveness in this context, in which the United States has recognized and enforced actions taken abroad which cut substantially into the rights which individuals, including American citizens, would have had if the actions had been taken within the United States.

In evaluating the prisoner transfer program in relation to these precedents, one should recognize that it involves much less of an inroad into the rights of an American as measured by the United States Constitution. It would obviously be unconstitutional for an American trial abroad to take place under foreign procedures not known to our Constitution. Similarly, it would be intolerable to have American trial safeguards circumvented by collusion between American and foreign law enforcement agencies. The transfer arrangement does not affect the quality of any American trial. A transfer by American authorities to a foreign government prior to trial ensures that the accused will have neither an American trial nor American imprisonment. A transfer of a convicted prisoner back to the United States assures him that he will at least be confined subject to the protections of the Eighth Amendment. It might have been preferable in theory to obtain an arrangement providing for both trial and confinement to be under the auspices of the United States. However, it is plain that neither country could have accepted a treaty that made such inroads into its territorial sovereignty. The Treaty should not be invalidated because, having achieved much for the prisoners in Mexico, it could not go on to reach their other problems.*

* Cf. Holmes v. Laird, *supra.*, in which the court recognized that Status of Forces Agreements obtained as much American control over the trials in question as could be achieved under the circumstances.

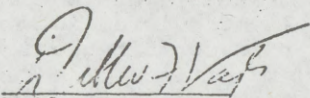
IV. The Consent of the Accused Undercuts the Constitutional Objections to the Transfer of Prisoners.

If the transfer of prisoners from a Mexican to an American prison involved a significant surrender of any rights possessed by the prisoners there would be a question as to whether the prisoner's consent would be an effective waiver. However, as we have seen, the prisoners never had a right to be tried in a Mexican court according to United States constitutional procedures. All that the prisoners have done is to surrender the right to serve a sentence in a Mexican prison in favor of the option to serve that sentence in an American prison. By so doing, they indicate that the American prison is, from their point of view, preferable. This obviates questions raised in the cases involving internal American transfer, supra., about the limitations on transfers against a prisoner's will and in circumstances that increased, rather than decreased, the severity of the prisoner's sentence.

However, a strong argument can be made in support of the proposition that consent is an adequate separate basis for sustaining the continued imprisonment within the United States of one originally convicted in Mexico. The cases hold that it is constitutional to present individuals with some very difficult and unpleasant choices, so long as they are lawful ones. Recent decisions of the Supreme Court have made it apparent that a plea of guilty is effective as a waiver of almost all categories of constitutional claims as to trial safeguards in American law. E.g., Tollett v. Henderson, 411 U.S. 258 (1973). Similarly, an American citizen has been held to have effectively waived the basic right of citizenship itself, even when under the pressure of a threat of being drafted to serve in a war he found repellent. Jolley v. INS, 441 F.2d 1245 (5th Cir. 1971). Thus, it appears that the consent of the accused to transfer under the terms of the Treaty will in all probability be found sufficient to waive effectively any claim to a constitutional review of the Mexican proceedings according to United States standards.

CONCLUSION

It thus appears that an American has no basis for a constitutional objection to being tried in Mexico according to the procedures prevailing there and that his being transferred to the United States to serve the remainder of his sentence, under conditions which the authorities and the prisoner agree to be preferable, does not cause a new right to arise at that time. The involvement of the United States in executing on behalf of Mexico the sentence of a Mexican court does not retroactively convert the proceedings into a United States trial. Whatever right the prisoner had in this regard should in any case be regarded as knowingly waived by his consent to be transferred.


Detlev F. Vagts

December 15, 1976



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TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE
UNITED MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES:
LEGAL ISSUES

On November 25, 1976, representatives of the United States and Mexico signed the Treaty Between the United States of America and the United Mexican States of the Execution of Penal Sentences. The Treaty is the subject of a memorandum of law prepared for the Department of State by Professor Detlev F. Vagts. The Treaty raises several legal issues which are the subject of this report.

The Treaty authorizes the United States and Mexico to transfer custody of each other's nationals. The transfers are limited to prisoners convicted of conduct which is criminal under the laws of both the United States and Mexico who have no pending appeals, have at least six months remaining on their fixed sentences and who are not domiciliaries of the nation where they are incarcerated, Arts. II, IV(6). While the nation with custody must initiate the transfer on a case by case basis, no transfer can be accomplished without the approval of the prisoner and the nation to which he is to be transferred, Arts. IV, V. Where the prisoner has been convicted by one of the United States or one of the Mexican states, their approval is also required, Art. IV(5). Transferred prisoners serve the sentence imposed upon conviction but subject to the laws and procedures of the nation to which they are transferred with two exceptions, Art. V. The pardon power and access to the courts to challenge the sentence imposed are limited to those of the nation which is transferring the prisoner, Arts. V(2), VI. After ratification, the Treaty would be in force for an indefinite number

of three year periods and either nation would be permitted to terminate the Treaty upon the completion of any three year interval, Art. X.

The legal issues raised by the Treaty include the following:

1. Do the provisions of the United States Constitution apply to Mexican convictions of American nationals for conduct committed in Mexico?
2. Does the acceptance by the United States of the transfer of prisoners from Mexico represent such an involvement in the Mexican proceedings as to render the United States Constitution applicable?
3. Does the consent of the prisoner to be transferred cure what would otherwise be due process infirmities?
4. Does continued incarceration after transfer constitute cruel and unusual punishment in violation of the Eight Amendment?
5. Does continued incarceration after the transfer constitute a violation of the constitutional prohibition against ex post facto laws or bills of attainder?
6. Does the Treaty operate as an unconstitutional restriction on the pardoning power of the President?
7. Would compliance with the Treaty require an unconstitutional withdrawal of the jurisdiction of the federal courts?
8. Would the Treaty unconstitutionally deny access to federal courts?
9. Assuming the federal courts ordered the release of a transferred American prisoner, could he be extradited back to Mexico to serve the remainder of his Mexican sentence?

Do the Provisions of the United States Constitution Apply to Mexican Convictions of American Nationals for Conduct Committed in Mexico?

NO: The rights and protections afforded by the United States Constitution to those convicted of criminal offenses are restrictions on the exercise of authority by the federal government and the states. They do not apply to the trial of Americans before a foreign tribunal for conduct committed within the foreign nation in violation of that nation's laws.

YES: While in most circumstances American courts will not consider the question of foreign application of the Constitution, there are exceptions. The courts have not hesitated to consider whether proceedings conducted by American tribunals in a foreign country are subject to the restrictions of the Constitution, Reid v. Covert, 354 U.S.1(1957). They have also exhibited a willingness to consider the applicability of the Constitution to the conduct of foreign officials within a foreign nation when that conduct was "at the direction of United States officials," United States v. Toscanino, 500 F.2d 267(2d Cir. 1974) or when "Federal agents so substantially participated in the [conduct] as to convert [it] into [a] joint venture between the United States and the foreign officials," Stonehill v. United States, 405 F.2d 738, 743(9th Cir. 1969).

This suggests that while the courts give great deference to the political branches of government on issues involving foreign relations, there are instances where the level of American involvement in foreign conduct within a foreign country is such that the courts will apply the restrictions of the Constitution.

ANALYSIS: American courts have apparently never held that foreign courts who prosecute Americans for offenses against foreign law within their own territory are bound by the United States Constitution. In fact, there is ample authority for a general rule to the contrary as the statements quoted by Professor Vagts demonstrate:

In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States....Therefore, the charge, if true, must be that the defendant was denied "due process" in Mexico by Mexicans. If true, that is no legal concern of an American court. Wentz v. United States, 244 F.2d 172, 176 (9th Cir. 1957).

The Constitution, of course, applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country, United States v. Toscanino, 500 F.2d 267, 280n.9(2d Cir. 1974).

Obviously, the constitutional provisions appellants invoke exerted no force of their own upon the Federal Republic [of Germany] in that exercise of its sovereignty. Holmes v. Laird, 459 F.2d 1211, 1218(D.C.Cir. 1972)

The Holmes opinion even suggests that if the Americans subject to this Treaty escaped to the United States rather than being transferred here the American courts would not interfere with their return to Mexican authorities by federal officials pursuant to a treaty obligation or similar commitment even if it could be established that their Mexican convictions had been secured as a result of activities or proceedings that would have been unconstitutional if conducted by federal officials and court within the United States. In Holmes, American servicemen, convicted by West German authorities in West Germany under proceedings which they alleged lacked some of the constitutional requirements of an American trial, sought to prevent federal officials from returning them to West Germany after their unauthorized return to the United States. The court denied their request. Wentz and Toscanino are somewhat less analogous. Both involve the question of whether an American court may conduct criminal proceedings against an individual who has illegally been brought within the jurisdiction of the court. However, all three statements accurately reflect the consistent view of American courts.

Does the Acceptance by the United States of a Transfer of Prisoners From Mexico Represent such an Involvement in the Mexican Proceedings as to Render The United States Constitution Applicable?

NO: Professor Vagts presents this argument very capably as follows:

"The critical question in this case is whether the receipt by the United States of prisoners transferred from Mexico under the Treaty so involves the United States as to make their continued imprisonment here somehow the unlawful fruit of the lawful Mexican trial. In Holmes v. Laird, supra, the court phrased the contention thus:

'The argument, in essence, is that a turnover of an American citizen for service of a sentence imposed in culmination of an unfair foreign trial is a governmental involvement which the Constitution does not tolerate.'
[459 F.2d at 1217]

The court rejected that argument, made in the context of a surrender of American citizens for trial by Germany under the provision of the Status of Forces Agreement. Similar contentions have been made in a number of different contexts, all of which arise out of the growing interconnections between national criminal systems in the fight against international crime. In all but one case, discussed below, the courts have rejected contentions that the United States was involved to the degree the Constitution applied. None of the situations is precisely like this one because no treaty of this type has ever been implemented by the United States, but no reason appears to suggest that this situation should be treated differently. Indeed, it seems a less suitable case for the application of a rule of United States involvement than many others.

Extradition or Surrender by the United States

In Holmes v. Laird, supra, the court sustained the surrender by the United States of American citizens to a foreign sovereign for trial according to proceedings which the court assumed would deviate substantially from American practice. It specifically rejected the contention that the entanglement of functions made the United States responsible for the whole. It is but one of a large number of cases reaching the same result, including Wilson v. Girard, 354 U.S.

524(1957). To like effect we have a number of cases in which persons being extradited to face foreign trials argued that it was unlawful to do so when the procedures have consistently taken the position that:

'The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. Neely v. Henkel, 180 U.S. 109, 122(1901).'

This rule has been consistently followed, so that a court could say '...we have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition.' Gallina v. Fraser, 278 F.2d 77(2d Cir. 1960), cert. denied, 364 U.S. 851 (1960).

Surrender to the United States

In a number of cases prisoners have challenged the process whereby they were turned over to the United States authorities for trial. The general answer of the courts has been that quoted above from Wentz v. United States, 244 F.2d 172(9th Cir. 1957), that what happened in Mexico is "no legal concern of an American court." The one exception to this line of cases has been United States v. Toscanino, 500 F.2d 267(2d Cir. 1974), which stated that a district court should inquire into allegations that agents of the United States had not only participated in forcefully bringing the accused into the country from Uruguay via Brazil without benefit of any request for extradition, but had also been involved in torturing him. The subsequent cases, e.g., United States v. Lira, 515 F.2d 68 (2d Cir. 1975), show that this constitutes a very narrow exception to the rule of non-inquiry.

Procurement of Evidence Abroad

In a number of cases the accused has made the claim that evidence procured by foreign police forces in violation of the rules that would be applicable to United States law enforcement agencies should be excluded from an American trial.

The courts have conceded that a confession obtained abroad under extreme pressures might be untrustworthy, and hence unusable, and have further stated that if the foreign police acted so closely with United States law enforcement officials as to convert their activities into a joint venture, the results of a search might be excluded. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968). For the rest, the courts have rejected arguments that wiretapping or searches unlawful under American law is a basis for exclusion in the United States: '...no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico.' Brulay v. United States, 383 F.2d 345 (9th Cir. 1967). The same result has been arrived at in an increasing number of cases. E.g., United States, 346 F.2d 775 (5th Cir. 1965), cert. denied, 382 U.S. 963 (1966); United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975); cf. Berlin Democratic v. Rumsfeld, 410 F. Supp. 144, 154-55 (D.D.C. 1976).

Confinement

No case is found under which the United States confined an American citizen pursuant to an order of a foreign court — as distinguished from pre-trial confinement pending surrender to the foreign state for trial or punishment. The one agreement under which that is called for has not been implemented, i.e., the Status of Forces Agreement with South Korea, 17 U.S.T. 1677, Article XXII (7)(b). The United States is authorized by statute and by the typical Status of Forces Agreement to enforce sentences of imprisonment handed down in its territory by the courts-martial of friendly foreign forces. In a terse per curiam opinion, the Supreme Court in Hirota v. McArthur, 338 U.S. 197 (1949), rejected an attempt to review the trial by an international war crime tribunal of a Japanese prisoner held in United States custody. Under 22 U.S.C. §257 foreign seaman may be confined for two months pursuant to a determination by the consul of the relevant foreign country. See Dallemagne v. Moisan, 197 U.S. 169 (1905). Citizens taken into custody abroad by reason of their insanity may, under 24 U.S.C. §321, be

transferred into American institutions. That law has been applied to a citizen who had been convicted of a crime abroad but moved to an institution for the criminally insane. DeMarcos v. Overholser, 122F. 2d 16(D.C.Cir. 1941).

"While the international movement of prisoners has been rare, transfers between two states, between a state and the federal government, and between federal prisoners have been quite frequent. (See 18 U.S.C. §4002, 5003). Note that generally such transfers have been challenged in situations where the transfer was involuntary and away from the prisoner's home in contrast with those under the Treaty. The courts have sustained such moves despite claims that the transfer constituted cruel and unusual punishment, e.g., Rodriguez-Sandoval v. United States, 409 F.2d 529(1st Cir. 1969); Hillen v. Directo, 455 F.2d 529 (9th Cir. 1972), although one decision did indicate that a hearing should be granted prior to transfer. Hoitt v. Vitek, 361 F. Supp. 1238(D.N.H. 1973), modified, 495 F.2d 219(1st Cir. 1974). The decision in Meachum v. Fano, ___ U.S. ___ (June 1976), although arising in an intrastate context, does indicate that the courts will regard the question where a prisoner is held as not a matter for judicial inquiry.

"One of the consequences of the transfer of prisoners within the United States is that a prisoner tried under system 'X' winds up in a prison belonging to system 'Y' which has different rules as to the conduct of trials. For example, a prisoner might be transferred from a state after a conviction based on a trial based on an information so that he served his sentence in prison managed by federal authorities who constitutionally must proceed by way of indictment. It has not been suggested that such a transfer makes the conviction a federal one and thus renders it constitutionally inadequate.

Enforcement of Foreign Judgments

In various situations foreign criminal convictions are given significant collateral consequences by the United States legal system. Aliens convicted abroad of crimes involving moral turpitude are not admissible to the United States. In Colley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975) an Iranian conviction for murder was held to be a bar to a claim for social security benefits derived through the deceased. Somewhat further afield, foreign civil judgments are given enforcement here in various cases, even where the courts recognize that the foreign procedures differ from American, even to the extent of falling below United States constitutional standards. For a recent summary of the rules here see materials assembled in Steiner & Vagts, Transnational Legal Problems, pp. 767-796 (2d ed. 1976). Going one step further, one finds that the act of state doctrine, where it applies, causes American courts to enforce expropriations of property carried out by a foreign government even though the same transaction, if carried out by the United States, would have been in clear violation of the Fifth Amendment guarantee against uncompensated takings. Banco Nacional v. Sabbatino, 376 U.S. 398 (1964). Thus, there are a wide variety of situations, of varying degrees of persuasiveness in this context, in which the United States has recognized and enforced actions taken abroad which cut substantially into the rights which individuals, including American citizens, would have had if the actions had been taken within the United States.

In evaluating the prisoner transfer program in relation to these precedents, one should recognize that it involves much less of an inroad into the rights of an American as measured by the United States Constitution. It would obviously be unconstitutional for an American trial abroad to take place under foreign procedures not known to our Constitution. Similarly, it would be intolerable to

have American trial safeguards circumvented by collusion between American and foreign law enforcement agencies. The transfer arrangement does not affect the quality of any American trial. A transfer by American authorities to a foreign government prior to trial ensures that the accused will have neither an American trial nor American imprisonment. A transfer of a convicted prisoner back to the United States assures him that he will at least be confined subject to the protections of the Eight Amendment. It might have been preferable in theory to obtain an arrangement providing for both trial and confinement to be under the auspices of the United States. However, it is plain that neither country could have accepted a treaty that made such inroads into its territorial sovereignty. The Treaty should not be invalidated because, having achieved much for the prisoners in Mexico, it could not go on to reach their other problems."

YES: This issue is really two issues. First, will American courts permit federal authorities to inflict a punishment if it is assumed that the proceedings under which the punishment was imposed would be considered violative of due process if they had been conducted by American courts? Second, would an American court be any more willing to order federal authorities to release a prisoner transferred from Mexico if it could be shown that American officials also participated in earlier stages of the case or that the Mexican proceedings were "antipathetic to a federal court's sense of decency?"

With respect to the first issue, the argument in support of the Treaty must be grounded on the disquieting assertion that the Constitution does not bar federal authorities from carrying out a punishment pursuant to treaty no matter how arbitrarily imposed by a foreign government. It is difficult to believe that the courts would permit federal authorities to carry

out a death penalty or term of life imprisonment ordered without trial or any other type of hearing by a foreign government for the crime of having red hair or being left-handed. Obviously, this is not possible under the Treaty, but the argument in favor of the Treaty on this issue rests on the proposition that only discretion in making, ratifying and complying with a treaty -- not constitutional restriction -- bars such a result.

The Fifth Amendment prohibits the federal government from depriving anyone of his liberty without due process of law. The Amendment operates as a restriction on the exercise of federal authority to carry out a sentence of imprisonment against anyone within the United States.

With respect to the second aspect of this issue, whether an American court would be willing to order the release of a transferred American prisoner in cases where there were additional American involvement or where the denials of due process were antipathetic to a federal court's sense of decency, Professor Vagts has correctly observed, "It would obviously be unconstitutional for an American trial abroad to take place under foreign procedures not known to our Constitution. Similarly, it would be intolerable to have American trial safeguards circumvented by collusion between American and foreign law enforcement agencies." But suppose after the treaty is ratified, the FBI or DEA becomes aware of a conspiracy to smuggle drugs into the United States from Mexico and rather than wait and arrest the American smugglers after they cross the border, federal officials alert Mexican authorities who arrest, try,

convict and transfer the smugglers. Under these facts it is not too difficult to argue that American and Mexican authorities have circumvented American trial safeguards by collusion and that the Mexican authorities are really acting as agents in what is essentially an American trial conducted abroad.

ANALYSIS: "The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." Reid v. Convert, 354 U.S.1, 5-6(1957). The federal government is prohibited acting so that anyone is "deprived of...liberty...without due process of law..."U.S. Const. Amend. V. The due process limitations of the Fifth Amendment imposed on the federal government are at least as restrictive as those imposed on the states by the Fourteenth Amendment Due Process Clause; Geneva Towers Tenants Organization v. Federal Mortgage Investors, 504 F.2d 483(9th Cir. 1974); Walker v. Hughes, 386 F.Supp. 32(E.D.Mich. 1974). Thus, absent other considerations, the Fifth Amendment Due Process Clause prohibits the federal government from imprisoning anyone within the United States except pursuant to proceedings featuring all those guarantees of the Bill of Rights which the Due Process Clause of the Fourteenth Amendment requires of state criminal proceedings.

It has been suggested that this may not be the case where federal imprisonment occurs pursuant to treaty and Mexican proceedings conducted within that country for violations of its laws. This is not to suggest that any "agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution" Powell v. Zuckert, 366 F.2d 634, 640(D.C.Cir. 1966) quoting Reid v. Covert, 354 U.S. 1, 16(1957), nor does it suggest that the Mexican proceedings were characterized by those attributes which would be constitutionally required in state criminal proceedings. Rather the argument is based on a principle of judicial restraint.

It seems well settled that the principles of judicial self-restraint in reaching the merits of cases involving questions of foreign relations are not absolute, Baker v. Carr, 369 U.S. 186, 211-13(1962); Zweibon v. Mitchell, 516 F.2d 594(D.C.Cir. 1975). This is true in cases where restraint would ordinarily be called for when examination of the validity of the official acts of a foreign government is sought, Gallin v. Fraser, 278 F.2d 77, 79(2d Cir. 1960); United States ex rel. Bloomfield v. Gengler, 507 F.2d 925, 928(2d Cir. 1974); United States v. Cotroni, 527 F.2d 708, 712n.10(7th Cir. 1976).

While there is apparently no case law directly on point, principles of judicial self-restraint are not likely to be applied in a case where the federal government is acting as jailer for a foreign nation and would be declared in violation of the Fifth Amendment but for the foreign connection. The cases, which articulate the view that the official acts of a foreign tribunal dealing with conduct committed within its territory are not the concern of American courts, are not characterized

by the level of federal involvement present where the federal government acts as executioner of a foreign criminal punishment. Constitutional challenges of the authority of the federal government to imprison American citizens are traditionally within the province of the federal courts. There is no reason to adhere to the principle that "any issue that touches foreign affairs is to be immunized from judicial review, particularly when there are strong countervailing constitutional interests that merit judicial protection." Zweibon v. Mitchell, 516 F.2d 594, 623(D.C.Cir. 1975).

While the authority marshalled in favor of judicial restraint is impressive, it is distinguishable. The level of federal involvement in foreign conduct associated with acceptance and punishment of Americans convicted in Mexican tribunals seems considerably greater than where the federal authorities surrender an individual pursuant to an extradition treaty or some similar obligation, where the federal courts accept jurisdiction over an individual illegally brought before them through the actions of foreign officials, or where the federal courts accept evidence secured by foreign officials. Moreover, even at these lower levels of federal involvement the courts have indicated that the principle of judicial restraint is not absolute:

We regard it as significant that the procedures which will occur in the demanding country subsequent to extradition were not listed as a matter of a federal court's consideration in Ornelas v. Ruiz, 1896, 161 U.S.502...; and we regard it as equally significant that, in refusing to enjoin the Secretary of Defense from turning over an American soldier for prosecution in Japanese courts on charges of having committed crimes on Japanese soil, the Supreme Court gave no consideration to the procedures that would prevail in the Japanese courts, Wilson v. Girard, 1957, 354 U.S. 524....Nevertheless, we confess to some

disquiet at this result. We can imagine situations where the relator, upon extradition would be subject to procedures or punishments so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above. Gallina v. Fraser, *supra* at 79.

While ordinarily the courts of the extraditing country will not "inquire into the [internal legal] procedures which await the relator upon extradition," Gallina v. Fraser, 278 F.2d 77, 78(2d Cir.) cert. denied, 364 U.S. 851...(1960)(claim of Italian trial inabsentia), leaving this to executive discretion, cf. Sweeney v. Woodall, 344 U.S.86...(1952), our court has been able to imagine, as we can, situations where the relator on extradition "would be subject to procedures or punishments so antipathetic to a federal court's sense of decency as to require reexamination" of this principle. United States ex rel. Bloomfield v. Gengler, 507 F.2d 925, 128(2d Cir. 1974)

The fourth amendment does apply to actions by foreign officials if United States officials participated in those "so as to convert them into joint ventures between the United States and foreign officials." [Stonehill v. United States, 405 F.2d 738, 743(9th Cir. 1968)] Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 154(D.D.C. 1976).

[T]his court [has] held that if information is obtained in a search by a private individual absent probable cause, the information is usable if Government agents did not participate in the search. The same standard applies when foreign law enforcement personnel obtain evidence through such a search. United States v. Marzano, 537 F.2d 257, 269-70(7th Cir. 1976).

The exclusionary rule is intended to inculcate a respect for the Constitution in the police in our nation....Since it has little if any deterrent effect upon foreign police...it is seldom used to bar their work.

[Were the conduct of foreign police so reprehensible as to shock the conscience, a different result might obtain.] United States v. Cotroni, 527, F.2d 708, 712 (2d Cir. 1975)(footnote 10 of the court's opinion in brackets).

The cases involving federal confinement in association with foreign proceedings are also distinguishable. In Hirota v. MacArthur, 338 U.S. 198(1948), those incarcerated were Japanese held in Japan by the authority of these with governmental powers over Japan at that time. In fact, the Court's opinion suggests that both the tribunal and the custodians had to be viewed as foreign authorities. Moreover, Justice Douglas' concurrence is perhaps more damaging than the per curiam is helpful:

I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of habeas corpus can effect a release from that custody. It is the historic function of the writ to examine into cause of restraint of liberty. We should not allow the inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well....

These are increasingly important questions as collaboration among nations at the international level continues. They pose questions for which there is no precedent. But we sacrifice principle when we stop our inquiry once we ascertain that the tribunal is international.

I cannot believe that we would adhere to that formula if these petitioners were American citizens. Id. at 204, 205(1949).

Dalemagne v. Moisan, 197 U.S. 169(1905), not only did not involve any allegations of violation of the United States Constitution nor the action or anticipated action of any foreign tribunals, but the case turned on interpretations of federal statutes and state law. Moreover, the

confinement involved seems more properly considered with the extradition cases and seems distinguishable on the same grounds.

DeMarcos v. Overholser, 122 F.2d 16(D.C.Cir. 1941), involving the transfer of an American who had been convicted by a Canadian court to an American institution for the criminally insane, also involved an American judicial proceeding in which the individual was found "to be a person of unsound mind and was recommitted for treatment." In addition, the case was limited to a determination of whether the individual was entitled to a transfer from an American institution in the District of Columbia to an institution in Tennessee.

The prisoner transfer cases cited by Professor Vagts can provide little support on this issue since they involve judicial proceedings where the due process requirements were honored or where the failure to honor them could have and probably would have been resolved without reference to the transfer.

The "act of state" doctrine might be thought to be persuasive authority for the Treaty on this issue but for the fact that the courts have long held that the act of state doctrine does not require American courts to execute the penal laws of a foreign country. Banco Nacional de Cuba v. Sabbatton, 376 U.S. 398, 413-14(1964) citing The Antelope, 23 U.S.(10 Wheat.) 66,123 (1825). In Cooley v. Weinberger, 518 F.2d 1151(10th Cir. 1975), the administrative law judge appears to have examined the question of whether the Iranian conviction involved procedures which would be violative of due process if utilized by an American court and concluded it did not.

In summary, it would seem that absent other considerations, American courts would order federal authorities to release transferred prisoners whose Mexican trials lacked any of the due process requirements of state criminal proceedings. This would be particularly true in the case of transferred prisoners, if any, whose cases involved collusion between federal and Mexican authorities in securing a Mexican rather than an American trial or involved Mexican procedures "antipathetic to a federal court's sense of decency."

Does the Consent of the Prisoners to be Transferred Cure
What Would Otherwise be Due Process Infirmities?

YES: By consenting to the transfer and thereby accepting the benefits of the Treaty's provisions, American prisoners have waived any rights they may have had to challenge the Mexican proceedings in American courts on due process grounds. Professor Vagts noted:

Recent decisions of the Supreme Court have made it apparent that a plea of guilty is effective as a waiver of almost all categories of constitutional claims as to trial safeguards in American law. E.g., Tollett v. Henderson, 411 U.S. 258(1973). Similarly, an American citizen has been held to have effectively waived the basic right of citizenship itself, even when under the pressure of a threat of being drafted to serve in a war he found repellant. Jolley v. INS, 441 F.2d 1245 (5th Cir. 1971). Thus, it appears that the consent of the accused to transfer under the terms of the Treaty will in all probability be found sufficient to waive effectively any claim to constitutional review of the Mexican proceedings according to United States standards.

If the constitutional difficulty is identified as the imprisonment by federal authorities pursuant to the sentence of a foreign tribunal

which was not characterized by those procedures and rights required in state criminal prosecutions, the consent to be transferred is an effective waiver because it accepts incarceration by federal authorities.

NO: Consent to be transferred is not a waiver of the right to seek relief from incarceration by federal authorities pursuant to Mexican proceedings which did not comply with the minimum standards of due process. It may be viewed as a waiver of any rights violated by the transfer procedures but not as a waiver of the opportunity to contest the validity of the Mexican proceedings.

Consent also cannot be viewed as a valid waiver since it is not truly voluntary but rather the product of a draconian choice between imprisonment in a Mexican prison and the claim of constitution rights.

ANALYSIS: Constitutional rights may generally be waived if the waiver is voluntary, knowing and intelligent, United States v. Arredo-Sarmiento, 524 F.2d 591(2d Cir. 1975); United States v. Oliver, 525 F.2d 109(8th Cir. 1975). A voluntary, knowing and intelligent consent to be transferred to the custody of federal authorities would be a waiver of any rights to challenge federal custody as a deprivation of liberty without due process of law. The fact "that the coercive impact of the Hobson's choice of compromising valuable constitutional rights out of fear of greater punishment should they be asserted in full, does not of itself constitute impermissible coercion." United States ex rel. Delman v.

Butler, 390 F.Supp. 606,609(E.D.N.Y. 1975) citing Brady v. United States, 397 U.S. 742(1970); McMann v. Richardson, 397 U.S. 759(1970); Parker v. North Carolina, 397 U.S. 790(1970).

Does Continued Incarceration After Transfer Constitute a
Violation of the Constitutional Prohibition Against
Ex Post Facto Laws or Bills of Attainder?

NO: The Treaty does not operate as a bill of attainder because (1) it is not legislation, (2) it does not inflict a punishment and (3) it does not involve the absence of a judicial trial. The Treaty does not inflict a punishment; the punishments are already established by applicable Mexican and American law and the Treaty would not add to the sentences imposed on transferred prisoners. The Treaty does not involve infliction of a punishment without a judicial trial; the Treaty does nothing that effects the rights to trial under either Mexican or American law.

The Treaty is not an ex post facto law because it establishes no new punishments and does not increase existing punishments.

Moreover, if the Treaty did operate as either a bill of attainder or an ex post facto law, the prisoner's consent to be transferred would constitute a waiver of any right to claim the protection of the Clause.

YES: The bill of attainder provision of the Constitution "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." United States v. Brown, 381 U.S.437, 442(1965). A bill of attainder may be legislative action in any form, United States v. Lovett, 328U.S. 303(1946). It should be of no constitutional consequence that the Congressional invasion of

the judicial domain occurs with Executive participation through the ratification of a treaty rather than through the enactment of a statute signed by the Executive.

The Treaty operates to inflict punishment without a judicial trial in two senses. First, since the federal and Mexican parole provisions are not likely to be the same and since the prisoners are subject to the the parole provisions of the country to which they are transferred rather than those of the nation which sentenced them, prisoners transferred to the country with the more stringent parole provisions have in effect had their sentences increased without the benefit of any judicial proceedings. Second and perhaps more importantly, the judicial proceeding, whose absence is prohibited by the restrictions on bills of attainder, must be that characterized by the minimum standards of due process required of American courts. Any other interpretation seems inconsistent with the intent of the Framers, for it is clear that the powers of the judiciary protected by the separation of powers doctrine are primarily those necessary to protect the people and the states from the excesses of the other two branches of the national government. It would also seem that the judicial participation required must be more than some minimal ministerial involvement and that the judicial participation demanded must involve procedures which satisfy the minimum standards of fundamental fairness required in other American criminal proceedings, see Barenblatt v. United States, 360 U.S.109, 160(Black, J., dissenting).

The Treaty would operate as an ex post facto law because it would increase the real sentences of those prisoners who after transfer

would be exposed to more severe parole provisions than would have been applicable in the country where they were tried and sentenced.

Since objections to the Treaty as a bill of attainder and ex post facto law go to the legislative power of Congress they cannot be waived by the consent to be transferred, see Mercado v. Rockefeller, 502 F.2d 666(2d Cir. 1974)(guilty plea does not waive right to challenge constitutionality of statute upon which conviction is based).

ANALYSIS: Article I, §9, cl.3 of the United States Constitution states, "No Bill of Attainder or ex post facto law shall be passed." The prohibition against bills of attainders is a proscription against legislation which inflicts punishment upon an ascertainable individual or group without the benefit of a judicial trial, United States v. Lovett, 328 U.S. 303(1946). An ex post facto law is one which makes criminal conduct which was innocent when committed or one which imposes a greater penalty for misconduct than that which was permissible at the time of its commission, Bouie v. City of Columbia, 378 U.S. 347(1964).

Although there is no case law directly on point, it is questionable whether Senate ratification of a treaty constitutes passage for purposes of the Bill of Attainder and Ex Post Facto Clause. Admittedly, the cases indicate that the Clause is to be broadly interpreted and refer to legislative action in any form, but these views seem to have been expressed to rebut the contention that the Clause is limited to special criminal statutes and probably should only be read to cover enactment of any form of legislation, see Cummings v. Missouri, 71 U.S.(4 Wall.) 277, 322-25(1866); United States v. Lovett, 328 U.S. 303, 315-18(1946). There is some authority for the proposition that the Clause should not

be applied to the nonlegislative action of a single House in ratifying a treaty, confirming executive appointments, impeachment or the trial of impeachments, citations for contempt of the legislative body, refusals to sit any one as a Member, etc., see Groppi v. Leslie, 331 F.Supp. 772, 781(W.D.Wis.), rev'd on other grounds, 436 F.2d 326(7th Cir. 1970), rev'd, 404 U.S.496(1972)(contempt citation by one of the houses of the Wisconsin legislature); Bond v. Floyd, 251 F.Supp. 333, 345(N.D.Ga.), rev'd on other grounds, 385 U.S. 116, 137 & n.14(1966)(refusal of one of the houses of the Georgia legislature to seat a Member). While it is undoubtedly true that treaties and Acts of Congress are considered of equal dignity for purposes of the Supremacy Clause, it would seem that a treaty is more properly classified as executive action and, although Congressionally approved, any allegation that a treaty results in punishment without trial raises due process rather than bill of attainder questions.

There is also a real question as to whether the Treaty would impose any new punishment or increase an existing punishment. It might be argued that the Treaty simply Americanizes the punishment previously imposed and being carried out by a foreign government. Although cases where the date of parole eligibility is earlier under the laws of the transferring country might be thought to result in an increase in sentence sufficient to satisfy the requirements of claim under the Clause, see Love v. Fitzharris, 460 F.2d 382(9th Cir. 1972) vac'd and remanded with instructions to dismiss as moot, 409 U.S. 1100(1973); Greenfield v. Scafati, 277 F.Supp. 644(D.Mass. 1967), aff'd, 390 U.S. 713(1968),

Article V(3) of the Treaty may overcome this problem:

No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Transferring State.

The question of waiver is likewise troublesome. It is generally conceded that nonjurisdictional constitutional defects may be waived, United States v. Karger, 439 F.2d 1108(1st Cir. 1971); United States v. Doyle, 348 F.2d 715(2d Cir. 1965); United States v. Hawthorne, 532 F.2d 318 (3d Cir. 1976). It is also generally agreed that one who reaps the benefits of a statute may not then question its constitutionality, 16 Am.Jur.2d "Constitutional Law" §135(1964) citing *inter alia*, United Fuel Gas Co. v. Railroad Comm. of Kentucky, 278 U.S. 300(1929); Buck v. Kuykendall, 267 U.S. 307(1952). On the other hand, if the Treaty exceeds the constitutional authority of the United States as a bill of attainder or ex post facto law, the consent of an American prisoner to be transferred cannot make it any more valid, cf., Gilmore v. Utah, 45 U.S.L.W. 4053, 4055(U.S. Dec. 13, 1976)(White, Brennan, Marshall, JJ., dissenting) (a state is not privileged to impose a cruel and unusual punishment simply because the subject refuses to contest).

On balance, it appears that ratification of a treaty should not be considered passage for purposes of the Clause. If the courts should hold otherwise, it seems unlikely that they would grant relief in cases such as these where violation of the Clause can only occur with the consent of the transferred American prisoners.

Does Continued Incarceration After Transfer Constitute Cruel and Unusual Punishment in Violation of the Eighth Amendment?

NO: An Eighth Amendment challenge by prisoners transferred under the Treaty might be based on the transfer itself, the sentence which the prisoner is to serve in the country to which he is transferred, or the conditions of confinement to which the transferred prisoner is subjected. The Cruel and Unusual Punishments Clause of the Eighth Amendment does not preclude the out of state transfer of prisoners without their consent, Tai v. Thompson, 387 F.Supp. 912(D.Hawaii 1975); Gomes v. Travisono, 353 F.Supp. 457(D.R.I. 1973); Hoitt v. Vitek, 361 F.Supp. 1238(D.N.H. 1973). It certainly should not be thought to preclude transfer of prisoners with their consent from a foreign country to their native lands. The Treaty limits jurisdiction to set aside or modify sentences to courts of the sentencing country. Therefore, American transferred prisoners would not be permitted to challenge their Mexican sentences on the grounds that they were disproportionate and therefore cruel and unusual except in Mexican courts. Moreover, given the application of American parole provisions, the instances where a sentence would be so disproportionate as to constitute a violation are likely to be rare. Eighth Amendment claims arising after transfer because of the conditions of confinement would be handled in the same manner whether raised by transferred prisoners or other federal prisoners.

YES: The federal government may not inflict a cruel and unusual punishment no matter by whom the punishment is imposed. Sentences which are disproportionate to the severity of the offense for which they are imposed are contrary to the prohibitions of the Eighth Amendment,

Gregg v. Georgia, 96 S.Ct. 2909, 2925(1976); Trop v. Dulles, 356 U.S. 86, 100(1958); Weems v. United States, 217 U.S. 349, 367(1910). As will be discussed later in this report access to the courts to contest violations of constitutional rights cannot be denied by treaty.

ANALYSIS: The growing number of cases brought by prisoners to contest the conditions of their incarceration demonstrates that the Eighth Amendment is not limited to legislative and/or judicial action, LaReau v. MacDougall, 473 F.2d 974(2d Cir. 1972); Berch v. Stahl, 373 F.Supp. 412(W.D.N.C. 1974); Landman v. Royster, 333 F.Supp. 121(E.D.Va. 1971).

Sentences which are excessive or disproportionate to the severity of the offense for which they are imposed are contrary to the requirements of the Eighth Amendment. Varying factors have been used to determine whether a particular sentence is unconstitutionally disproportionate. These include consideration of the nature of the offense, the legislative purpose in establishing the punishment, comparison of the punishment with penalties authorized for other offenses by the same jurisdiction, comparison of the punishment with penalties authorized for the same offense by other jurisdictions, and comparison of the punishment in a particular case with punishments inflicted for the same offense by the same jurisdiction in other cases, Gregg v. Georgia, 96 S.Ct. 2909(1976); Furman v. Georgia, 408 U.S. 238 (1972); Hart v. Coiner, 483 F.2d 136(4th Cir. 1973); People v. Venable, 46 App.Div.2d 73, 361 N.Y.S.2d 398(1974). While there seems to be no reason why American prisoners transferred to serve excessive or disproportionate sentences in federal custody could not raise this issue,

the courts are extremely reluctant to find a sentence disproportionate and this should prove particularly true where the sentence was imposed by a foreign court pursuant to foreign law and where American parole provisions apply.

Does the Treaty Operate as an Unconstitutional Restriction on the Pardoning Power of the President?

NO: Article V(2) preserves the pardon power conferred on the President by the Constitution; the power is not restricted in any way by the Treaty.

YES: The President's power under the Constitution to grant pardons encompasses not only those who violate federal laws but those who are punished by the exercise of the authority of the Executive Branch without retaining the power of the Chief Executive to pardon. A necessary attribute of the President's duty to exercise his discretion to see that the laws are faithfully executed is the discretion to determine whether and extent to which laws calling for criminal punishment should be applied in a particular case. This power cannot be restricted by Congress and one President, by treaty, may not limit the pardoning power of his successors.

ANALYSIS: Article II, §2 of the Constitution states that the President "shall have power to grant reprieves and pardons for offenses against the United States" (emphasis added). Article V(2) of the Treaty preserves the pardoning power of the country which sentenced the prisoner. There is no authority to support the contention offered above and the language of the Constitution and case law, In re Bocchiaro, 49 F.Supp. 37(W.D.N.Y. 1943); United States v. Donofrio, 450 F.2d 1056(5th Cir. 1971),

indicate that the power is limited to offenses against the laws of the United States.

Would Compliance with the Treaty Require an Unconstitutional Withdrawal of the Jurisdiction of Federal Courts?

NO: The only jurisdiction of the federal courts which cannot be withdrawn is the original jurisdiction of the Supreme Court, i.e., "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be part." U.S. Const. Art. III.

Article VI of the Treaty provides that "The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." This language does not necessarily operate as any restriction on the jurisdiction of federal courts since invocations of their jurisdiction might be classified as challenges to the authority of the federal government to hold the transferred prisoners rather than challenges of the sentences imposed by Mexican courts. This is a very real distinction since successful invocation of the jurisdiction of federal courts may nonetheless be followed by extradition to Mexico for service of remainder of any sentence, see infra.

YES: Article VI of the Treaty is rather clearly designed to avoid judicial examination by one country of the criminal proceedings of the other. The phrase "in any form" precludes the interpretation offered above. The Treaty read as a whole clearly indicates an intent that transferred prisoners serve the full sentences imposed subject only to the parole provisions of the country to which the prisoners are transferred.

Release of prisoners on a writ of habeas corpus or any other form prior to the full service of their sentences less any time released on parole is obviously contrary to the intent of the signatories.

Thus Article VI can only reasonably be interpreted as a restriction on the jurisdiction of federal courts to consider allegations of violations of constitutional rights and to issue appropriate writs including habeas corpus. Such a constitutional restriction cannot be accomplished by treaty.

ANALYSIS: This issue is really two. First, is Article VI of the Treaty contrary to Article I, §9 of the Constitution, i.e., "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it"? Second, does it exceed the authority over court jurisdiction vested by Article III of the Constitution, "The judicial power of the United States, shall be vested...in such inferior courts as Congress may from time to time ordain and establish....In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as Congress shall make"?

Neely v. Henkel, 180 U.S. 109(1901), discussed earlier, might be thought to hold that the prohibition against suspension of the privilege of writ of habeas corpus was inapplicable when the grounds for federal custody were based on crimes committed within a foreign country against the laws of that nation. However, a careful reading of the case indicates that the holding merely provides that the absence of the writ in foreign proceedings is no impediment to extradition:

It is contended that the act of June 6, 1900, [calling for American surrender of persons charged with committing offenses within a foreign country occupied by the United States] is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is made to the provisions of the Federal Constitution relating to the writ of habeas corpus bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. 180 U.S. at 122.

Support for the Treaty provisions against a challenge that it suspended the privilege might also be thought to flow from the Supreme Court decision in Ex parte Bollman, 8 U.S.(4 Cranch), 75(1807) and Ex parte McCordle, 74 U.S.(7 Wall.) 506(1869). In Bollman, Chief Justice Marshall stated that the power to issue the writ must be legislatively provided and in McCordle, Chief Justice Chase recognized the authority of Congress to restrict direct appellate jurisdiction of the Supreme Court over habeas corpus cases. However, Chief Justice Marshall noted that:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive

life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus. 8 U.S.(4Cranch) at 94-95.

Soon after McCardle, the Court handed down Ex parte Yerger, 75 U.S.(8 Wall.) 85(1869), in which it affirmed its authority to review habeas corpus questions on certiorari. It is questionable whether the courts would read these cases to permit suspension of the type called for in Treaty which involves withdrawal of jurisdiction without any approximately equivalent relief available.

It might also be thought that the Clause should be interpreted only as a restriction of executive suspension of the privilege of the writ. This is in part accurate but the circumstances under which Congress may suspend are constitutionally provided, i.e., "when in cases of rebellion or invasion the public safety may require it." Neither the Executive, nor Congress nor the Judiciary may otherwise suspend the privilege, Ex parte Merryman, 17 F.Cas. 144, 148(C.C.D.Md. 1861)(No. 9, 487); Ex parte Milligan, 71 U.S.(4 Wall.) 2, 125(1866). Congress has not and it is difficult to believe that it would declare suspension of the privilege by the Treaty required by public safety in the case of a rebellion or invasion.

Thus it would seem that the Treaty may not bar relief through issuance of a writ of habeas corpus in any case where such relief would otherwise be appropriate.

The question of whether Article VI of the Treaty would otherwise operate as an unconstitutional withdrawal of jurisdiction from the federal courts is a more difficult question. While there is substantial data to support the proposition that Congress has plenary authority over the original jurisdiction of the inferior federal courts and the appellate jurisdiction of all federal courts, Turner v. Bank of North America, 4 U.S.(4 Dall.) 8, 10(1799); Ex parte Bollman, 8 U.S.(4 Cranch) 75, 93(1807); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32,33(1812), there is considerable scholarly commentary to the contrary, see Redish & Woods, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Syntheses" 124 University of Pennsylvania Law Review 45(1975); Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction" 88 Yale Law Journal 498(1974). The exercise of Congressional legislative authority over the jurisdiction of the federal courts seems most constitutionally suspect where it attempts to foreclose any judicial relief from constitutional violations, Feinberg v. Federal Deposit Insurance Corp., 522 F.2d 1335, 1342(D.C.Cir. 1975) citing Bob Jones University v. Simon, 416 U.S. 725, 746(1974); International Telephone & Telegraph Corp. v. Alexander, 396 F.Supp. 1150, 1163n.31(D.Del. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257(2d Cir. 1948).

While the exercise of the treaty making power may permit the exercise of governmental authority that would otherwise not be constitutionally possible, Missouri v. Holland, 252 U.S. 416(1920), the treaty making power may not overcome the Constitution's express restrictions on federal governmental action, Reid v. Covert, 354 U.S. 1(1957).

In the case of Article VI of the Treaty, if Congress could not completely withdraw the jurisdiction of federal courts to entertain constitutional challenges to federal action because of the express restrictions of the Due Process Clause or the Eighth Amendment, it is difficult to understand how such a result could constitutionally be reached under the treaty power.

Since this issue goes to the jurisdiction of the courts it cannot be waived by consenting to the transfer.

Although the courts will ordinarily interpret a treaty's provisions with an eye to preserving the intent of the signatories, Maximov v. United States, 299 F.2d 565(2d Cir. 1962), aff'd 373 U.S. 49 (1963); Board of County Commissioners v. Aerolineas Peruanas, 307 F.2d 802(5th Cir. 1962), interpretation of a treaty's provisions is similar to contract and statutory interpretation in many other respects, id.; National Indian Youth Council v. Bruce, 485 F.2d 97(10th Cir. 1973). Thus, courts may be expected to avoid an interpretation which results in conflict between the treaty and the Constitution where possible. As indicated above it is possible to avoid this issue by interpreting Article VI as no impediment to federal court jurisdiction over challenges based on the constitutionality of federal incarceration. While this seems contrary to the intent of the signatories, Article V(6) offers some support:

The fact that an offender has been transferred under the provisions of this Treaty shall not prejudice his civil rights in the Receiving State in any way beyond those ways in which the fact of his conviction in the Transferring State by itself effects such prejudice under the laws of the Receiving State or any State thereof.

Would the Treaty Unconstitutionally Deny Access to the Federal Courts?

NO: Article VI of the Treaty merely denies access to federal courts in cases involving attacks on the transferred prisoner's Mexican sentence. Alteration of that sentence is solely within the authority of the Mexican courts and the pardoning power of the Mexican executive. The federal courts would remain available to transferred American prisoners on all other questions, Art. V(6).

YES: Article VI attempts to deny all Americans transferred pursuant to the Treaty access to relief through the federal judicial system. It is to prevent precisely such denials that the doctrine has evolved.

ANALYSIS: "The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." Procunier v. Martinez, 416 U.S. 396, 419(1974). The right of access applies regardless of the form of relief sought, Wolff v. McDonnell, 418 U.S. 539, 579-80(1974). Again, faced with the alternative of construing a treaty so as to conflict with constitutional restrictions, courts might well opt for an interpretation which avoids such a choice.

Assuming Federal Courts Ordered the Release Of An Transferred American Prisoner, Could the Prisoner be Extradited to Serve the Remainder of His Mexican Sentence?

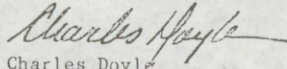
YES: The extradition treaty between Mexico and United States provides for the extradition of those "charged with, or convicted of" any of a list of designated offenses, 31 Stat. 1818(1899), supplemented, T.S. No.421(1903); 44 Stat. 2409(1926); 55 Stat. 1188(1941). Transferred

American prisoners released by American courts because the federal government could not constitutionally continue to imprison them would nevertheless be subject to extradition to Mexico to serve any unexpired portion of their sentences.

NO: The transfer Treaty acts as a modification of the extradition treaty. When a prisoner is transferred, the nation which convicted him relinquishes those rights it would ordinarily enjoy under the extradition treaty. It certainly could not have been intended that a prisoner transferred pursuant to the Treaty while serving his Mexican sentence in federal custody would be the subject of an extradition request based on the same conviction.

ANALYSIS: Transferred prisoners convicted of offenses listed in the extradition treaty between the United States and Mexico would be subject to extradition for the duration of their sentences if released from federal custody other than through parole or request of the Mexican authorities or operation of the Treaty. To interpret the Treaty to modify the extradition treaty and bar extradition would be contrary to the general principles of requiring construction of treaty provisions to reflect the intent of the signatories and requiring clear indication of an intention to abrogate treaty provisions, Maximov v. United States, 299 F.2d 565(2d Cir. 1962), aff'd 373 U.S. 49(1963); Board of County Commissioners v. Aerolineas Peruanasa, 307 F.2d 802(5th Cir. 1962); Pigeon River Co. v. Cox Co. 291 U.S. 138(1934); Menominee Tribe v. United States, 391 U.S. 404(1968). Furthermore although there is apparently no case law directly on point, in the case of interstate

rendition extradition is permitted where the fugitive has been removed to the asylum state by officials of the demanding state, Golla v. State, 52 De. 433, 159 A.2d 585(1960); King v. Mount, 196 G. 461, 26 S.E.2d 419(1943); In re Martin, 142 Kan. 907, 52 P.2d 1196(1935).



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March 8, 1977

Senator BIDEN. I would also like to briefly run through the witness list for today so that you will all know what is in order.

Our first witness will be a former prisoner, Mr. Dwight Worker. Our next witness will be Mr. and Mrs. Benjamin Marshall, parents of a prisoner, from Long Beach, Calif. Then we will have Mr. Robert Miller, a former prisoner from California also.

Then Ms. Marie Wiernicz will testify for Mrs. Nancy K. Van Den Brink, a mother of two sons in Mexican prisons. After that Judge John L. Smith of the U.S. District Court for the District of Columbia will testify. Then Judge Oliver Gasch of the U.S. District Court for the District of Columbia will also appear. Our final witness will be Mr. Michael Griffith, an attorney from Mineola, N.Y.

That will be the order of our testimony today.

I have been apologizing for being late and I have been giving you a saga as to how I get here. I commute every day. I did not plan on the New York blackout last night which shut down the Metroliner trains. So I was promptly on time which is unusual for me for the Metroliner. Yesterday was the saga of the airlines. So today I could not get on a train because they are blacked out. I ended up driving. I apologize again for being late.

We will then begin with the testimony of Mr. Worker. We appreciate your presence here. I would suggest you proceed in any way you feel is the best way to express your views.

STATEMENT OF DWIGHT WORKER, FORMER PRISONER, SAN FRANCISCO

Mr. WORKER. Thank you for inviting me to testify.

My name is Dwight Worker and my wife and I live in San Francisco where I am employed as a computer terminal operator for Bank of America. I am also a computer programmer for the United Way. My wife Barbara is a nursing student.

I was a prisoner in Mexico City for 2 years. From this experience and from research that I have done since then I feel that I have gained a certain insight and have something to add.

You have already heard about the torture and extortion and abuse. As a personal witness and victim to these acts that you have heard about, I can testify that this and much more is true. But I do not want to dwell upon those stories as much as the general issue.

I want the proposed prisoner transfer treaty to be implemented as soon as possible. Here are my reasons:

First of all, I think the treaty should be passed as soon as possible because it is a reasonable and modest proposal. It is designed to accommodate all of the parties.

As you know, it would not release prisoners. But it would allow the receiving governments the options of applying parole by their own standards.

This allows for some flexibility in that for those Americans with minor charges who are being held in Mexico, such as for the possession of marihuana, there would be a parole board which would allow for this while those few prisoners who are charged with serious charges would not necessarily be included in the parole. I mean that they would have the option. They may not be granted parole however.

Second, this treaty is not a threat to the U.S. governmental interests. Yesterday Mr. Peter Flaherty said that a number of prisoners are in Mexico for serious crimes. This is in contrast to what Mr. Bensinger, of the Drug Enforcement Administration, spoke about when he testified on June 15 of this year before the Senate Foreign Relations Committee.

Mr. Bensinger stated that the majority of prisoners down there were not there for serious crimes at all. The State Department has at numerous times released data on the nature of the crimes of the prisoners and the data that they released State Senator Garcia, of California, indicated that half of U.S. prisoners were there for the possession of marihuana while less than 1 percent were there for trafficking of heroin. By far the great majority are there for marihuana.

My personal experience is in Mexico City in Lecumberri Prison.

Senator BIDEN. Why were you in prison?

Mr. WORKER. I was there for importation of cocaine. I would like to state this: I was guilty. Although it was the first time I had ever done it and I can make no moral defense for it. What I did was wrong. But I would like to also state that my crime was considerably more serious than the violations that the majority of American prisoners have made. The fact that I was guilty—at least I had the consolation in prison of knowing that I was guilty, unlike many innocent Americans that I have met in prison.

But of the 160 U.S. prisoners in Mexico City, not one is there for heroin—either possession or trafficking. That is a significant statement. That is a serious problem.

Senator BIDEN. How recent is that figure?

Mr. WORKER. I left Mexico in December of 1975, but as of March of 1977 I talked with American prisoners who had been released. They said that there still is not one in Mexico City—

Senator BIDEN. I'm talking about the figure of 160. Where did you get that?

Mr. WORKER. I got that figure from talks with State Senator Garcia.

Senator BIDEN. I was just curious. I'm trying to fit in the same confused picture that you alluded to, that is, the State Department says one thing and the Department of Justice says another thing. Other people come and independently come and tell us that there are significant numbers of people held in Mexican jails who are felons under anyone's standards and so on. That's the only reason I ask that. I'm not trying to argue with you.

Mr. WORKER. That 160 figure is in Mexico City. There are approximately 490 on drug charges within all of Mexico.

This treaty is not talking about gaining these people's release. That is why I stress the point that it is a modest proposal. It concerns returning them. As the legal experts testified last month, they felt it was basically constitutional. This is very important as a consideration.

The DEA stated last month that this would not interfere with the drug interdiction policies. That is important also because we all have vested interests in controlling the serious drug traffic beyond the borders.

Also, this treaty would allow rehabilitation. I can testify personally that as a U.S. prisoner in Mexico there is no rehabilitation, especially

for U.S. prisoners. It is debilitation. As an example, I was forced in some dormitories I was in to pay a weekly \$5 allowance for heroin. I had to pay for the heroin whether I used it or not. I could not resell it, which I did not, but what I did was to throw it away. I was forced to pay however. This is one of many abuses.

Senator BIDEN. Forced by whom?

Mr. WORKER. By the dormitory prisoners who ran it. They were thugs. They ran the scene and forced you to pay for everything—the rights to go to the bathroom, the rights to make a collect phone call and so on. I was forced to pay \$150 a month in rent. As they stated to me, “We will do everything to get the money from you except evict you if you do not pay.” That was how it started right there.

Senator BIDEN. These are prisoners who did this?

Mr. WORKER. Yes; prisoners working in conjunction with prison officials.

Prison officials would not do it themselves but would let their prisoners do it for them. They would split the extortion fees.

Extortion was so regular that it was just a way of life. You either fought it and lost, or you paid.

Senator BIDEN. When you lost, what would you lose? Would they physically beat you?

Mr. WORKER. Yes. I was hospitalized three times. I could give you details.

Senator BIDEN. You don’t have to give me details of all of it but give me one example.

Mr. WORKER. When I first went to dormitory O, I was assessed \$5,000 in fees. There was \$2,000 for myself and \$3,000 for a lawyer.

Senator BIDEN. That seems fair. [Laughter.]

Mr. WORKER. I was told I had to pay.

Senator BIDEN. That’s a new wrinkle. [Laughter.]

Mr. WORKER. It’s a self-supporting system. I told them I couldn’t. They said that I would have to. So I refused. They began beating up on me. I began fighting back. Seven or eight people jumped on me. I received a brain contusion, torn ligaments in the back, and a dislocated hip. I spent 3 weeks in the hospital for that occasion. Twice afterwards I was hospitalized again for inability to pay extortion because I did not have the money.

One time I met Dan Root, vice consul in charge of prisoner affairs, this is former vice consul of the Embassy. I asked for his help. He said he could not give me any help at all. I told him that he would have to because I was going to be killed. He said there was nothing he could do. I went back to the dormitory and everything I had said to Root in private was quoted to me in Spanish. I was told I was making trouble for the “man from the Embassy.” So I was tied up and whipped. Four days later I was stabbed three times and rehospitized again.

Senator BIDEN. You say you were tied up and whipped. You were actually whipped?

Mr. WORKER. With a very stiff hose. I was whipped until I was bleeding. I was also sent to psychiatric ward for electric shock treatment in Lecumberri Prison. My family was extorted for large amounts of money.

Senator BIDEN. Your family was extorted directly through you? You would call home and contact them and say that you had to have the money? Is that how it happened?

Mr. WORKER. I can give you specific examples. I called up once in December 1973, right after I had been arrested. As soon as I got the phone call by arms were twisted behind by back and I was beaten and my parents could hear me yelling. Fernando Gardner said, "Send the money or we're going to kill him."

I was not extorted nearly as bad as other prisoners.

Senator BIDEN. Were you an exception to the rule or were you the rule?

Mr. WORKER. In Lecumberri Prison I was perhaps more brutalized than most in terms of violence. Others were brutalized very badly also. But I was not extorted or robbed as badly as others, simply because my family did not have the kind of money that other families did.

Senator BIDEN. Once again, was this treatment set aside for American prisoners because they assumed that the Americans would have the money?

Mr. WORKER. Yes; part of the discrepancy in wealth.

Senator BIDEN. Was it based on the ability to pay?

Mr. WORKER. Yes.

I was asked questions that were almost identical to the questions you would have to fill out applying for a credit card, to assess valuation and so on. Americans had a bare minimum of \$1,000.

Senator BIDEN. I have one other question. I will not belabor it but I think it's important to be on the record and that we understand the impetus for this treaty in the first instance.

Was there any evidence that you could cite that would indicate that there was direct collusion? For example, if in fact you said to this "thug" or whoever was in charge, which happens in our prisons and happens all over the world, that you had no family and no income, that you were by yourself and were destitute before you came in. You are lying about that and let's say that your father was a millionaire. There would be no way for that local thug to determine what your worth was or potential extortionability was in terms of you unless they had some sort of access to records.

If you said you were worth an x -amount of dollars and said it facetiously like filling out a credit card and if you lied on all those questions, would they have known you lied?

Mr. WORKER. Then their response would be immediately to put you into Fajinas which is compulsory duty and leave you there for 6 months to 1 year, 7 days a week, 18 hours a day work duty. Some of it would be standing in the urinals while people were using the urinals and while you're in there naked and rubbing brick back and forth 12 hours nonstop. Even if you didn't have money, you would find some way to get money through relatives.

Senator BIDEN. The reason I asked the question was not to further document the brutality which is clear I think, but to determine whether or not this extortion was a consequence of prison guards and the cell thugs in collusion with one another, or whether or not it was on a larger scale.

Mr. WORKER. I see now. There is no question about the guards and the prison thugs because the prison thugs would admit it. When I

was there I was told by Fernando Gardner, the former mayor of dormitory O, where all Americans were kept and which was a double maximum security dormitory, that he had to pay \$1,000 for all Americans. For any American who arrived that was his price. He had to get at least that out of us.

As far as other involvements, the only thing I'm personally a witness to is what former Vice Consul Dan Root told me. To quote him as best I can and this was in the early spring and late winter of 1974, he said that if were a prisoner in Mexico, he would use Jorge Aviles Ortiz, a Mexican lawyer, because if anyone is going to get us free it is Jorge Aviles Ortiz.

First of all, it's against U.S. consul policy to advise any individual lawyer. The most that the U.S. embassies and consuls can do overseas is to give a list of lawyers. U.S. prisons did not know this in time and they trusted Root. U.S. prisoners gave large amounts of money to Jorge Ortiz and never saw him again. The amounts of money that came mostly from relatives went well into the hundreds of thousands of dollars. This came from prisoners and prisoners' families. This was over a 7-month period. Ortiz disappeared to be re-arrested in April of 1975. He signed a declaration saying that he and Dan Root were working together to defraud Americans of money. But there are many other witnesses all of whom are in prison in Mexico. Perhaps conveniently for the State Department, all of them are sentenced from 7 to 15 years which is beyond the statute of limitations for charging Dan Root with defrauding and such as that. Yes, there are other witnesses to that.

Senator BIDEN. Please proceed.

Mr. WORKER. Perhaps one of the most useful aspects of this treaty is to ease the hardships placed on families from both countries. Mexico and the United States are two different cultures, languages, and legal systems. It is most difficult for American relatives trying to deal with the system, but it's also difficult for relatives of Mexican prisoners within the United States. There are logistical considerations such as expense of travel and things like that that this treaty could ease. It would be useful there.

I would like to commend the present administration for taking an interest in human rights and an active concern for U.S. prisoners overseas. This is a refreshing change and an improvement from the early seventies. But I would like to state that no matter how concerned President Carter's administration is, it is not possible to guarantee the rights of U.S. prisoners overseas for a number of legal and logistical reasons.

It just cannot be done because you are operating in a different system and a different culture. The differences between the wealth of Americans and in this case Mexicans, is just too great to be ignored in prison. The temptations for extortion are too overwhelming to resist. It is the sensible way to reduce a lot of this because upon the prisoner transfer treaty, a lot of the extortion and the hardship, extraneous to the actual conviction itself, could be reduced. But until it is it must be remembered that U.S. prisoners overseas are big business. That is the key word. Guilt or innocence has nothing to do with it, once in prison. Bail or a bond or anything like it is precluded.

But it is big business. It's a moneymaking proposition for people involved.

The prisoner problems between the United States and Mexico have obscured and interfered with the real, important issues and problems between the United States and Mexico. The real problems between Mexico and the United States concern the trade and economic problems, the deficit in balance payments that Mexico has with the United States, the arrangement of petroleum and gas imports from Mexico to offset this. The heroin importation problems is a real problem for Mexico and the United States. As I have already stated this does not concern the majority of your prisoners who are not—

Senator BIDEN. You mean heroin importation to the United States?

Mr. WORKER. Yes. This is a real problem. We should not allow the transfer of prisoners to obscure this. As I mentioned, these people are not for the most part involved in heroin. But if they were they could still return as prisoners. If someone is convicted, let's say for trafficking in heroin, he does not have to be granted parole, unlike perhaps someone who is convicted in Mazatlan for possession of marihuana.

The real issues are the veritable illegal alien invasion from Mexico to the United States. These are the real issues. The prisoner transfer issue is not a real issue, but it is getting in the way and obscuring the real problems between the two countries which need to be worked on. I feel it has been an issue long enough. I first heard of rumors of a prisoner transfer treaty in January of 1974, a month after I had been a prisoner. Had I believed those rumors, I would be in Mexico today.

So, we want to get this done. My feeling is that we want to pass the treaty because first the legal process is a long involved one and after the treaty is passed and signed by the President, then the implementing legislation must be done. We want to get this out of the way because it is causing ill will between the United States and Mexico.

Mexico is often accused of having a mañana consciousness of putting everything off until tomorrow. But in regards to this treaty, Mexico backed it very promptly and has finished ratifying everything by December 30, 1976. The remainder needs to be done by the U.S. Congress. I would urge them to keep in mind that every day they wait and postpone, perhaps not deliberately but through inertia or whatever, is just another day wasted of so many people's lives. It prolongs the ill will and the problems relating to the treaty.

The State Department and Justice Department and DEA, the President, the relatives of prisoners and prisoners themselves in both countries are in favor of this treaty.

But with all the preponderance of testimony I feel this should be passed as soon as possible.

In closing I would like to tell a personal story.

I crossed the United States-Mexico border into Arizona on Christmas eve, in 1975. I was penniless, exhausted, scared for my life. But I was perhaps the most grateful man on the planet at that moment. I got down on my hands and knees and kissed the sand and began crying. The two U.S. customs agents saw me doing this and of course

they were not aware of my previous circumstances of having been in Mexico 2 years on potentially a 15-year sentence for my first arrest. They thought this was a very unusual display of emotion for someone who had just been to Mexico for a short vacation.

After I got up I brushed the sand off my face and I walked over to a pay phone. I called my father. We talked over the phone and we cried through the whole conversation. I have to say at this point that I am perhaps more than ever—I hope as much now—I have a real appreciation for the rights granted under our Constitution and the Bill of Rights. These rights I have previously taken for granted. I would like to stress that there are other United States prisoners in Mexico that have learned the hard way. But at least they have learned that the rights granted under the Constitution and the Bill of Rights are precious. I am sure in my correspondence with them and my communications that they do appreciate these rights much more. By far the majority of them would be ever so thankful to be able to return to the United States as prisoners. They understand that.

Only with prompt action with the Senate and later on with the House and Senate and President to implement this legislation can this be done.

I would like to thank you for the honor of allowing me to testify before this distinguished body. More than ever before I cherish the right to do so.

Senator BIDEN. We thank you very much for your testimony. I have two questions. I realize we have a lot of witnesses, but I am compelled to asked these. One is out of curiosity, and I will save it for last. It does not directly bear on this legislation. But I have one that does directly bear on this.

Yesterday in a colloquy between Senator Mathias of Maryland and myself, I raised the question that the return to American prisons will not be a bed of roses. Many of the prisoners will not be released on parole, as you pointed out. They will be imprisoned in the United States. They will not be immune to physical abuse, rape, and every other thing that goes on. We hope it is with less regularity but it goes on in prisons all over the world.

I wonder whether or not there is a possibility, in light of your documentation of treatment in at least this prison in Mexico City—and I assume others are not any better—whether or not we will be able to uphold this treaty under the Constitution on the grounds of whether or not consent was voluntarily given.

The picture you painted is such that almost anybody would trade anything in order to get out of that prison. They would make any commitment in order to get out of that prison.

I'm not asking you as a lawyer or as a constitutional expert, but I'm asking whether or not you think that people in your circumstance or who have been in your circumstance are in a position to be able to rationally weight the alternatives? Before you answer that, an addendum to that question is this. You were convicted of a crime for which you say you are guilty. This was in Mexico. Was it selling cocaine?

Mr. WORKER. Importing cocaine.

Senator BIDEN. I see.

If you were convicted for that crime in the United States of America, then you would have a record. You would be fingerprinted. You

would be a felon. Your right to vote, except I understand in California that is changed, but your right to vote and the practicability of being able to get a job and every other thing that goes along with the ordinary civil rights of any American would be limited at least.

Whereas now—and I do not say this facetiously—you are a bit of a folk hero. I assume people will watch this on television. they will look at a nice looking young man who is clean-cut. I am not being smart but I am being serious now. He is clean-cut and talks about the atrocities of what has happened in prison. They really happened. Back home people will not say, "Look at that felon, Dwight Worker." People will say, "Look at that poor boy. He was taken advantage of."

Whereas if you are an American and the same things happen to you and you have that record then those folks back home are going to look at you and say, "There is another damn person who is out there trafficking. There is somebody who is ruining my child and my family."

So, do you think prisoners returning will be aware of that and will they balance that with the fact that if they come to the United States they are going to move into the category of being convicted felons? Do you think that will impact in any way? Do you think the desire to escape that brutality is so strong that they will say, "I'm coming home anyway no matter what"? Do you think these people are considering that?

Mr. WORKER. I think that's a very good point. There are people who have been there a long time and have established their routines and have not too much more time left. Perhaps having families with money might cause them to opt to stay there. For example, a person who has just a few months left of his sentence may realize that if he stays in Mexico when he is released he can return as a nonfelon. I think some people may choose that.

I think this treaty may benefit mostly the people who have been recently arrested and the people arrested for more minor crimes, such as the prisoners who are not in Mexico City. The prisoners in Mazatlan are virtually all there for possession of marihuana. I think they could return in good conscience and understand that they have something on their record and be able to face up to it later.

Senator BIDEN. But as someone who has returned, you would, in advising friends or family or anyone else involved with someone being in a Mexican prison. If they sent you back as a magistrate to advise a prisoner, can you conceive of the circumstances where you would advise someone not to come back because of the political repercussion in America?

Mr. WORKER. Yes, that one circumstance of a person who has not too much more time to go. Just for the sake of getting employment later on, then I think it would be useful.

I think for the most part, however, that parole board would be more generous in the case of possession of marihuana. In those cases I would advise, and I have been advising prisoners, to consider the treaty definitely as a viable alternative. After hearing the previous testimony, I have been advising them that I do not think a constitutional challenge of habeas corpus would stand up within the United States.

I feel that the treaty, because it is voluntary and cannot be done against the consent of the prisoner and against the consent of either

the transferring or the receiving governments, removes the potential coerciveness involved.

I would like to also state that in no way do I consider myself a hero or a folk hero.

Senator BIDEN. I didn't really mean that.

Mr. WORKER. I consider myself grateful and thankful and lucky.

Senator BIDEN. I consider us very fortunate to have you come forward in a forthright way and say, "Look, I broke a law." You don't have to tell anybody about that because no one would know. I think it is very, very commendable of you to be involved in this because obviously it cannot help you at home to say, "I was guilty of importing cocaine. I really committed that crime." You could have easily come back and said, "It was just one of those trumped up charges. You know how they are down there." You could have made all kinds of assertions. I commend you for that and thank you for that.

I have one last question.

My curiosity is beyond what it should be probably. Why are you here instead of in a Mexican jail? How did you get out?

Mr. WORKER. I will make this as short as possible. I was in Lecumberri Prison where, according to everyone I had ever talked to no one had ever escaped from there in 63 years since Pancho Villa had escaped.

Senator BIDEN. You and Pancho, eh? [Laughter.]

When I was running for the Senate I was 29 years old and the campaign against me was that I was too young. Every time my opponents would speak of me they would say, "That 29-year-old kid." People would say, "Isn't it true you're awfully young?" The only answer that I could respond with was, "It's true. Not since Henry Clay has anyone done this." So you and Pancho and me and Henry Clay. [Laughter.]

Mr. WORKER. Pancho is in a more dubious category. [Laughter.]

Senator BIDEN. I don't know. [Laughter.]

Mr. WORKER. I would not be here, first of all, if it were not for my wife, Barbara. She was my fiancée at the time. Her love and faith and help was there. She was visiting me. We were making observations about the prison. At the same time we were trying to get married legally. We observed the factors and we thought that it might be possible, once every 42 days, once every 3 minutes every 42 days. We knew months in advance that this would be December 17 at 1:42 p.m. if I were going to try to escape. So we were trying to get married and our wedding date was set for December 13. They postponed the wedding until December 17 in the morning. So we got married within the prison in the morning and I escaped in the afternoon of December 17. It made for an interesting honeymoon. [Laughter.]

Senator BIDEN. How did you escape? If you'd rather not say that's all right.

Mr. WORKER. It's kind of embarrassing. It is the first and last time I have ever dressed in drag. I walked by five check points in drag. [Laughter.]

I walked by hundreds of people who had seen my face 20 times a day for 2 years. I walked right by them. The only real danger I had was when one guard tried to pinch me. He would have felt my foam

pad. So I made it and Barbara was waiting for me in a taxi cab outside. We bid our adieus to Lecumberri Prison and to a new life in the United States which we very much appreciate.

Senator BIDEN. I hope you have a happy marriage. [Laughter.]

Thank you very much for a fascinating presentation. This has been helpful to us. With your permission we may be back to you. I quite frankly would like to find a little more out about the former vice consul and what he is doing and where he is. Maybe we can talk to him a little bit.

We thank you very much for coming.

Mr. WORKER. Thank you.

Senator BIDEN Our next witnesses are Mr. and Mrs. Benjamin Marshall, who are parents of a prisoner. They are from Long Beach, Calif.

Would you please identify yourself for the record and the name of your son or daughter who is a prisoner.

**STATEMENT OF LYNELL F. MARSHALL, MOTHER OF A PRISONER,
LONG BEACH, CALIF.**

Mrs. MARSHALL. My name is Lynell Marshall. I am a teacher with the Downey Unified School District in California. I am a member of 1732, Inc., an organization of parents and friends of Americans in Mexican jails. I am also the mother of a 20-year-old boy, Rob Quirk, who has been in the Mazatlan prison for the last 2 years.

I shall address my testimony to why I believe it is urgent that the implementing legislation to the exchange treaty be expedited. I shall restrict my testimony's content to only my personal viewpoint based on experiences our son has shared with us through his letters and on my own first-hand experiences while visiting the jail.

I have only one reason to offer for an expeditious passage of the implementing legislation. That reason is: I feel strongly that by allowing American citizens to be exposed to the degradation of a Mexican jail for any length of time is a serious and very real threat to, not only their present physical and mental condition, but may adversely affect their health and well-being for the rest of their lives.

I offer the following episodes as evidence to support my seemingly dramatic overstatement.

Our son's first exposure to Mexico's justice occurred in August of 1975 shortly after his arrest for marihuana. His first letter home read:

I was stripped of my clothes and beat in front of Rhonda and a room full of police. Then they threw me in a closet that was very hot and wrapped a thick wool blanket around me and shut the door. They didn't give me any water or allow me to go to the bathroom. I couldn't move because I was tied up. From time to time they would open the door and burn my legs with their cigarette butts.

Two weeks later when we saw our son for the first time he wept uncontrollably as he recounted the horrors of his first encounter with Mexican justice. The bruises and burns were still visible and his chest was wrapped with rags to aid the healing of his cracked ribs.

Another episode which seriously endangered Rob's life occurred several months later when Hurricane Olivia destroyed the walls surrounding the Mazatlan jail. Rob narrowly avoided being buried alive in an avalanche of bricks and cement. While the holocaust was at its

peak, guards fired rounds of ammunition into the crowd of frantic prisoners who were scrambling to escape the flying debris. Miraculously, our son escaped serious injury, but several of his friends were not so lucky.

Following the melee, there was no electricity, no water, no food brought to the jail. Our son lived on rain water and bananas for 5 days. Everything he had managed to accumulate during his first 2 months of confinement was destroyed including his caraca—hut—which we had recently purchased.

During the weeks that followed, several inmates died of typhoid, and for months afterward our son wore a wooden bead necklace with a machinegun shell dangling in the center; a shell which he dug out of the rubble of his caraca. He said he wore it to remind himself how glad he was to be alive—even in a Mexican jail.

Three months later, January 1976, another event took place which reminded us of the constant peril to which our son is exposed. At that time an escape was attempted by several inmates. After the escape was aborted, one of the Americans involved returned to his caraca and shot himself.

The following day the jail officials systematically began removing each American, whether they were involved in the escape or not, and subjected them to torture. The officials were attempting to discover the source of the dynamite, the gun and the ladder used in the escape attempt. Also, the officials refused to believe that the dead American had committed suicide, and they were determined to unveil his murderer through a forced confession. Again, our son was spared, but he lived with terror for many days.

I want to add something here. At that time we contacted Edie Wilkie in Congressman Stark's office and a member of her staff went to the State Department. They had two State Department officials down there immediately.

In December of 1976 our son became ill with hepatitis. The only medical treatment provided in Mazatlan for hepatitis is isolation. I would like to read an excerpt from Rob's letter written on Christmas Day 1976 from the "hole" in Mazatlan:

In here anybody who has a contagious disease like hepatitis is sent upstairs to the hole until they get well. It is a single cell on top of the wall in solitary confinement. It's made of bricks and cement. It's a small room; a four-walled cement square with a cold lumpy floor. It's about eight feet by eight feet and just barely tall enough so I don't bump my head when I stand up. It has a small iron door that comes up to about eye level, and a little iron-grilled air vent where my food is passed.

The food is coffee and beans in the mornings, and tortillas, beans, and a soup in the evening. The only things I have with me are my pan and spoon, two blankets and my pillow, my pen and paper, and a couple of books. Besides that, it's just an empty cement box with only a bucket in the corner for me to go to the bathroom in.

In the four days I've been here, the door hasn't opened once—not to empty the bucket in the corner, or for me to take a shower. I sent a note down today with one of the guards, asking one of the men downstairs to find out how much more time I'll be locked in here. I swear to God, he wrote back and said I could get out today on a Christmas special for 1500 pesos—\$75—or else I must stay in quarantine for 30 days. For 30 days. Jesus. If I have to do a month in here, I'll be a raving lunatic by the time they open the door.

Our son spent 7 days in solitary. Not once in that length of time was his menu varied or his bucket emptied. Not once was he allowed medi-

cal treatment or access to a telephone. He learned quickly that when you are sick the last thing you do is let anyone know about it.

Senator BIDEN. How did he get out in 7 days? Did he pay 1,500 pesos?

Mrs. MARSHALL. We didn't pay anything. I don't know how he managed it. We send him money regularly. He may have given that to them.

Last month, June 1977, I visited our son for the fourth time since his imprisonment. I found him suffering from staph infection and an intestinal ailment the inmates call "amoebas." While I was in town, I went to a pharmacy, described my son's condition, and bought the medicine the pharmacist recommended. In order to get the medicine into the jail, I gave the matron a liberal tip, and she allowed me to carry the medicine inside.

When I left Mazatlan 4 days later, his condition was improved; but how long will that improvement last without proper medication?

During Rob's ordeal, he has suffered torture at the hands of the Federalies, numerous attempted sexual assaults and physical beatings, extortion through the prison commission, and neglect of his very minimal dental and medical needs.

Because of all of the above-mentioned experiences, I feel that Rob's life is in danger each day he remains in Mazatlan. Prolonging his imprisonment can serve no useful purpose to Rob or to society.

I want him home alive. Alive with his untended teeth, his cracked ribs, his broken collar bone, his cigarette-burn scarred legs, his hepatitis, his staph infection, his amoeba-filled intestines, his living nightmares of sexual assaults and physical abuse.

I want him home alive before he turns to a needle or the trigger of a gun to end the misery and loneliness of another summer in a country where he neither understands the language or its culture, and where every day he lives with the knowledge that his life and his well-being are at the mercy of unpredictable and alien forces.

Our family has expended thousands of dollars to lawyers and friends who claimed they could arrange to have our son released within a short time. We have followed every lead. We have investigated every avenue which held any hope of an end to this nightmare. Our son's appeal was denied last month and his sentence reconfirmed—5 years, 3 months.

Our story is not unique. Through sharing our experiences with other parents in 1732, we find similar occurrences are happening throughout Mexico. For most of us this treaty represents our only hope of getting our sons and daughters home within the next few months. I beg you to do whatever is necessary, as rapidly as possible, to expedite this urgently needed legislation.

Senator BIDEN. Mr. Marshall, would you like to testify?

**STATEMENT OF BENJAMIN KELL MARSHALL, FATHER OF
PRISONER, LONG BEACH, CALIF.**

Mr. MARSHALL. Mr. Chairman and members of the committee, my name is Benjamin Marshall. I am an employee of an aerospace firm in California and a part-time college instructor. I am vice president

of 1732, Inc., an organization of parents and friends of Americans in Mexican jails. I am also the stepfather of Robert Quirk, a prisoner in the Mazatlan jail.

This testimony complements that offered by my wife, Lynell F. Marshall. I shall limit the following to two additional reasons why we feel this implementing legislation should be passed with a minimum of delay.

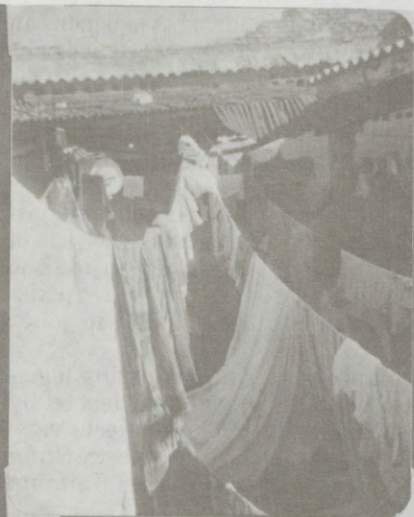
The first reason and the most serious of the two is the deplorable jail conditions which exist in Mexican prisons and in particular the prison in Mazatlan. I shall illustrate through photographs taken inside the jail itself the crowded, filthy, and inhumane conditions which exist within its walls. These conditions are similar to those found in other prisons.

The second reason for a speedy acceptance of the implementing legislation is the devastating and long-term financial affect experienced by families with a son or daughter in a Mexican jail. These affects vary from mortgaged homes, loss of retirement savings, to people working more than one job. All of this hardship is in order to provide minimum subsistence for a loved one.

These reasons are tragically interwoven. The jail conditions are partially relieved by the money extorted from the prisoners and provided by their families.

Mr. Chairman, I have photographs for the committee to visually illustrate my contention.

These photographs numbered 1 through 8 show a section of the Mazatlan prison called Correctionales. Approximately 225 persons live within this 60 foot square area. Photograph No. 1—because many of the prisoners sleep in the open their bedding frequently gets wet from the rain. During certain months it rains every day and they find it impossible to dry their bedding or clothes.



1.



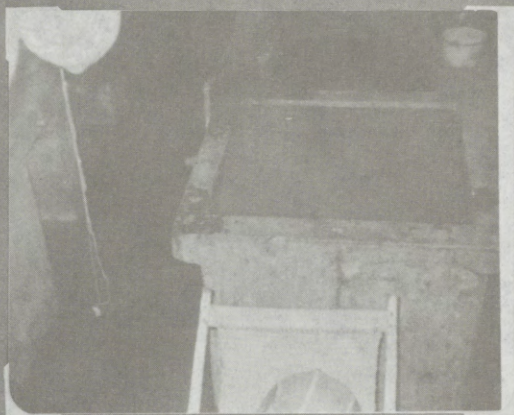
2.



3.



4.



5.



6.



7.



8.

Photograph No. 2—this photograph shows the overcrowded conditions. If a prisoner wishes a permanent place in the open area on the cement he must purchase it. This space or camp is sold to him with the understanding that it is for the entire length of his incarceration.

Photograph No. 3—this is the inside of one of the caracas or huts constructed around the perimeter of the open patio. They are usually made of thin plywood or cardboard and are approximately 6 by 8 feet in size. Three people share this particular caraca. The prisoners build these structures by themselves with lumber purchased at exorbitant prices. The space in which the caraca is built must also be purchased.

Photograph No. 4—there are about 3 or 4 inches of water standing on the floor of the caraca. This frequently happens when the toilet or shower overflows or if there is a heavy rain.

Photograph No. 5—clothes and dishes are washed in the sink. It's the only one available in this section of the prison. There is only cold water and the plumbing is often clogged.

Photograph No. 6—this is one of the two toilets used by more than 200 prisoners. The large oil drum of water is kept in the bathroom. A bucket is filled with water from the drum and poured into the toilet for flushing. Frequently the drum is empty and of course when this happens flushing is impossible.

Photograph No. 7—the use of this shower is a privilege for a fixed monetary price. There is only cold water and the water is only on from 12 midnight for a short period of time.

Photograph No. 8—this is a photo of the shower drain. Each time the toilet is flushed in the adjoining room it's contents backs up to the drain into the shower stall.

It is obvious from the foregoing that the Mazatlan jail does not provide adequate facilities for the most essential physical needs. Whatever needs a prisoner has must be purchased from the commission. The commission is a group of prisoners headed by a president who operates with the approval of the warden. This group controls inmate related activities such as administering punishment, selling drugs, including heroin, to the prisoners who cannot face the realities which they have found, and demanding exhortion.

The following is a brief reference to our son's struggle to secure a safe place to sleep and store his possessions. This is presented only as one example of various forms of extortion.

The first time we visited our son was 2 weeks after his arrest. He had on only his trousers and a borrowed shirt. In order to protect himself from sexual assault he had been forced to trade his shoes for a place to sleep under another inmate's cot.

The Federalies had taken his car, his money, and literally the shirt off his back. We inquired about the availability of a caraca for our son. We were told that none was available. However, we were able to buy him a cot for \$40 and a space to put it on for another \$20. He had no pillow, no blanket, no toilet paper, no soap, no toothbrush, no towel, no dishes. We purchased these and other needed items including a tarpaulin. We helped him hang it above the space to be protected against the recurrent rain. Through this rude initiation we became aware that virtually all of those things which make a difference between existing like an animal as opposed to a being a human being have to be purchased.

This even included purchasing food for an adequate diet and reasonable medical care.

During the 2 years that our son has been incarcerated, we have purchased four caracas. Each purchase was brought about by arbitrary expulsion. This has caused physical and emotional hardship for Rob as well as financial hardship for our family. All forms of extortion and attendant expense have cost our family approximately \$25,000.

However, many prisoners and families have suffered a great deal more. This misery must end. The only reservation as to the exchange expressed to me by prisoners is their concern about the possible drawbacks of having prison records in the United States. However, they feel that on balance it is to their advantage to return home.

Thank you.

Senator BIDEN. Thank you very much. Your fortitude is commendable. I don't know how you control yourself at all quite frankly. My inclination is not to ask you any questions because it sounds so clinical for me to sit here while your son is undergoing the problems that he is. So my inclination is not to ask you pointed questions.

But I think for the benefit of your son and others like your son, who are in jails in other parts of the world, it is best that I do ask your questions. I apologize for being so clinical. I feel that what I should do is go down and hug you instead of ask you questions.

Well, here goes.

I am curious as to what impact your ability to aid your son financially has had on his relations with non-American, Mexican prisoners and whether or not he and others like him, who are able to purchase even the slightest amenities, are further put to jeopardy with the prisoners who are incapable of purchasing anything. In other words, does he reap the whirlwind for what you are able to do for him? What effect if any is there?

Mrs. MARSHALL. The Mexican jails are only terrible for the Americans. For the Mexican people they are very family focused. Their emphasis is on family. When a Mexican man is in jail, his family comes to visit him every visiting day, Thursday and Sunday, and they bring food and they bring the children in.

There is a good community spirit for the Mexicans in the jail. Everyday outside the Mazatlan jail little children are lined up with buckets of food. They have little pots stacked and the daughters will bring those to the jail and have them sent into their fathers.

For a Mexican in jail, their environment is not that different from their home. Do you understand what I mean? The conditions in Mazatlan are much like their homes without running water and so on.

Senator BIDEÑ. Let me ask you a specific question. In photograph No. 1 where all the bedding is hung on clothes lines, you indicated, Mr. Marshall, that there are 200 prisoners who live there; is that right?

Mr. MARSHALL. Yes; there are. That is in a 60-by-60 foot area.

Senator BIDEN. Are those prisoners all American?

Mr. MARSHALL. No; they're not.

Senator BIDEN. So that when space is purchased, either in that 60-by-60 square foot area or the adjacent area where the little huts are, are only people with money given preferential treatment for those spaces? In other words, you asked if you could purchase one of those huts and you were told there was none available at that time.

Mr. MARSHALL. That's true.

Senator BIDEN. Do all the Mexicans already have one of those huts and you have to wait in line for an American's spot, or by purchasing a spot does that mean that somebody without money, including a Mexican without money, would not have that slight accommodation?

Mrs. MARSHALL. I think the problem at that time was that there was no room to build one. They were all occupied. There was no room.

Senator BIDEN. I'm getting at this. The money that has been extorted from your son through you is the only means of being able to help him—has that been used to bring him up to the minimal standards that every Mexican prisoner already has, or has that entitled him to any additional amenities that a prisoner, indigent Mexican, would not have in those jails?

Mrs. MARSHALL. Yes; I would say so. For example, in Mazatlan, when he was on a correction site it was hard for the Americans to eat Mexican food. It was very crowded. Frequently by the time—Well, they just didn't eat it. It was terrible. They call it *yagua*. It's something like horsemeat. So with money Americans can send out and get fresh fruit. That is brought to the Mexicans by their families. But an American has to pay a *mandadero* to go to the market and buy the fresh fruit or whatever and bring it to the jail for them.

I think they live on pretty much an equal basis, but the Americans must purchase the difference because the family is not there. Am I answering your question?

Senator BIDEN. Yes; that's what I'm getting at. I used to be a criminal defense lawyer before I came to this body. I know that the currency in American prisons is money. If in fact you have money then that is the difference. That is the difference between everything. I'm talking about everything from sexual assault to cigarettes, to drugs, to whatever. The person that walks into prison with money can be king within that awful area. It's almost regardless of who the person is.

I know the prisoners whom I represented, which does not say much for my ability, but those who I represented who went to prison who were indigent, because that's the kind of work I did, would say how much they would like to get Charley. That prisoner committed the same crime they committed but has a good deal more going for him in prison because Charley's parents are wealthy or because Charley had means of getting money into the prison.

That put Charley in jeopardy, not just for my client but for every other person in there who did not have the capability. Usually the money was able to buy protection. That's what happens in American jails. It happens in all jails.

What I'm trying to drive at is this. I wonder whether or not in addition to getting that awful hut that you had to purchase, whether or not your son, or other Americans, are treated so differently from Mexican prisoners as a consequence of money they can use, then they can also purchase protection from Mexican prisoners. They, of course, resent that difference.

Mrs. MARSHALL. The prices vary for Americans. I will say that. They charge Americans more for the caraca facilities than they would charge Mexicans. That's only because we have more money.

Mr. MARSHALL. I would like to respond to that question. The money that is collected for housing and for these additional amenities goes to the commission, a group of Mexican prisoners who run the inside of the prison. They are very glad to get any money they can. It is to their interest to perpetuate this practice. So, therefore, they would not in my opinion allow any activity that would tend to lessen its existence.

Senator BIDEN. Please understand why I am pursuing this. I think the conditions are absolutely hideous. I do not sympathize for a moment with conditions that you have outlined and have demonstrated to us. They have been outlined time and again by others, especially in more rural prisons. Senator Mathias visited a prison himself in Mexico which he said happened to be one of the more modern ones. It was not significantly different from any prison in the United States in terms of a physical situation.

For example, this commode that you show us looks like an abandoned bus stop in a ghetto in some American city. It is horrible.

But I think it is important, for purposes of this treaty working, that we have an accurate picture. If it is not true, then we must not paint any picture that Mexican authorities and the Mexican Government officially condone abuse of only American prisoners. If that is the case, then it sets the tone in terms of the relationship between Mexico and the United States.

Mrs. Marshall, you pointed out with some reluctance that the conditions in many instances are not much different than are found in the homes in that area.

Mrs. MARSHALL. Mazatlan is called the Mississippi of Mexico. It's a very poor area. It is very depressed.

Senator BIDEN. So I think it is very important that Senator Stennis not hear that comment. [Laughter.]

But in addition to that I think it is very important in terms of the relationship between our countries that we point this out. These conditions are horrible but they are horrible for everyone in their prisons. Although Americans may be abused beyond that physically and may have more money extorted from them than Mexicans, Mexican prisoners use that same toilet. There is not one around the corner that is clean and for Mexicans only. There is the same shower, although the frequency with which you get to it may be affected by whether you are a Mexican or an American, but that same shower is used by Mexicans who are in the prison; is that correct?

Mrs. MARSHALL. Yes.

Senator BIDEN. Please understand. I'm not suggesting that that in any way says:

What in the devil are you doing there? All those poor Mexicans are in jail also. Why are you complaining to me?

That's not what I mean at all.

But I think it is important for the record that we not paint a picture that is such that indicates that American prisoners are treated drastically different in terms of the amenities within the prison than Mexican prisoners. That has the ability to poison U.S.-Mexican relations.

Mr. Worker indicated with some degree of sophistication that the real problems in Mexico, beyond the single most important problem which is your son—and I mean that seriously—but beyond that question the real problems are the incredible poverty in that country and the economic concern.

Again, we're overemphasizing it, but I think it is important that we make clear that we are not saying to Mexico:

You are brutalizing Americans and not anyone else. You are deliberately picking on us as if you were an American prisoner in a Russian concentration camp. You are there because you are an American. Because you are an American you are exposed to depravities that others would not be exposed to.

Now, the critical issue is how do we get your son home as quickly as possible. If this were an American jail and if people could not see this [indicating] rusty old pipe in this photograph and paint-peeled room that forms a shower or if the floor of a cell in an American jail looked like a swamp like those [indicating] then even the hardliners who want to lock people up, who should be locked up, would be coming in and saying: "That condition should not continue."

So as you pointed out in the beginning of your testimony, for that reason, if for no other, it makes sense for me as a U.S. Senator to do all I can to get an American citizen out of that condition just as I would if that jail situation were prevalent in American prisons on a regular basis. By the way, in some instances it is like that.

Mrs. MARSHALL. May I say something?

Senator BIDEN. Certainly.

Mrs. MARSHALL. It was brought up in the previous testimony of Mr. Worker. This was about the number of people in jail for serious crimes. In Mazatlan which is only 150 miles from the heroin capital of Mexico there is not one prisoner for heroin. They were all, without one exception, marihuana offenders.

Senator BIDEN. Is that why your son is there?

Mrs. MARSHALL. Yes. He was trafficking. He and four others decided to buy a large amount of marihuana, about 30 kilos. He was the only one convicted out of the five. The other four are gone.

Senator BIDEN. I have two more questions.

First, as far as the actual trial of your son prior to being a prisoner while he was awaiting trial but the actual trial—was it in your opinion a just proceeding? I'm not talking about the sentencing but I'm talking about the determination of his guilt or innocence.

Mrs. MARSHALL. We have no way of knowing that. I am so confused as to the Mexican procedures. We have gone through four different attorneys. We have received no legal documents about our son's case except a paper that I got from my son when I was down there last month about the reconfirmation of his appeal. So I am completely in the dark.

Senator BIDEN. But you do know that your son was involved with the purchasing and attempt to transport back to the United States significant amounts of marihuana; don't you?

Mrs. MARSHALL. I don't want to take up so much time.

Senator BIDEN. I apologize to the other witnesses but this is critical and I will stay here as long as need be.

Mrs. MARSHALL. I will tell you exactly what my son told me. He was surfing on a beach with his girlfriend. They went on a trip. He had just finished his first year of college. They went on a vacation before he would start college in the fall.

He was surfing on the beach and some men walked along, young boys about his age. There were three of them. They introduced themselves and began talking. They were all from California and they were friendly and nice. One of the boys said he was going to make a small purchase of marihuana. He said, "Would you like to go in with us on it?" And Rob said that he would. He left and came back awhile later with the marihuana. They went to the hotel room and smoked it. They decided it was very high quality grass. They went out to dinner together. The next day Doug Clarno asked if my son would be interested in going in on a large purchase of marihuana. He said it was safe and all my son had to do was transport it to the border and Doug would get rid of it before the border and Doug would take it across. They would just use my son's Volkswagen. Rob said that it sounded like easy money. He could make \$80 or something.

So all of the boys pitched in money and Doug, my son, and the other two—they left the girl at the hotel—bought the marihuana and brought it back. The next day the Federalies caught them.

May I add this. Doug Clarno spoke fluent Spanish. He arranged the buy and handled all the money. He was never seen after the initial arrest except on the street after my son and his girlfriend were in jail. He was seen on the street wearing my son's shirt. He was also seen taking money from the Federalies after my son's girlfriend's father and uncle paid to have her released. The Federalies gave Doug Clarno an amount of money which we don't know about. We have reason to believe that he was working in cahoots with the Federalies, helping to arrest Americans.

Senator BIDEN. I see.

Mrs. MARSHALL. Our son was not a drug smuggler. He has no prior criminal record. He had just turned 19 at the time of his arrest. He had been 19 for 2 days.

Senator BIDEN. I'm not trying to retry or convict your son.

Mrs. MARSHALL. I feel defensive for him.

Senator BIDEN. I understand. I'd be surprised if you did not. The reason I raise that question is to try to determine whether or not in the first instance those who were in jail are in fact guilty of any crime at all, whether or not the sentence imposed and the treatment of the crime meets with our standards—that is the secondary issue to the constitutionality one.

If in fact as the major sponsor of this legislation—and you want it badly and I want it badly and those who are incarcerated I would think would want it badly—but if in fact we cannot establish that the Mexican judicial system in terms of determination of guilt or innocence meets the modicum of American standards, then your son and everyone else will stay in the jail in Mexico. The first person out who gets here in America and has a writ of habeas corpus and challenges the proceeding in Mexico, and if the Supreme Court of the United States finds that their justice system does not meet the minimal standards then that is all over.

No one else will get out. They will stay there. So that is why I ask the question. I appreciate your candor in telling me that your son was involved in the transportation of 30 kilos of marihuana. Even if it were 1 kilo, make no mistake about it, in my little State of Delaware, if your son were moving through Delaware to New York with 30 kilos of marihuana for whatever the reason in the back of anything, he would spend some time in jail. It would not be under these conditions but he would spend time in jail.

So do you understand the point I'm trying to make?

Mrs. MARSHALL. Yes.

Senator BIDEN. It's essential that the constitutionality of this amendment be built into the record and that once it goes into effect that we do not have, as a consequence of dealing with that issue, an abrogation of the treaty that would leave those Americans in that jail in Mexico because I have not figured out a way to get them out other than this. One of the things I am committed to is to get them out of jails like that, regardless of whether or not Mexican prisoners are treated that way.

Do you understand? I hope you do. It's so callous to raise it that way but there is no better way of building the record and to get it through to people who have deep emotional interest in the subject.

There are many, many questions that I would like to ask you. But they do not directly relate to the constitutionality of this. I think you have made a significant contribution in these hearings. I am very hopeful that we can expeditiously report this out of the Judiciary Committee to the floor of the U.S. Senate and through Congress and get underway.

I would like to mention two caveats. The hearing may not be the forum but I would like to speak to them. As leaders of or representatives of an organization which represents parents in similar circumstances, please do not make this out to be more than it is. With the grace of God and the good will of the neighbors and enough votes we will get your son out of a Mexican jail. But we will not be able to straighten out your son's life. We will not be able to prevent your son from serving time in American jails. That will be up to a parole board. We will not be able to avoid your son having a felony record. We will not be able to prevent your son from being denied a job when in fact he is paroled or gets out of an American prison whenever that comes.

I am talking about your son in an editorial sense.

We will not be able to prevent the brutality in American prisons. God forbid that it happens. But one of the things that most concerns me is homosexual attacks and rapes in American prisons. We have not been able to cure that.

So, it's not going to be a panacea. Obviously I think it is better than these photographs [indicating] but I would not want to mislead you or anyone else into thinking that if we are able to get this enabling legislation through and the transfers underway that that would have solved your problem. It would not have solved your problem.

Mr. MARSHALL. This particular subject has been discussed a great deal by the prisoners themselves. We are, therefore, certain that it has been given a lot of consideration. In spite of what has been said

here of what they may find when they return home, they still want to come home.

Senator BIDEN. I think that is right. But I think one of the problems that we in the U.S. Senate and major governmental officials by and large have committed is that we tend to paint things more than they are. We tend to overpromise.

One of the cardinal rules of my involvement in politics is to try to level with people. That is not to promise something you cannot deliver. Even if it means painting a blacker picture. Maybe that's why folks don't believe us and why there is so much lack of confidence in Government. We promise what we cannot deliver. I want to make it clear that we cannot deliver all the things that I just mentioned in this treaty, even though I fully agree with you that it is the best thing we can do and that time is of the essence. The sooner we get your son out of that jail the better for everybody.

I wanted just to make it as they used to say "perfectly clear." Anyway, thank you very much. I think it takes a good deal of intestinal fortitude to be able to sit through this. I'm flattered that you would take the time to come and tell us with the decorum that you did.

What I would like to do, if I may, at this time is this. I would like to call forward the distinguished members of the bench. By the way, it will be a unique pleasure to be on the other side of the questioning process. I would like to ask whether or not the judges have duties which are pressing at the moment.

I am not saying that these judges are more important or less important than the other witnesses who are listed.

But, I would like to ask, at this time, Judge Smith and Judge Gasch to come forward together as a panel. Each then could give their testimony, and then I could question them both. This might speed things up a bit.

Then after that we could have Robert Miller, a former prisoner.

Excuse me. I am informed that Judge Smith is the only judge who is present. So, we will have the testimony of Judge Smith. Then after that, we will have the testimony of Robert Miller, Anne Wiernicz, and Michael Griffith.

During the last segment of questioning, I sort of wished I would have had Dwight Worker back to respond to those questions. Without objection, we will proceed in this manner.

Judge Smith, we thank you for waiting for us. I have never had the court wait on me before without suffering some penalty. We welcome you.

STATEMENT OF JUDGE JOHN L. SMITH, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; MEMBER, COMMITTEE ON MAGISTRATES

Judge SMITH. Thank you, Mr. Chairman. Thank you for accommodating me. I happen to be in the middle of a criminal jury trial.

Senator BIDEN. I wish I had known that. We should have put you on first in that case. I apologize to you.

Judge SMITH. My name is John Lewis Smith, Jr. For the past 10 years I have been a judge of the U.S. District Court for the District

of Columbia. For the past 3 years I have been a member of the Magistrates Committee of the Judicial Conference of the United States.

I have been asked to testify today on the function that would be performed by U.S. magistrates if S. 1682 is enacted into law. I appear here today as a member of the Magistrates Committee of the Judicial Conference of the United States.

The duties to be performed by magistrates in connection with the transfer of offenders between the United States and foreign nations are set out in proposed sections 4107 and 4108 of title 18, United States Code. The duties are essentially the same under both sections. Under the bill a foreign citizen or national, serving a sentence in the United States imposed either by a State or Federal court, would be eligible to be transferred to his home country, and there to serve out the sentence imposed by an American court in accordance with any treaty entered into between the United States and the foreign country. The transfer could be made, however, only with the consent of the offender.

Conversely, American citizens convicted in a country in which a treaty for the transfer of prisoners had been signed with the United States could be transferred to the United States upon their consent for completion of their sentence.

Under section 4107 a U.S. magistrate would be empowered to conduct a proceeding to verify that the consent of the offender to be transferred from the United States has been voluntarily given. In addition, he would be required under section 4107 (b) to explain to the offender the consequences of consenting to the transfer, indicating specifically that only the appropriate courts in the United States may modify or set aside the conviction or sentence; that the sentence will be carried out according to the laws of the country to which the offender is transferred; and that if a court of the country to which he is transferred should determine that the transfer was not accomplished in accordance with the treaty or laws of that country, he may be returned to the United States to complete the sentence.

In many instances the magistrate would be required to journey to a State or Federal penal institution to conduct such a proceeding.

Similarly section 4108 would authorize the U.S. magistrate, or a citizen of the United States specifically designated by the Attorney General, to conduct a similar proceeding in a foreign nation to determine that an individual serving a sentence imposed by a court of that nation has freely consented to being transferred to the United States to complete his sentence. He would also be required to explain to the offender the consequences of such a transfer.

Mr. Chairman, the provisions of this bill were fully considered by the Judicial Conference Committee on the magistrates system at its recent meeting on July 8. The committee does not believe that the assignment of these duties to U.S. magistrates will create any particular problem. Furthermore, the committee believes that these new duties are consistent with the kinds of duties presently performed by magistrates.

The Federal Magistrates Act of 1968 abolished the old U.S. commissioner system and created in its place a corps of subordinate judicial

officers in the Federal judicial system with greatly expanded powers and jurisdiction. Magistrates today issue complaints in criminal cases, conduct preliminary hearings, fix bail, and try minor offense cases in which the punishment does not exceed 1 year in jail, or \$1,000 fine.

In addition, magistrates examine a defendant's financial status to determine whether he is eligible to have counsel appointed for him at Government expense pursuant to the Criminal Justice Act. If so, the magistrate makes the appointment.

Under their expanded powers magistrates hold probation revocation hearings, conduct pretrial conferences in civil and criminal cases, and consider certain preliminary motions in both civil and criminal cases which are not dispositive of litigation.

If the bill is enacted into law, additional funds may be necessary to cover the costs of travel and other miscellaneous expenses of the magistrates in conducting proceedings under sections 4107 and 4108. It is not anticipated, however, that the amount will be great since the number of offenders eligible for transfer to and from the United States is not expected to be significantly large.

In summary, Mr. Chairman, the Magistrates Committee of the Judicial Conference of the United States believes that U.S. magistrates can appropriately assume these new duties. We have no amendments to suggest with respect to these two sections of the bill.

Thank you for the opportunity to appear and testify on this legislation.

Senator BIDEN. Thank you very much, Judge.

I would like to ask you a few questions.

As I am sure you are aware, the Congress is presently working on legislation to further expand the jurisdiction of magistrates. As a matter of fact, yesterday this very committee reported out a bill that significantly expands the jurisdiction of magistrates. Of course crystal ball gazing is risky but I suspect that it will become a law. It would not only allow them to try criminal cases or waive jury trials with the consent of the defendant, but to try civil litigation of some consequence with the consent of both parties. So the jurisdiction is being expanded.

As you pointed out, I think this is consistent with the additional responsibilities which we are suggesting in this legislation.

Obviously you know better than I the reason we are suggesting that magistrates be involved. It goes to the heart of the consent question of whether or not someone would be in a position to knowingly consent to waive certain constitutional rights.

Do you believe that the use of the magistrates would cure the potential for unconstitutionality of this legislation with regard to the consent argument?

Judge SMITH. I do not like the use of the term "cure." That is quite broad. I think it would provide an additional safeguard. I think the magistrate would perform a function similar to that of a judge in a criminal proceeding.

Every attempt is made, as you know, to determine that a plea of guilty is voluntarily made with a full realization of all of the rights that a defendant would have.

Senator BIDEN. When you are making that determination there is no specific test that is used other than determining whether or not the

rights have been read and the person was able to understand what was read. Beyond that it is within the discretion of the judge, is it not, to make a determination of whether or not it was really understood?

Judge SMITH. That is correct.

Senator BIDEN. So what is going to happen here happens normally in every criminal case where a lawyer comes before you with a client and suggests that when he or she plead guilty that they did not understand what they were doing. It is a subjective determination beyond certain basic showings that are necessary. Is that not correct?

Judge SMITH. That is correct.

Senator BIDEN. So in this instance we will be in a position where a magistrate at least will add further weight to the argument that basic rights were at least explained to the defendant. That is about all we can do, is it not?

Judge SMITH. I believe it is, Senator. Also, I believe there will be situations where you will have to have interpreters explain the rights.

Senator BIDEN. That was my next question.

In cases that I have defended—and many of them have come before you—when I have been representing particularly members of the Latin community, one of the things that is in fact a real problem is this. In many police departments in this country they do not have competent interpreters. The cultural shock to which a defendant is exposed when confronted with arrest and incarceration in a city lockup further confuses, in many instances, someone who does not understand the language.

An element in determining whether or not the confession was voluntary is in part whether or not that defendant really did understand what was going on.

One of the things that police departments around the country and prosecutors offer to contravene the arguments made by lawyers such as myself is, "Well, we had Roman Garcia, a sergeant on the police force, who is a Puerto Rican, a Cuban, or whatever, explain to Mandez his rights, and Mandez is also a Puerto Rican or whatever." Therefore, it is intimated that he understood it. That argument is used by prosecutors to blunt the argument used by defense attorneys.

Does that lead us to the conclusion that we should be training and/or hiring magistrates who are fluent in Spanish, even though they are speaking to Americans? They would be able to understand the system. We would then not be open to the collateral attack that when the plea was being taken the magistrate did not understand the Mexican judicial system. Should we be doing anything beyond that?

Judge SMITH. I do not believe that is necessary, Senator. In the District of Columbia of course we have very little problem with language difficulties. Possibly in the border States it would be a factor, but I would assume that the magistrates in Texas and other States in that location probably are bilingual. I think probably at least one of the magistrates would be bilingual in those areas.

I do not believe it is up to your committee or the Magistrates Committee to train interpreters.

Senator BIDEN. I just wanted to get that information.

Judge, I want to thank you again. I apologize for not bringing you up to testify earlier.

Judge SMITH. Thank you.

Senator BIDEN. We are trying to accommodate the schedule of witnesses here. I know this is not the only business in which all of you are involved.

I am told that Ms. Wiernicz has a 2 p.m. flight to catch at Dulles Airport. So let's have Ms. Wiernicz come forward now.

Mr. Miller, why don't you also come forward with Ms. Wiernicz?

STATEMENT OF NANCY K. VAN DEN BRINK, NEWPORT BEACH, CALIF., PRESENTED BY ANNE WIERNICZ

Ms. WIERNICZ. I would like to begin by showing a copy of a picture of my cousin.

Senator BIDEN. Excuse me. Before you begin, will you please tell us who you are and where you are from? Don't be nervous.

Ms. WIERNICZ. My name is Anne Wiernicz. I come from Laguna Beach, Calif.

Nancy Van Den Brink is the mother of Dirk and Tony Van Den Brink.

I would like to present this photograph to you, if I may. It is a copy.

Senator BIDEN. Please proceed in any way in which you feel comfortable. We can do it any way you want to do it.

Ms. WIERNICZ. In the photograph you will see that his chest was crushed in on May 8 through a beating which he received. On May 9 they had another beating. Also, Dirk and Tony were there.

I had testimony written up but things have changed so much since then that I feel that I should go ahead from the news that I have received lately, if that is all right.

Senator BIDEN. Certainly, we will have your entire testimony in the record.

[The material follows:]

COMMENTS BY NANCY K. VAN DEN BRINK, MOTHER

My two sons left on March 21, 1975 to drive to Guatemala and expected to return to Newport Beach on or before June 10th. The June 10th date was definite because of family graduation party. The trip had been planned as a pleasureable event and they were also interested in purchasing handmade arts and crafts, that would indicate the culture of the small villages and large towns they were to visit.

On June 1st I received a phone call and they informed me they were in need of some money for repairs on their G.M.C. truck. I told them I would wire it immediately. A few hours later they phoned and related that they had met a young Mexican man whom they had met on their way to Guatemala. He stated that he would help them out by paying for the truck repairs if they would drive a V.W. to his brothers house who lived a few miles away. His brother needed the car and he could not lose work to take it to him. My sons said they had checked the car thoroughly and could not find anything illegal and it seemed to be a reliable auto.

They left feeling good about the situation. They had money for the truck repairs and all seemed fine. When they were approaching Ameca, they were stopped by the Federales road block. They were beaten, tied to a tree and the Federales took a cutting torch and cut the V.W. to pieces—finding it had a complete metal sub flooring placed in it. Housed under the flooring was marijuana. The boys were then taken to the Guadalajara secret service jail. They did not have me notified because at this time they did not feel they had a serious problem because they were innocent of any knowledge regarding the marijuana in the car.

We have always been a very close family. They are honest, reliable, industrial and hard-working young men. I had no reason to doubt their word then nor do I to this day. The nightmare of the past two years most assuredly would have brought out facts to the contrary. Because it has been just that—a financial, emotional and physical hardship. Not to mention the beatings and cattle prodings and just the day to day existence they have had to withstand in the prison.

As a parent, in order to expedite their release from prison, I have tried every avenue to help them legally, medically and personally at the cost of an excess of \$51,000.00. I have records to verify this figure. It is my sincere hope that the evidence presented to you and your committee will bring forth a decision that will demonstrate what Americans believe in; human rights and dignity for all mankind.

Sincerely,

NANCY K. VAN DEN BRINK.

TESTIMONY: NANCY K. VANDENBRINK

May 28, 1975.—Call from sons, Tony and Dirk from Mexico. They wanted to come home for the graduation of their cousin on June 12 but needed money. Called back a short time later and said they had worked out the car repair costs and would make it home in time for the graduation.

June 2, 1975.—Tony and Dirk arrested in Ameca by Federal Mexican authorities.

June 12, 1975.—A young Mexican man came to my door at approximately 10:00 P.M. to inform me of their arrest. He said they were in Guadalajara. He claimed to be a friend of my sons. He said he had a friend who is an attorney by the name of Perez Duarte who would act in their behalf. That I should send \$2,000 immediately to him. This was imperative or the condition of *my* health would change drastically, he also said. He also threatened that if I didn't do things his way, I would be putting my sons situation in jeopardy. This, by the way, is the first I had even heard of my sons arrest.

June 13, 1975.—Sent \$2,000 through United California Bank. The copy obtained from the bank shows the Banco De Londres in Guaymas credited the money to Victor Duarte, account #457. An interpreter called with a message from Victor Duarte. He asked that I meet Duarte in Mexico City on July 3. He said I was to bring \$4,000 in cash and also character references for the boys. Some with official titles, if possible.

July 3, 1975.—A friend accompanied me to Mexico City. When we met Duarte in a coffee shop he gave me a large stock of legal papers in Spanish. They appeared to be legal papers. The interpreter was brought by Duarte. My friend upset Duarte by asking questions about any past cases and what success he had had. The meeting ended on a very unfriendly note and no money was given. We then spoke with a Mr. Danielson who was duty officer at the American Embassy. He was interested and courteous, but stated that due to the fact that my sons were being held in Guadalajara he was limited as to giving us direction as to how to proceed. He did call Guadalajara and tried to contact a Mr. Summers. He could not be reached.

July 5, 1975.—We went to Guadalajara to see the boys. Their physical conditions were not at all good. I was shocked. They were physically injured and emaciated. Tony was jaundiced from viral hepatitis and they both lost weight, between 30 and 40 pounds.

My sons at this time related to me their story. Following their arrest they were taken to a jail called the Federal Palace where they were held for 18 days. During this time they were subjected to physical assault with various types of objects, including a cattle prod as well as being beaten by guards. They were given one cup of water a day with a bread roll. There were no bathing facilities. The rats would come out at night and chew the blood stained parts of their clothing. They recalled that a man from the American Consulate had come to see them once after they had been there over a week, but he had made no attempt to help them. They asked him to send medical help and food or at least try to recover some of the money they had had on their possession when they were arrested so they could attempt to pay a guard to buy something for them. They never heard from this man again. On June 21, Tony's 21st birthday, in a state of unconsciousness to semi-consciousness they were moved to the Federal Penal. The guards had taken their money and wallets and thus they had no means to pay for food

or purchase a cell. They slept on the streets of a cellblock for nine days and had to eat in what is called the beanline. Without their own container, they could only have as much as would fit in their hands. They could not take a shower because they had not the needed money for that privilege. They were so weak that they could not stand for long without falling down. They had been starved for so long that their vision had been affected. At times they could only tell light from dark. Their bodies were covered with bruises and open lesions. All bony prominences were either calcious or abraded from having slept on the concrete for nearly a month. After a few days in the Penal, a few fellow American prisoners helped them with a little money and blankets.

After having seen my sons deplorable condition I gave them the necessary money for food and brought in medication that a medical doctor, a fellow prisoner, advised me to purchase. This prisoner doctor told me that in his professional opinion, he did not believe either of the boys would live when he first saw them.

I went to the American Consulate and talked with a Mr. Charlie Brown and a Mr. Bill Rosmore and inquired regarding their position. I was told that one member did go to see my sons when they were first arrested but then this member went on vacation and neglected to leave the information regarding my sons situation with the replacement. I asked them about the money and other possessions that had been taken from Tony and Dirk at the time of their arrest and was told "that is one of the illegal occurrences that happens in Mexico." It is the Mexican way and there was nothing they could do for me. Their whole attitude, in general, was such that I had to remind them that I was not a criminal, I wanted to set up a trust fund for the boys so I would feel assured they would always have the necessary money for food and other necessities since I knew that nothing was free at the Penal. Mr. Rosmore and Mr. Brown discouraged this because of the time and paper work it would involve them. A young man prisoner, Jorge, had convinced Tony and Dirk that a judge in the 5th Court had been very successful in getting the release of prisoners. His name was Raul Solis-Solis. Jorge told them that for \$15,000 Solis-Solis would destroy their papers and set them free. I returned home to see about borrowing money.

July 25, 1975.—I returned to Guadalajara. I stayed at the hotel Marriot. While out of my room one day, my room was ransacked. The door knobs were removed and everything was searched. I had put my money in the safe at the hotel. I checked out and asked the hotel to get me an English speaking cab driver. I hired him for one day. His name is Raul Flores. With his assistance, I bought food and supplies to take to the Penal. He went to the Penal with me and offered to help me whenever I needed him.

Tony and Dirk still had faith in the prisoner Jorge's connection with the Judge. I spoke with Jorge myself and he assured me that I could deposit the money (\$15,000) into Judge Raul Solis-Solis's account. He convinced me that to contact the Judge personally would place the Judge in jeopardy.

Aug. 9, 1975.—Returned to Guadalajara after wiring \$15,000 to the Londres Y Mexico Bank of Guadalajara. I had borrowed the money. I had arranged for Raul Flores to meet my plane. During the time I had stayed with him and his family on my previous visit he had informed me that he was a tour guide for a large reputable international travel agency. I trusted this man completely. At the airport Sr. Flores was accompanied by another young Mexican man who claimed to be Judge Raul Solis-Solis's attorney. Sr. Flores had already established the credibility of this attorney and I had complete confidence in his judgment. We went immediately to the bank where I withdrew the money in pesos. Since we had to walk down the street to Banco De Comercio where Solis-Solis had his account, I was escorted by the attorney, who had a gun, and Sr. Flores. I deposited the money in Judge Raul Solis-Solis's account-Tolsa 17-01175-8. This was witnessed by Raul Flores.

Sept.-Oct. 1975.—Waiting for the release of my sons. Jorge continued to encourage the boys that everything was alright. He had Solis-Solis's lawyer speak to them several times. Around the end of August Jorge was released from prison but told them not to worry, they would hear from him soon. A week later they received a telegram from him from Mexico City saying everything was looking good. They never heard from him again. We realized then that we had lost the money. I had no direction for recourse.

Lawyer Javier Navarro F., (address: Angelo Peralto No. 24, Guadalajara) came to the Penal and contacted Tony and Dirk. My sons called and relayed the

information that he promised great help and he would file as their legal representative. He would need \$1,250 for a starting fee. He would be in Tijuana on October 1, 1975 and would meet me there.

My attorney Robert Huckenphler contacted a friend who was a business man in Tijuana who would let us meet Sr. Navarro in his office and would also act as an interpreter. During this meeting I gave Sr. Navarro \$1,250. His fee was to be \$30,000 if he freed the boys. He never returned to the Penal nor gave any assistance.

Nov. 1975.—During Thanksgiving Holiday I again went to Guadalajara where I met a good friend of Raul Flores. His name is Lic. Agustin Vazquez Villegas. He is a Public Minister of the No. 2 Criminal Court. (Telephone No. 17-56-50 and 17-17-71).

Dec. 1975.—Sr. Vasquez had checked into Tony and Dirks case and was convinced of their innocence and quoted \$12,000 to \$15,000 to free the boys. He explained that as a public official he could not represent them himself but would use someone from his office as legal representation. I gave Sr. Vasquez \$12,000. I have this cancelled check.

Feb. 1976.—After a call from the friend of a fellow prisoner informing me that Dirk was ill, I flew to Guadalajara with a doctor.

April 1976.—Sr. Vasquez called saying everyone but one secretary had signed the release of my sons and that I should come and bring two airline tickets for Tony and Dirk. When I arrived in Guadalajara I found out that the secretary was out of town and had not yet signed the forms. I left the plane tickets with Sr. Vasquez for the boys when they were released.

During this time Sr. Vasquez said the case was more involved and needed \$10,000 more. I gave him a check payable to himself but before cashing had to be countersigned by Tony and Dirk in the USA.

Summer 1976.—Spent six weeks with the Raul Flores family. Visited the boys. Sr. Vasquez always said "Don't worry". Always new problems arising. During this stay, and with the help of Sr. Vasquez, I filed a civil complaint against Judge Raul Solis-Solis. There is legal documentation of this action on file in Guadalajara.

Aug. 1976.—Raul Flores, his wife Berta and myself appeared before the Judge who was to hear the case. This was four days before the trial date and 14 months since the arrest of my sons. We spent one hour talking to him. He did look at Tony and Dirks character references. At Bertas insistence he did move the trial date up so I would still be there.

At the trial he questioned the boys through an interpreter. Approximately three weeks later the decision was handed down, 5 years and six months. Vasquez said "don't worry". He would put in an "impara". He again mentioned needing the \$10,000 more but Sr. Flores said it would only be available when the boys were free.

Dec. 1976.—Returned to Guadalajara. I contacted Sr. Vasquez's lawyer frequently who always said not to worry, that the "impara" would be acted upon the first of the year. Found out from my sons that members of Sr. Vasquez's staff had been to the Penal bothering the boys for more money.

April 1977.—While in Guadalajara for Easter vacation from my duties as school nurse, on Wednesday I waited all day for Sr. Vasquez to come tell me the status of the "impara". Thursday a staff person, Maria, brought a letter to the Penal. It said a typographical error had been corrected and the sentence was now 5 years and 3 months. So I'm in doubt as to whether an "impara" was submitted or not.

April 28, 1977.—I received a call from the mother of another American prisoner who said a riot at the Penal between two Mexican groups had started on the 26th. She also said that the American Council had succeeded in moving the American prisoners to another jail in Guadalajara for their safety.

See attached letter from my son regarding the riot.

NANCY K. VAN DEN BRINK.

The following was received from an American imprisoned in Mexico. For protection of their lives, the names have been changed.

Friday April 29, 1977.

"Well loves—sweet God where do I start? So much, so much Bazzarness. I guess I'll start by telling you the events of last Monday where you'd find ole

John sick as a dog. I'd been in this condition for six days. (remember the Hong Kong flue) well I was sicker than that. So any way there I was sick in George's room, thank God he'd been nursing me just don't know what I'd of done without him. The day started off by Ray getting robbed and beat up pretty bad (three broken ribs) yea and the day progressed from there about a half hour later Sam was robbed for 500 pesos by knife point.

Later in the day Pete and Bob were accused by Juan of stealing 800 pesos. Yea I was almost glad I was so sick that I couldn't get out to get in any trouble. Yea this was the starting of wierd vibes. So the day passed and night came, I was only too glad.

Then about 12:00 Monday night (I was sleeping in George's room cause of my fever—103) George comes rushing in "Federal search" There were at least 200 soldiers and Blues lining up in front of processados getting ready for a heavy search. The people over there throw milk bottles and coke bottles at the pigs. They moved back. The mexicans in processados tore up those little restaurants, put the wood in front of the door, dowsed it with kerosene and torched it. Now there is no way for the pigs to get into there. But of course the mexicans in Sentincados followed suite.

So now both departments are burning. Just unreal. About 5 A.M. Tuesday morning the fire truck comes and puts out the blaze. So now the pigs go in and search. Our department where all the americans live was the last department to be searched and boy they tore it apart. The pigs stole all Fred's silverware and those little boat parts you got him.

So the pigs split but like they say, you ain't "heard nothing yet" Well when they searched Sentenciados they locked all of the mexican prisoners in the new corral. Well the little angels broke down the doors then went to let out all the derranged killers from the old corral. Now all the heavy psycos are loose and things are looking bad, real bad (Oh, forgot to say Monday night they killed seven people).

Now we have a full fledged riot. They completely looted and burned the store and a few shops. I'd say at least thirty critically wounded. The fire truck came again and put out the blaze at the store. I saw all this and lots more, people getting carved up left and right. They shot my friend Jose three times and stabbed him a few . . . don't know if he's alive or what—God its so insane, prisoners running around with 22—38 and 45 blowing people away and stabbing them.

So now it brings us to Wednesday. Our department and considerados are the only ones that haven't burned. About 10:00 A.M. John and Gus are forced by knife point back into the hallway. I truly think they would have died but two Mexicans saved them. One of these mexicans is a heavy killer. Anyway John's door was bent in half and a few hundred of the "mob" was yelling sabe de gacachos, which means like kill em . . . it was close . . . way too close and we all needless to say a little freaked out.

People start to clean up the mess and if you can ——— believe it they let visitors come in—Jesus Christ—visitors, while people are getting stabbed and killed and robbed and what have you just really crazy . . . My God my God. I was thinking, is this going to be my last letter to my loved ones—well if it is and these suckers come in again were going to take a few of the suckers with us for sure—God, I don't want to kill anybody but it looks like kill or be killed—so that's the way its going to be.

Oh the council is here, were all telling them for Christ sake get us out of here. It's a critical situation. If they don't get us out their going to carry a few of us out feet first, no. We all go back to the department not really convinced anything is going to happen. Were making clubs, moon chucks and bombs. Jesus if we're here in the morning its going to be very very heavy.

It's about 9:00 P.M. and guess ——— what there coming to get us. Oh Hala-lula . . . were going to all live . . . unreal.

They load us all in a big truck and were ready to go . . . small compensation the sec. Governor says "no." But, ——— "the Council" sends someone to the Governor's house. So about 12:30 were on our way.

Now were in the secret service Jail. Much nicer than before—food . . . beds . . . clean cells . . . its not perfect but not bad—slept here part of Wednesday night and Thursday night now today is Friday the 29th and were all alive and well.

Oh forgot to add—Wednesday night when Roy was trying to get us out, they carried out a mexican (one heavy killer) his chest looked like a piece of butchered meat. God I never thought I'd be happy to see anyone dead but I cheered

when I saw that sucker—so did everyone else. Roy also saw this, I think it was a motivating factor to get us the ——— out of there.

What ever they put in the papers don't believe it—this last week they have killed at least 15 people—this is a low estimate. The papers said two., well thats just pure ———. One thing I've learned is you can't believe what they print down here or up there for that mater. So anyway loves just want you to know we love you all and am thinking of you. Were still alive and well and when it comes down to it that's all that counts. So take care we love you and just might see you soon. We're not going back to the——— and they're talking about letting us go the States . . . whatever will be will be—que sera sera as they say.

Darling Maree & Family—I want you all to know and be proud Tony and I made a seccuful excape at 1:30 this morning and we tried our hearts out to get home to all of you. Well these police got us in a road block on our way out of town. I won't bring you down by saying what they have done to us since. Just know Tony and I are together and still have all our faculties. As this is the only important thing at this moment.

The American Council is to be comended they just came in and are doing every-thing possible to make sure our condition won't deterate.

Ole Mickey saved my life this morning a guy outside had a machinegun leaveled at me he drew thier attention away from me. Well there is not much to say other than we love you with all our hearts I want you to know this whatever hapens will happen were in Gods hands and he is our protector. Whenever possible I will call you and let you here my voice so you'll know everything is allright. This should be within a week.

Say a prayer for all of us and one special one for Terry God I was proud of him he jumped 30 feet for freedom unfortunately he broke his back and

So loves we were backed up against a wall we all acted like men and did what had to be done. I am Proud of us all.

Holding together brings good fortune.

Love you with all my heart,

DIRK AND TONY.

Ms. WIERNICZ. On May 9 they tried to escape. First of all, they were———

Senator BIDEN. We are talking about three people here; is that correct?

Ms. WIERNICZ. No; we are talking about Dirk and Tony.

Senator BIDEN. They are brothers?

Ms. WIERNICZ. I am their cousin. They are brothers. Their mother would have been here but Dirk is in grave condition at this point. He is the one on the left-hand side in the photograph.

On July 8 Tony called us and said that Dirk had been beaten severely and that he needed medical help. So Nancy flew down. She is a nurse. She has been there since then.

She went in to see Dirk. Prior to the beating he had contusions on his body. He has a brain tumor now. The doctor suspects it. He has been seen by a doctor.

They transported him to Mexico City in the back of a pickup truck. He spent 7½ hours there. We offered to pay for a litter on the plane but they said that they could not do that because he was a common criminal and that they could not trust him. He is semiconscious or unconscious at times.

He was admitted to the Mexico City jail hospital. He is being taken care of by a Dr. Lopez.

He is defined as a depressant schizophrenic. He does not know where he is. He does not know anyone. He is in grave condition.

He has been deported, supposedly. That is what the Mexican authorities say now, but he is in too grave a condition to be moved.

Senator BIDEN. From Mexico to the United States?

Ms. WIERNICZ. Supposedly. This is what the American consul has been telling their mother. But we do not believe him because the American consul has not been any help to us whatsoever.

He cannot be transported because he is dying right now.

I would like to know if this is true, if he has been deported. If you could find out, I would like to know that. If not, then we have to get the young man home or else he will not live.

His father was down there July 8 and said that all his ribs are broken. They will have to do open heart surgery. They will have to go in and rewire all the ribs. He will not make it unless we get him out of there.

Senator BIDEN. What about Tony?

Ms. WIERNICZ. Tony is in good condition. He is physically and mentally able to uphold anything that will come in the future.

I believe the treaty will do some good. I understand through these hearings that you cannot make any promises but just to have him back in the States would be good.

As Mr. and Mrs. Marshall testified, the beatings, the extortions, and everything else are the same in Guadalajara as they are any place else.

Senator BIDEN. Can you tell me what your cousins were arrested for?

Ms. WIERNICZ. Possession of marihuana. In June of 1975 they were asked to drive a VW bus to the airport. They needed money for car repair. So they did so. As they were entering the airport, the Federalies pulled up and said, "All right, we are going to arrest you for possession of marihuana." The boys had searched the car before and found nothing. The Federalies took blow torches in order to get to the subflooring of the car. As they did that, they found that they had hundreds of pounds of marihuana. The boys knew nothing about it.

Senator BIDEN. I just wanted to know what they were charged with.

Ms. WIERNICZ. They were sentenced to 5 years and 3 months.

Senator BIDEN. For having substantial amounts of marihuana?

Ms. WIERNICZ. Yes.

Senator BIDEN. It was not just possession of a small amount. It was a large amount; is that right?

Ms. WIERNICZ. Yes.

Senator BIDEN. I appreciate your testimony. We will try to find out as soon as we recess this hearing just what the situation is with regard to your cousin Dirk. I know you have a 2 o'clock flight. We will try to do it before 2 o'clock. However, in the event that we do not, you may be assured that the staff will be working for you. We will contact you as soon as we can.

Ms. WIERNICZ. I wish their mother could be here, but she said she could not be here.

Senator BIDEN. I fully understand. I appreciate your coming.

I see that Judge Gasch has just arrived. We will take his testimony at this time.

Judge, we thank you very much for appearing.

**STATEMENT OF JUDGE OLIVER GASCH, U.S. DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA; MEMBER, COMMITTEE TO IMPLE-
MENT THE CRIMINAL JUSTICE ACT**

Judge GASCH. I do have a jury that is waiting for me and I would like to get back to court as soon as possible.

Senator BIDEN. Please proceed in any way which you see fit.

Judge GASCH. Senator, I understand that the statement of our chairman of the Judicial Conference Committee on the Criminal Justice Act, Judge Dudley Bonsal, has been filed with the committee.

Senator BIDEN. Yes, that is correct. It will be made a part of the record.

[Material follows:]

**TESTIMONY OF DUDLEY B. BONSAI, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF
NEW YORK**

I am a Senior United States District Judge from the Southern District of New York, appointed to the Federal bench in October 1961. I have been a member of the United States Judicial Conference Committee to Implement the Criminal Justice Act since 1964 and was appointed Chairman of that Committee in 1974.

The Committee to Implement the Criminal Justice Act is charged with the responsibility of overseeing the Federal court-appointed counsel system and the operation of Federal Defender Organizations. It advises the Judicial Conference with regard to matters affecting the Criminal Justice Act, 18 USC 3006A, and its implementation, including proposed legislation affecting appointment of counsel under the Act. For this reason, at our meeting during the period June 27 through 29, 1977, the CJA Committee reviewed the Treaty between the United States of America, and the United Mexican States, on the Execution of Penal Sentences, which was signed in Mexico City on November 25, 1976, and S. 1682, the proposed legislation to implement such treaties. Because of its limited mandate, our Committee focused only on Section 4109 of S. 1682 and those provisions of the Treaty and the proposed legislation which had a bearing on the appointment of counsel.

I will limit my remarks today to the same area of concern, pointing out that I appear only as Chairman of the Criminal Justice Act Committee and do not speak for the Judicial Conference which has not had an opportunity to consider these matters, and will not, until its meeting in September 1977.

Turning now to Section 4109, the Criminal Justice Act Committee has no objection to the expressed right to advice of counsel or to the right to obtain appointed counsel under the Criminal Justice Act, which is given to financially eligible offenders before consenting to transfer from the United States under Section 4107. This right to appointed counsel appears in Section 4109 (a), and is spelled out in language which is sufficient, not only to obtain appointed counsel, but also to pay compensation, plus expenses, to such counsel. In my opinion, the Criminal Justice Act will not require amendment, although, of course, that could be done if desired.

Our present system for appointment and payment of counsel is adequate to accommodate this additional function, but, this naturally will have a financial impact on our appropriations. I am informed that there are approximately 375 Mexican nationals and 65 Canadian nationals who are presently in Federal institutions and who would be eligible for transfer. I have no estimate for state prisoners who may become eligible. It is difficult to accurately estimate the number of prisoners who will require court-appointed counsel, and thus we cannot provide you with an estimate of our funding requirements at this point in time. However, it can be expected that the program will require substantial additional appropriations for Criminal Justice Act representations.

As to Section 4109 (b) and the requirement for the Secretary of State to provide counsel for those American citizen offenders, eligible for transfer to the United States, the Criminal Justice Act Committee expressed no position. The bill has not attempted to extend the coverage of the Criminal Justice Act beyond the

boundaries of the United States, and with this, we agree. In this regard, if requested by the State Department, it is possible that some Federal Defenders can be made available on a reimbursable basis to provide the required legal advice in Mexico or Canada.

A major concern of the Criminal Justice Act Committee dealt with the problem appointed counsel would face because of the requirement in Article V, Section (1) of the Treaty with Mexico, that the offender's consent to transfer must be given voluntarily and "with full knowledge of the consequences." We do not know if the Treaty contemplates only the consequences spelled out in Subsections (b) (1), (2) and (3) of Sections 4107 and 4108. For example, does full knowledge of the consequences mean that a United States citizen in a foreign prison must be informed of a pending investigation in the United States or in one of the 50 states, which may be pressed if he returns. It is unlikely that the person advising the offender will have such knowledge. Perhaps Section 4108(b) (3) could provide that in such event the offender would have the option of being returned to the transferring state.

In closing, may I say that I applaud this effort to relieve the hardships faced by prisoners incarcerated in other nations, far from their homes and families, and trust that the results will be successful.

Mr. Chairman, I thank you and the Members of your Committee, for the opportunity to express these views.

Judge GASCH. Judge Bonsal called me and said that his original intention was to come down this morning to give his testimony in person but he is involved in a matter which keeps him in southern New York. So he asked me to come here to answer any questions which the committee might have.

I might say preliminarily that at our last meeting—excuse me. Would you like to look over his written statement for just a moment?

Senator BIDEN. Yes. I would like to take just a moment to glance at it.

Judge, it has been suggested by a law professor yesterday that there may be a potential conflict with the State Department appointing, in effect, the public defenders to advise Americans of their rights.

I will tell you the criticisms of which I am aware, and I would like you to respond.

Judge GASCH. Certainly.

Senator BIDEN. Second, it has been suggested by me that there is a possible problem in having counsel advising American citizens who are not fully aware of or versed in Mexican law as to whether or not that would impact on the question of consent.

Third, it has been suggested in this legislation the imprisonment in American jails may be challengeable on the ground that the very body that advised him as to whether or not to come back to the American jail was also part of the establishment that was in collusion with Mexican officials to put the person in jail. There have been those allegations.

I wonder if you could comment generally on any and all of those.

Judge GASCH. At the outset may I say that the Committee on the Criminal Justice Act of the Judicial Conference is set up to make recommendations to the Conference. It is only the Conference that can authoritatively speak for the position of judges.

However, I am happy to give you my own personal views about this, particularly since at our recent meeting in North Carolina we considered this proposed legislation rather carefully. We also considered the views of some of the public defenders who might be involved in going to a Mexican town to seek to answer some of these questions that

might be posed by persons who would be the beneficiaries of this act, namely Americans in Mexican jails who might be transferred back to the United States.

At the outset, we felt that there could be a potential conflict of interest between someone appointed by the State Department to serve as counsel for these people. We thought, however, that that potential conflict of interest would be completely alleviated if a public defender went down to Mexico, if available.

Mr. Cleary, for example, from San Diego who is nearby indicated his willingness to take such an assignment.

I can assure you, knowing these public defenders well over the years—because we meet jointly with them at least once a year—that they are aggressive. They are completely dedicated to the rights of the client whom they represent. There would be no conflict of interest, in my judgment, if a public defender assumed this responsibility.

Senator BIDEN. That is the nicest thing I have ever heard a judge say about a public defender.

Judge GASCH. I was a former U.S. attorney. I have great respect for them. They have appeared in my court many times. I have met with the Federal public defenders throughout the country. They are an outstanding group of people.

As to the question of consequences, that bothered us somewhat. Judge Fay of the fifth circuit and I were concerned particularly about undisclosed consequences that might not be readily known to anyone. That is quite a responsibility for a public defender or any other competent lawyer to assume. He would not necessarily know the status of the investigation, particularly in drug cases which might be under way either by the Drug Enforcement Administration or a State authority.

There may be some way of rationalizing that. I know the legislation as originally drawn did not seem to go into that aspect.

Judge Fay and I were satisfied, after that was pointed out at the meeting, that it is something that could be dealt with effectively by a public defender.

What I am concerned about is this. Any conscientious public defender might be brought into this picture and might not be able to fully understand what the consequences are before his seeking to advise someone in a Mexican jail about the adverse possibilities that might confront him if he came back to the States and found that there was a real investigation, let's say, in his own home State or by the Federal authorities which might implicate him for charges back in the States.

Senator BIDEN. As a practical matter, aren't we always faced with that in advising clients? I am talking about extradition matters.

When I did sit down with clients, one of the things I would have to ask the client when he asked me whether or not it would be better to seek trial in this jurisdiction or the one which was seeking him was, "Well, on the record I see nothing you are wanted for in the State requesting you beyond this charge, but you know what you did or did not do. Tell me, is there anything here?" I do not know how any more could be expected.

Judge GASCH. I am inclined to agree with you on that. That is one reason why the public defender is a much better person to confer pri-

vately with the individual concerned than someone who might to appointed by the State Department who might be a perfectly capable lawyer but one not experienced in criminal law.

I would agree with your analysis there.

Senator BIDEN. I have one other question along those lines.

Do you see any problem with the public defender system handling the counseling but the State Department paying the bill?

Judge GASCH. No; I do not. In the Federal service we are familiar with borrowing personnel from other agencies on a reimbursable basis.

While I know that we on the Criminal Justice Act Committee do seek to review carefully the expenditures of a Federal public defender, if this were reimbursable it certainly would not add materially to the load which would be attributable to that particular activity.

Senator BIDEN. That is my feeling.

I wonder if you agree with me in that what the public defender might overlook in counseling could be handled by counseling our magistrates to understand the situation in the same way judges today are instructed, as they are appointed to the bench, when they hold a hearing on whether or not there is knowledgeable consent. There are certain basic things they know to look into. You pick up the form.

If the magistrate system trains those magistrates who will be dealing with this question to make them aware of certain things that should or should not be brought to the attention of the defendant, then that would be better.

I have been in situations where I might be fully confident of the defendant's openness but the judge asked whether or not the attorney has questioned him.

Do you believe we have a double net here?

Judge GASCH. Yes; I understand Judge Smith appeared. He serves on the Magistrates Committee of the Judicial Conference. I am on the Magistrates Committee in our court.

From what I know of the magistrates throughout the country, they would be capable of performing that duty.

Senator BIDEN. Judge, thank you very much. We thank you for interrupting your schedule to come and testify.

Judge GASCH. I appreciate your hearing me out of order.

Senator BIDEN. Mr. Miller, as a former prisoner, I guess you are used to waiting.

Mr. MILLER. "Mañana" was the word.

Senator BIDEN. Please identify yourself and whom you represent here. Then you may proceed with your testimony in any way which you see fit.

STATEMENT OF ROBERT MILLER, MANHATTAN BEACH, CALIF.

Mr. MILLER. My name is Robert Miller. I represent myself as a former prisoner in Mexico.

In fact, I was in prison with Robert Quirk. You have heard statements from his parents already about the conditions and about what he went through. I can attest to the validity of their statements.

I had been in Mazatlan prison for 2 weeks at the time of his arrival. He was in pretty bad shape physically and mentally. He is a young kid. He is a good kid. After what he has been through physically, he was very nervous having to go through all he did.

Senator BIDEN. How old are you?

Mr. MILLER. I am 32.

I do not want to repeat a lot of things that have already been mentioned about the prison. I have those in my statement.

I might say that Hurricane Olivia which was mentioned where prisoners were buried alive, I was one of the prisoners buried alive. I was dug out. I broke two bones. I was taken to a hospital where I spent a week without any treatment whatsoever until my mother arrived in Mazatlan to put up some money and some pressure for an operation.

I have been physically disabled for a year and a half, until about 3 months ago. I am on my feet again. I am fortunately back home.

Senator BIDEN. How long have you been out of prison?

Mr. MILLER. I escaped New Year's Eve of 1975. That was from the hospital.

Senator BIDEN. What had you been arrested for?

Mr. MILLER. At the time I was apprehended I was not charged for a week. When they finally charged me, it was for the possession of one marihuana cigarette, which they expressed, according to my attorney, in milligrams of marihuana.

Senator BIDEN. How long were you sentenced?

Mr. MILLER. I was not sentenced. I had been incarcerated for 6 months. At the time of my escape I found out, only after escaping, that I had been found not guilty but that the papers had been taken to the prison 4 days before my escape and I had been in the hospital. In fact, Robert Quirk was called down in my place before they found the mistake that the papers were actually for me.

There was another prisoner who witnessed the papers who was released on New Year's Eve also. He told me he saw my release papers with his own eyes.

For some reason they were not taken directly to the hospital. At the time I escaped I figured I was facing a minimum penalty of 5 years and 3 months.

The doctor had told me that he was going to transfer me back to the prison although I was unable to walk or get around myself.

Senator BIDEN. Have you gone to trial?

Mr. MILLER. I have gone in to make two of my statements. You go into an office and make your statement before a secretary. You never actually see a judge in Mexico.

Senator BIDEN. Please proceed.

Mr. MILLER. I am one of the fortunate few to have returned home to a country where human rights and due process of law are more than just words. The hundreds of suffering Americans still imprisoned in Mexican jails, living under the worst conditions imaginable, are desperately in need of the spark of hope that only their Government can provide—the knowledge that their country still cares.

The story of my arrest is fairly typical. I was on my way to the highly respected Institute Allende to continue my studies when apprehended in Mazatlan for reasons I must guess at even now.

My car was literally torn apart and I was searched and humiliated. My two companions, local residents, were released immediately. Nothing illegal was found in my possession or in the car but I was subsequently beaten, tortured, and held incommunicado for 7 days. I

was not even allowed to make a phone call or contact the American consulate.

When I was finally permitted to speak with a Mexican attorney, he informed me that I would be charged with possession of one marihuana cigarette unless he received \$5,000 to pay off Government officials. He contacted my mother for the money, and the news of my arrest nearly killed her.

Naturally, she wanted to do everything possible to obtain my release. To raise the funds she had to mortgage her home. Shortly after receiving the money, the attorney disappeared.

I was told that a new drug law had recently been passed by the Mexican Legislature with pressure from the United States. Under this law I was facing a minimum sentence of 5 years and 3 months. The law did not differentiate between heroin and marihuana or possession and trafficking.

I was first imprisoned in a military camp outside Mazatlan, then transferred to a sweat tank in the town's central jail. From there I was sent to the main prison, the notorious Carcel Publico Municipal. Conditions there are appalling. Everyone was sick with something—from minor discomforts such as diarrhea and scabies to hepatitis, tuberculosis, and typhoid. Maintaining our health, mental and physical, was constantly on our minds. To survive, it had to be.

Everything costs money in a Mexican jail and most of the American prisoners relied on money from home in order to live. If you don't want to sleep among bodies and rats on the crowded cement of the prison yard, you can purchase a cot. But you must also buy a space to put the cot. If that space is protected from the heat and rain, it will cost more.

The charge to buy a key to the toilet is \$16, and it is \$8 to make a collect telephone call. Food, of course, is a major expense. There are many others.

I mentioned that outside money is essential in order to live. For many, it is used to perpetuate a living death.

Entering the main prison in Mazatlan, newcomers are met by a commission, its members being old-time, hardened prisoners. This select group makes the rules for day-to-day living and enforces them. The commission makes much of its money by introducing nervous, young Americans to hard drugs. Extortion is another one of their techniques. Heroin, they tell us, will calm the nerves and make time less painful.

For those who do not have ready cash, credit is available. When checks and moneygrams arrive from home, they are often confiscated to pay for past and future purchases.

Drugs of various kinds are readily available. I know of one American who smoked marihuana for the first time inside a Mexican prison. And I saw some Americans, young people who were arrested for minor possession of marihuana, who were persuaded to use harder drugs for the first time.

It is not easy to be optimistic in a Mexican prison. Many Americans have simply given up hope after being taken for large sums of money by unscrupulous Mexican attorneys, after being let down by their country's local representatives, and after being subject to continual harassment and oftentimes barbaric tortures.

These Americans are far from home and loved ones and are a greatly outnumbered minority. Some are desperate enough to risk their lives in escape rather than be subjected to this inhumane treatment for over 5 years. I was that desperate.

I must emphasize that it is not only imprisoned American men and women who are experiencing this nightmare. The suffering extends across the border as well to families of prisoners. They not only share the pain of their children, but are losing huge sums of money—money that they can ill afford to spend. These people need your help with this treaty almost as desperately as their sons and daughters.

Today there are over 600 Americans in Mexican jails and the number is increasing. The majority are not involved with major narcotic syndicates trafficking in hard drugs. When I was in prison there was not one American arrested for possession of heroin. Some of these so-called criminals are simply kids on vacation in Mexico who wind up becoming heroin addicts in Mexican jails. Valuable lives are being ruined. There can be no rehabilitation under these conditions.

Although the prisoner exchange treaty is a positive step in the right direction, we must look beyond it to the basis for the dramatic increase in arrests of American citizens in Mexico. When did we initiate this cooperative drug policy with Mexico that puts a bounty on Americans? How many times in peacetime have there been over 600 Americans in a foreign prison? Are we really stopping the major drug traffickers, or are young amateurs being used as pawns in a political chess game?

If it is within the realm of human possibility, I urge you to bring these Americans home and give them the chance they need so desperately. I hope this treaty will be the first positive step in reevaluating our drug policy with Mexico. We have a chance to show the world that we are not only concerned with human rights when it comes to other nations, but we are also deeply concerned with human rights of Americans in foreign countries.

Senator BIDEN. Thank you very much.

What additional steps would you suggest? You mentioned a first step. Do you have any suggestions for a second step and a third step?

Mr. MILLER. I believe that the new Mexican drug law was put into effect through American pressure equating minor possession of marihuana with possession of quantities of heroin and harder drugs. I believe we can put pressure through our State Department and the President, probably not to the Congress itself, to communicate with Mexico on possibly a new law or retracting the old law that was passed through pressure of our administration. Possibly Congress through funds in the foreign aid program can have some power. I know that we give Mexico quite a number of dollars in foreign aid. Maybe this money is being used to train Mexican Federalies and so on.

Senator BIDEN. Mr. Miller, what do you consider a minor possession of marihuana? Do you consider 30 kilos a minor possession of marihuana?

Mr. MILLER. I believe in Mexico that yes, I would consider that a minor offense, although I would not consider it minor in the United States. Many of the Mexicans feel that a ton is the normal number.

Senator BIDEN. How about in terms of its being transported into the United States?

Mr. MILLER. Actually being transported? In the act of transportation?

Senator BIDEN. Yes.

Mr. MILLER. As I say, in Mexico again I think most Mexicans consider it minor. However, in the United States it probably would be considered major.

Senator BIDEN. Would you suggest that marihuana should not even be a consideration? You say comparing minor amounts of marihuana to heroin. Implicit in that is that minor amounts of marihuana are all right but major amounts are not. Really what you are saying is that marihuana, trafficking or otherwise, is not worthy of our paying any attention to transporting it to the United States? Is that what you are saying? Am I not reading correctly between the lines?

Mr. MILLER. I think we should differentiate between marihuana and heroin and between minor and major quantities of marihuana also.

One thing I had in mind when I said "minor" was this. Another man who came in besides myself came in at the same time as Robert Quirk, who was arrested for half an ounce of marihuana on the beach. He received a sentence of I believe 5 years and 5 months for a half an ounce of marihuana. I definitely consider this minor.

Senator BIDEN. I am not arguing on that. I am not even sure I do not agree with the implication I made. I was curious as to what you mean.

I do not know how anyone can say that 30 kilos is a minor amount of marihuana in terms of it being imported to the United States. I can see how somebody would say that it makes no sense to make marihuana illegal and therefore it does not matter what you import.

If we are going to stick to the major-minor kind of qualifications, then I do not know how 30 kilos of anything is minor in terms of importation into the United States.

Anyway, that is neither here nor there.

Let me question you about the role of the American consul. Did you attempt to contact the American consul when you were arrested? Did you attempt to contact the American Embassy?

Mr. MILLER. Yes; I asked numerous times to be allowed to speak with the American consulate.

Senator BIDEN. Were you allowed to do that?

Mr. MILLER. No.

Senator BIDEN. Did your mother attempt to contact the American consul in Mexico in the area where you were being held?

Mr. MILLER. My mother was not aware that I had been apprehended.

Senator BIDEN. She was when you asked for \$5,000, wasn't she?

Mr. MILLER. Yes; she did go to the American consul. The transfer to the hospital was done with the help of the American consul through pressure by my mother.

Senator BIDEN. In terms of getting a lawyer, that charlatan that stole the \$5,000—had your mother, you, or anyone in your family contacted the American consul prior to hiring that lawyer?

Mr. MILLER. Yes; a man sent down by my family who spoke Spanish and English went to the American consulate and asked about this attorney.

Senator BIDEN. What was the response?

Mr. MILLER. Yes; that he was on the list as being one of the attorneys that was recommended.

Senator BIDEN. Do you recall who the American consul was?

Mr. MILLER. No; I do not know who the consul was. I communicated with the vice consul.

Senator BIDEN. You spoke to the vice consul?

Mr. MILLER. He came to the prison after I had been arrested. After 10 or 14 days he came to the prison to talk to me. He read me my rights.

Senator BIDEN. What did he tell you? Tell me about him.

Mr. MILLER. He brought a list of attorneys and also something describing Mexican law. He read off where it said that under Mexican law I had to be charged within 72 hours. I told him that I had been there over a week and that I was not charged for anything. I was incommunicado. He said he could not do anything about that.

It is also stated that you had to be tried and sentenced within 1 year. Going into the prison, I talked to a couple of Americans who had been in prison over 1 year who had not been found guilty or not guilty.

There were a few other things pertaining to Mexican law and the list of attorneys which he told me about.

He asked me if I would like to contact my family and I told him my family had already been contacted.

Senator BIDEN. Do you feel that he was of any service with a positive consequence for you?

Mr. MILLER. No; not really.

Senator BIDEN. Do you believe that this committee or any other committee should be looking into the role of the American consul in those areas?

Mr. MILLER. Yes; I definitely do. That is probably the case in any country. Americans would be helped.

Senator BIDEN. What do you think we should be asking them? If you were sitting here and if I had the American consul before me or if you had him before you, what would you ask him?

Mr. MILLER. I would ask him what their practice is with regard to our Americans in need in foreign countries.

Senator BIDEN. He was on the other side of it.

Mr. MILLER. In my particular experience, yes.

Senator BIDEN. What would you suggest? What is the line of questioning that you would address to the American consul to make a record that they were good, bad, or indifferent?

Mr. MILLER. I think—

Senator BIDEN. Is there anything they could have done for you that they did not do? Do you honestly believe it was in their power to do it and that it was denied you?

Mr. MILLER. I cannot say for sure. I do not know whether they had any power or not. I think that they should have spoken to the Mexican authorities about the tortures. I believe they should have talked to them about that.

There were other things which we were facing, such as mail being stolen and checks sent by parents that were stolen.

We drew up a petition once and had it delivered to the American consul. The mail had not arrived for over 3 weeks. We counted on this

for survival to buy food and medical supplies. We found out that many of the checks had been cashed. We asked the American consul to do something about it. It took a month. They said they were working and doing everything possible.

Senator BIDEN. Did you believe that?

Mr. MILLER. I think the American consul could do more if they really wanted to do more. I do not really think it was that big of a thing for them. I think it should be.

Senator BIDEN. Can you think of any instance where the American consul did make a difference with you and/or with those with whom you served time?

Mr. MILLER. For myself, they made a difference probably in saving my leg. I feel that it would have been amputated if I had not been transferred to a decent hospital. They did recommend a doctor. They worked with my mother and with the judge to have me transferred to a decent hospital.

Senator BIDEN. Was the treatment of you any different than a Mexican prisoner for a similar offense or a Mexican prisoner awaiting trial or a Mexican prisoner being held incommunicado? I am talking about your experience sitting in a jail. Were the Mexicans treated any differently?

Mr. MILLER. I believe everyone is treated differently. Probably being held in incommunicado for 7 days was not that common.

Senator BIDEN. You say it was not that common?

Mr. MILLER. Yes; it was not that common. For Mexicans, it is not that common.

In various ways within the prison itself Americans are treated differently.

Senator BIDEN. Can you give me some examples of that?

Mr. MILLER. We were constantly extorted. To give you an example of the extortion, the president of the commission would draw up a list of American prisoners who had paid money to buy space for shelter. He would come by and approach each American. By the way, there were no Mexicans on the list. He would tell us that we would be transferred to another section of the prison and we would lose everything that we paid for, including the friends we had made, and our routine would be upset unless we paid 500 pesos apiece to the commissioner. If we would pay 500 pesos, we would be able to stay.

Another time a list was drawn up of Americans. They called us in one at a time and said that they wanted a donation to help the warden's sick mother. They wanted 500 pesos apiece. Americans were the only ones on the list.

Senator BIDEN. Were your living conditions, the ones that you paid for, better than the average American's or were they the same? Did all the Mexicans have caracas?

Mr. MILLER. No; it did not matter whether you were a Mexican or an American. It mattered whether you had enough money to buy the hut. Some Mexicans had them and some Americans had them.

Senator BIDEN. Proportionately, were there more Americans, relative to their population in the prison, who had huts? Of all the caracas of which you were aware, what percentage were held by Mexicans and what percentage were held by Americans? Could you guess?

If there were 50 huts, then how many would have been held by Americans and how many would have been held by Mexicans?

Mr. MILLER. I would say if there were 50 huts, then 20 Americans would have them. The population of Mexicans, of course, was greater.

Senator BIDEN. What was the factor, twice as many, even or what? Were you a distinct minority?

Mr. MILLER. A distinct minority, yes. Out of 200 prisoners, there were 20 Americans, I would say.

Senator BIDEN. So the vast majority of Americans were able to purchase the huts but the vast majority of Mexicans were not able to purchase them. Is that right?

You were extorted, of course. Again, I am not trying to paint a picture of you having luxury while Mexicans wallowed in filth. It seems as though you all wallowed in filth. It seems as though the line of demarcation was how much money they had. Correct me if I am wrong.

Mr. MILLER. That is it exactly.

Senator BIDEN. Is there anything else you would like to add?

Mr. MILLER. Nothing I can think of at this time.

Senator BIDEN. I have one last question.

If you were, in fact, in a Mexican prison—again, God forbid—and if you had committed a crime and if it was one that would be considered a major felony here in America, then do you think you would consider the consequences of returning home in terms of the impact that would have on your future and your ability to work and maintain friends and your daily routine? Would you weigh that at all against staying in a Mexican prison?

You would know that they might end up with a felony record here in the United States. They would be fingerprinted and photographed and so on. What kind of advice would you give someone like that? Would you consider those factors?

Mr. MILLER. I do not know if I would actually advise anyone. I would tell them what they would be facing if they came home, and they probably would know what they are facing in Mexico. It would be an individual decision. It would depend on how much time a person had left on the record. You would have to consider the problems of employment in the United States.

Senator BIDEN. Let me ask you a callous question. If you were a very wealthy young man and your parents were very wealthy and if you had committed a crime which you felt pretty sure you would not be paroled for in the United States if you came back to the United States, and let's say you were sentenced to a time certain in Mexico, then would you be likely to be able to pay your way in the jail to make subsistence in that jail livable for you or to make it tolerable while you were facing a sentence rather than coming back to the United States? Are there any kings of the prison?

Are there people in the prison who are able to pay enough money so that they do not have to be subjected to the inhumanities that we have heard about today?

Mr. MILLER. Yes; there were kings. There was one, in fact, but he was a Mexican. He was a very wealthy, big time smuggler, I guess. He had his own room in the hospital ward. He went out drinking occasionally with the warden. Under those conditions, someone might want to remain.

Senator BIDEN. I want to thank you very much for your testimony. It has been most helpful.

Our last witness of the day, but certainly not our least important, is Mr. Michael Griffith, attorney at law, Mineola, N.Y.

Would you identify yourself for the record?

**STATEMENT OF MICHAEL GRIFFITH, ATTORNEY AT LAW,
MINEOLA, N.Y.**

Mr. GRIFFITH. I am Michael Griffith, 1501 Franklin Avenue, Mineola, N.Y. I am representing myself.

Thank you, Mr. Chairman, for inviting me.

After being in New York last night without air conditioning and lights and TV, it almost feels like I was in a Mexican prison rather than in the United States. [Laughter.]

Mr. Chairman, I am grateful for this opportunity to share with you my views on the implementation of legislation which will potentially transfer Americans incarcerated in Mexican prisons to the jurisdiction of American prisons.

I am pleased to share with you my first-hand experience with regard to the proposed transfer of William Hayes, Jr., of north Babylon, N.Y., from a Turkish prison to the Nassau County Jail in East Meadow, N.Y.

For over 2 years, including three trips to Turkey, I worked with the U.S. Ambassador William Macomber, State Department attorneys, officials of the Turkish Government, the president of the Turkish Bar Association, Nassau County attorneys, and other eminent persons in the legal field in order to affect the first known transfer of an American in a prison of foreign jurisdiction to one of domestic jurisdiction.

This endeavor never quite came to pass, although we were within weeks of effectuating the above-said transfer, due to the successful escape of William Hayes, Jr., from Imrali Island in Turkey.

The details of my efforts to have him transferred and the specifics of his escape have been published in *Midnight Express* by E. P. Dutton & Co.

The areas on which I will speak are outlined as follows:

Basically the experience of the Hayes boy will be commenced with what happened here and an explanation of the highlights.

Turkey has a law, section 18, article 647, of the Turkish Code of Criminal Justice, which is included as an addendum to my written testimony as exhibit A.

Senator BIDEN. The exhibit attached to your written testimony will be made a part of the record.

[Material follows:]

EXHIBIT A

LAW ON THE EXECUTION OF PUNISHMENTS

STATUTE NO. 647 OF JULY 13, 1965; EFFECTIVE JULY 16, 1965,
AS AMENDED TO MAY 1973

Section 18.—(Amended by Statute No. 1712) Upon the request of the Ministry of Justice, the Council of Ministers may decide that Foreign Nationals who are serving imprisonment or security measures given by a Turkish court may be turned over to the agency of the offenders home country which is responsible for

the administration of sentences, provided that there is reciprocity between the states and a commitment is made that the punishment shall be fully implemented. Provisions of international agreements are not affected.

Foreigners who have been convicted in Turkish courts and who have served their imprisonments and/or have been granted total or partial amnesty or who have been conditionally released, including those whose status requires the application of the provisions of subparagraphs 3 and 4 of section 28 of Turkish Penal Code because the individual is subject to police supervision and/or is conditionally released, may be granted permission by the court to leave the country upon their request if such person has paid all fines, made necessary restitution, and paid all court costs. Further upon the request of the public prosecutor a decision may be made by the court to deport a foreigner whose presence in the country is deemed objectionable. In both cases the court which originally sentenced the foreigner shall make the final determination.

Foreigners who are subjected to expulsion, shall not be permitted to enter the country before the lapse of 5 years (following expulsion).

EXHIBIT B-1

MEMORANDUM II

From : Michael J. Griffith.

To : Ambassador William B. Macomber.

Subject : William Hayes, Jr.

It is noted that I have already spoken with my client, William Hayes, Jr., and it has been mutually agreed and promised to by he and I that :

First: William Hayes, Jr. will agree to be transferred to the custody of the Nassau County prison to finish out his remaining term.

Second: Michael J. Griffith, as attorney for defendant Hayes, will not make any efforts, bring any writs of habeas corpus or institute any legal proceedings after the transferral of William Hayes, Jr. to the New York authorities so as to terminate the jurisdiction of the Nassau County, New York authorities. A sworn deposition accompanies this memorandum.

EXHIBIT B-2

REPUBLIC OF TURKEY, CITY OF ISTANBUL, CONSULATE GENERAL OF THE UNITED STATES OF AMERICA

Before me, David Bloch, Consul of the United States of America at Istanbul, Turkey, duly commissioned and qualified, personally appeared this 23rd day of July A.D. 1975 Michael J. Griffith affiant herein, who after being duly sworn, deposes and says.

I, Michael J. Griffith, an attorney duly admitted to practice law in the State of New York, hereby state:

As attorney for the defendant, William H. Hayes, Jr., I will not, at anytime after his transfer to the jurisdiction of the County of Nassau and/or the State of New York, make any attempt to bring any writs of habeas corpus, institute any other legal procedures or make any effort in an attempt to terminate the jurisdiction of the authorities of the State of New York.

In accordance with this deposition, it is understood that these promises themselves may be part of any agreement, understanding, or codicil to instrument the release of William Hayes, Jr., from Turkish custody and the placement of the above prisoner in the jurisdiction of United States authorities.

Further affiant saith not:

In witness whereof affiant has hereunto set his hand and seal the day and year above written.

MICHAEL J. GRIFFITH.

Subscribed in my presence and sworn to before me this 23rd day of July A.D., 1975.

DAVID BLOCH,
Consul of the United States of America.

EXHIBIT C

MEMORANDUM

From : Michael J. Griffith.

To : Ambassador William B. Macomber.

Subject : William Hayes, Jr.

In accordance with the specific procedures to be taken for the eventual release of William Hayes, Jr. through the implementation of article 647 section 118 of the Turkish Criminal Court of Procedure regarding the expatriation of foreign prisoners, the following steps will be followed :

First : Steps have already been taken to secure a holding facility, the Nassau County jail, the main prison within the Long Island area where William Hayes resides. The warden has acquiesced to his serving the remainder of his term there.

Second : A confirmation that jurisdiction will be accepted by the Nassau County Government, who is in charge of above said jail and responsibility taken for the administration of the remainder of the term of William Hayes, Jr. in accordance with the laws of the State of New York.

Third : A transferral certificate must be presented to a duly authorized marshal of Nassau County who will come to Turkey to accept custody of the prisoner.

Fourth : Above said marshal will in turn receipt for said prisoner, William Hayes, Jr.

Fifth : The prisoner will be returned to the United States under the custody of the Nassau County marshal, and will be placed in detention in Nassau County jail in Westbury, New York.

Sixth : The remaining three years of the term of William Hayes, Jr. will be carried out in accordance with the laws of the State of New York.

The opportunity of work release, probation or parole is strictly discretionary upon said authorities. In any event, the prisoner could fulfill the remainder of his sentence by the above designated work release, probation or parole.

Mr. GRIFFITH. The Turkish Government has implemented this law and has successfully transferred two citizens to prisons of other jurisdictions, one being Denmark and the other being Sweden. As a matter of fact, I met with the Danish general consul the last time I was in Istanbul. She explained to me that it took a national bill in Denmark to effectuate this transfer. Of course, the national bill in Denmark may include 40 or 50 people in contrast to the size of our Congress here.

The language of the law basically states that the Council of Ministers may decide that foreign nationals who are serving imprisonment or security measures given by a Turkish court may be turned over to an agency of the offender's home country which is responsible for the administration of sentences. They go on to say providing that it is reciprocal, which is not necessarily always the case.

I questioned Mr. Faruk Arem, who is the author of this section of the Turkish law, who is the president of the bar association. He explained to me that in fact probation, parole, or work release might be readily available to those prisoners who would transfer. Although they do not have it available in their countries as the United States does, and when I say their countries I am talking about Turkey and Mexico, it would be within the jurisdiction of our prison officials to give that kind of treatment because that is part and parcel of our administrative system, pursuant to the correctional and penal institutions in our country.

The diplomatic efforts which were engaged in with regard to the transfer, I must add that contrary to what was done in Mexico, U.S. Ambassador William McComber was very, very helpful, as was the consulate staff. One gentleman by the name of Richard Dawson, who I believe had recently been transferred to Mexico City, worked very

closely with me. If, in fact, he is down there now, I would say that it is to the advantage of Americans in Mexico who might have the counsel of this particular vice consul.

We did not work the transfer out expeditiously because there was a change of government in Turkey, as you probably recently read. The governments kept going back and forth. Every time we got close, the government changed. This happened two or three times during our negotiations.

I secured the Nassau County Jail through provision of our county executive, Ralph Kayso, in Nassau County, which is a model holding jail. I received the permission of our county attorneys and our district attorney to effect this transfer. As a matter of fact, we had two detectives armed with passports ready to go get the Hayes boy when he did escape.

I had worked with the State Department attorneys, in particular a fellow by the name of Roland Gaither who gave the blessings of the State Department based upon the legal document I had afforded to them.

I believe that the legal doctrine which I came up with was quite basic. You being a fellow attorney, Mr. Chairman, would know about this. I found the "clean hands" doctrine to be applicable here.

I authored a consent form which the Hayes boy signed and which I myself signed. It basically said that, "If you promise to transfer me to a prison under American jurisdiction, then I will not bring any writs of habeas corpus."

Of course, the old legal adage which says, "He who seeks equity must do equity," could be argued quite efficiently I think by a U.S. attorney. Any American who would be transferred back to the United States, whether he plead his guilt or not, would in effect be waiving his right to habeas corpus.

As you know, we here in the United States—at least the criminals—waive rights every day. We waive rights to trial. We waive rights to all types of different things with regard to the plea bargaining doctrine which we have here.

Anyone who would come to a Federal court and ask for a writ of habeas corpus could easily be asked by the U.S. attorney, "Did you not sign this consent knowing that you would be transferred here? This being the condition and/or consideration, do you now mean to ask that you want to be let out? Is this not the consideration for which you were transferred?"

Senator BIDEN. If they were beating them with rubber hoses and they were feeding them with cockroaches, what would you do, sir?

Mr. GRIFFITH. I am getting to that now, Senator. The answer to that is simple.

As you know, we attorneys must take the judgments of other States on face value. For example, in an alimony proceedings if you try to enforce it in one State, we cannot go behind the merits of the judgment of the other State because of the full faith and credit doctrine.

The loophole that we do have is this. If fraud or other criteria was actually evident in the sentence, then another court of comparable jurisdiction could look behind that sentence.

There is a provision in international law which mandates that a citizen of one country be given the same equal rights of a citizen of

the country in which he is being tried. It would be a violation of international law if it were not so done.

In the Mexico case, as you know, the consuls allegedly keep files of those of us who are unfortunately arrested. It is well known to the consuls which trials or which cases are of an unusual nature. I would suggest that the consuls keep detailed files of these unfortunate situations, and if in fact the prisoners were not treated with the same regularity as would be a Mexican prisoner, then and only then could we look behind that particular Mexican sentence.

Senator BIDEN. Let me pursue that a moment.

We are talking about international law. Let's use Turkey and the United States as an example.

The American citizen is arrested in Turkey. He must be tried and treated in Turkey as any Turkish citizen would be. Or must he be treated and tried as though he had been arrested in the United States? What are you offering as the principle of international law there?

Mr. GRIFFITH. My principle is this. If an American prisoner were fed cockroaches and beaten badly, then under Turkish law this is not allowed. Of course, they do it to us knowing that we do not have any recall.

That principle of international law is well grounded.

Senator BIDEN. You cannot go beyond that? You have to accept Turkish law on its face and the judgment of the Turkish court on its face? You cannot apply the standard that you were not treated as you would have been treated in an American court; is that right?

Mr. GRIFFITH. Yes.

Senator BIDEN. I was confused about that. I see it now.

Mr. GRIFFITH. You must be treated the same as a similarly situated person convicted of a similar offense.

Senator BIDEN. I see.

Mr. GRIFFITH. Regarding the social and legal motive behind the proposed Mexican transfer, I am in favor of it for the following reasons:

No. 1, I think that since we have left the dark ages a number of years ago that we now understand that the principal and primary reason for incarceration is hopefully rehabilitation. How can one hope to rehabilitate a person when he cannot understand the language, the customs, or the traditions?

If a fellow needs a psychiatrist, how can a Mexican psychiatrist treat him?

The Hayes boy voluntarily committed himself to an insane assylum in Turkey hoping that he could trick his way out. When he saw the bedlam that existed in that insane assylum, he knew he had no hope of convincing them that he was insane, based upon these poor souls who were in there.

I might add this. It is probably well known. The civil rights of Americans in Mexico are being violated. Among other things, we have been subject to illegal arrests, torture, forced signings of unexplained documents, failure to notify U.S. officials, extortion, and unscrupulous Mexican attorneys.

I might add this. There are also economic considerations which are involved here. The legal fees of Mexican attorneys are absolutely astronomical.

There is a problem concerning the ability of relatives to visit Americans who are in prison in Mexico. It is quite difficult for them to get down there and give them aid and comfort.

Of course, as you have heard here today, stipends which have to be paid by Americans living in jails there are outrageous. They should not have to be paid.

I am very concerned. I know you asked a question before about whether someone would want to be transferred here knowing that they would have a felony on their record.

The Hayes boy shares something that many of the Americans are sharing right now. That is this. I would be pleased if I were a prisoner to have a felony on my record because a felony can always be expunged or at least explained or there would be an employer somewhere who would be willing to hire you based upon your ability.

However, can you expunge rotted teeth, root canal treatment which is almost impossible, dysentery bugs which may never leave your system? This is what Americans are going through, not only in Mexican prisons but in prisons all over the world today which are not up to Western standards.

Regarding the legal aspects of your proposed legislation, of course I do not think we have any legal precedent. I would advise a test case.

I have already suggested that we look behind Mexican judgments which seem to be unfair.

My proposals made heretofore are made basically from the first-hand experience gained through the proposed transfer of William Hayes, Jr., from Turkey to a domestic prison. The fact that the details for this transfer were approved by the aforementioned governmental agency placed us on the brink of making legal history if it were not for Mr. Hayes' premature escape.

Having possibly been the only attorney to have actively worked on a project of this type, it is my firm belief that legislation can be implemented using my proposals as illustrated above or using a mixture of the fruits of my work along with those legal doctrines espoused by other legal experts who have addressed this committee before me.

I have recently been asked to represent the 1932 committee which takes its name from the United States Civil Act, title 22, section 1732, of our law. It has been the function of this committee to bring pressure to bear to protect the civil rights of those Americans imprisoned in Mexico. A legal defense fund has been set up to help insure those rights and to expedite the implementation of this legislation. It is my fervent hope to see the work of this committee and other similarly situated committees terminated by legislation allowing for the transfer of Americans from Mexican jails to Federal prisons.

I believe we are on the threshold of a progressive and exciting innovation in the field of international law. In fact, there have already been international conferences where the transfer of prisoners to their home jurisdiction has been discussed.

I look forward to the day when the United States will have treaties with many countries so as to foster prisoner rehabilitation and for their health and welfare.

If an emerging nation like Turkey is forward enough to have successfully implemented transfers of prisoners, then we must eliminate our legal roadblocks in order to bring this legislation into being.

I would like to thank you, Mr. Chairman, for allowing me the courtesy to address this committee and to share with you my thoughts and experiences. I welcome the work that you are doing and I hope that the culmination of the work I have done for the past 3 years in this field will result in the legislation that you are considering.

I will be glad to answer any questions you think necessary.

Thank you very much.

Senator BIDEN. Thank you very much for your testimony.

The questions I have relate to the constitutionality of the legislation. Do you believe that equal application of Mexican law to Americans, as it would be applied to Mexicans, cures any deficiency that would exist when an attack would be made—and I am sure it would be made—that the system of justice within Mexico is not able to meet the minimal standards of the U.S. criminal justice system, and therefore, the incarcerated person should be freed?

Mr. GRIFFITH. Did you say that the legal minimum standards of Mexico would not meet our standards?

Senator BIDEN. Yes.

Mr. GRIFFITH. I would answer that by saying this. I know in different States in our country—and also regarding the principle of comity which is well grounded among other nations—there are certain States which do not meet the standards of other States.

For example, in certain States you need two witnesses for a will. In other States I believe you need three.

One State must give full faith and credit in our system of government of law to the judgment of another State, unless, as I said before, there is fraud behind it.

Senator BIDEN. Let me stop you there. It has been a while since I practiced law but I do not think that is correct.

I think that at any time any State statute in any application of a criminal law sanction or any other civil statute can be challenged in court as not meeting minimal constitutional safeguards.

For example, there are Federal district court judges now who have prisoners in State jails which meet the standards within that State. All prisoners are being treated the same in those jails. However, it is being argued and being cited in Federal court that it is cruel and unusual punishment under the Constitution of the United States to, in fact, keep someone incarcerated in that jail. Therefore, there is no right to continue to incarcerate people there.

The Federal court is going in and deciding that State's equal application of the law. Whether you are from Mississippi, California, Delaware, or New York, it matters not. The minimal standards are not met.

How do we overcome that?

Mr. GRIFFITH. By the international legal theory of comity.

Senator BIDEN. There is no law that can supersede our Constitution. There is none whatsoever.

Mr. GRIFFITH. Not in our country.

Senator BIDEN. That is what I was talking about. I was talking about our country. We are talking about bringing people back to our country. Then once we have them back, having their incarceration challenged on our constitutional grounds is what we are talking about.

No legal standard in any country, international or otherwise, can supersede the Constitution of the United States of America.

Quite frankly, the argument you are making holds no water whatsoever, to be very blunt about it, unless we are able to argue and sustain that the criminal justice system in Mexico, Turkey, or any other nation meets minimal constitutional standards by American standards.

MR. GRIFFITH. Not being familiar with the Mexican constitutional legal system at this point, it might not meet our minimal standards.

I take another approach. With the Turkish transfer, the Hayes fellow was going to admit his guilt. There might be another approach which could be taken which the U.S. attorneys might anticipate researching. The transfer alone, leaving one jurisdiction to go to a prison of another jurisdiction, might have the waiver and consent as enough of a consideration without actually admitting guilt.

I understand that your committee would like to place a criminal record on their backs. I would ask this. Would not the transfer alone be enough consideration to waive the right of habeas corpus?

Senator BIDEN. Where voluntary consent is not given, a basic right which is the most fundamental right in our Constitution, habeas corpus cannot be waived.

As a civil libertarian lawyer, under no circumstances would I support legislation which indicated on the face of a document habeas corpus could be waived. I think it is absolutely preposterous.

With regard to whether or not, as a U.S. Senator, the U.S. Senate wants to put a criminal record on their backs, that is not the issue. There is no other way we can get them transferred back.

Why would any jurisdiction say, "We are going to release people in our prisons who have been convicted under our law back to you merely for you to say that they were never guilty within our jurisdiction"? No nation can say that. It makes an international mockery of their system. How could anyone do that?

How could Mexican authorities, particularly with the sensitivity that they have to Big Brother sitting on the border, say, "We are going to sign a treaty which allows you to tell the whole world that we have a corrupt, inhumane, and totally backward judicial system which does not afford any sense of semblance of justice"? How can anybody sign that? How could that occur? It is beyond my comprehension.

MR. GRIFFITH. I would add that I am only giving you my firsthand experience. I know of the transfers which occurred between Turkey and Denmark, for example, and that there was no record which was put on the back of the prisoners.

Senator BIDEN. Sure, because Denmark does not have the U.S. Constitution. Denmark's system of justice has a different standard than we have.

The ruling principle of everything we do must be the Constitution of the United States.

MR. GRIFFITH. I agree with you, Mr. Chairman. I say to you that what we are doing here today is basically trespassing on a field that has never been trespassed on before. This is a field of law which has never been dealt with before. Only through trial and error—whether it be Denmark, Turkey, or Mexico—can we learn.

Senator BIDEN. I agree. That is really why I am trying to establish a record here that the minimal standards can be met and that there is not, as a rule, persecution of Americans really because they are Americans. There is not a total lack of any system of justice in other jurisdictions. If that is true, we may never get those sons back and we may never get your client back.

Once it has been challenged and once the court has ruled that, "Yes, it is true. We think that this system is awful and that it does not meet our minimal standards," then there is no recourse.

There is nothing I can do as a U.S. Senator that I have been able to think of yet to assure that young men such as Dwight Worker and others do not rot away in Mexican jails. We may get 2 out of 600 out. We may get 5 out of 600 out. Once it is challenged, it is all over.

So we have got to establish that. We cannot construct something. It has got to be true. I know of no other way of doing it.

Mr. GRIFFITH. I am flattered to have this colloquy with you over the aspects of law.

I do not think we will ever find a country anywhere, because of our Constitution, where we will actually be able to specifically define minimal requirements of law. Mexico certainly does not have it and Turkey does not have it.

There will be some constitutional scholar or lawyer who will point out that they have never met our minimal standards, which is a problem for our legal scholars.

Senator BIDEN. I hope you are wrong. If you are right, then it might prejudice the outcome of this legislation before we get going.

Thank you very much for your testimony.

I want to thank all of our witnesses today.

At this time I would like to enter into the record the testimony of Senator Birch Bayh; the testimony of Milton G. Rector, president, National Council on Crime and Delinquency; and the testimony of Col. Harry W. Poole, the Salvation Army.

[The material follows:]

ARNOLD BROWN
General



PAUL S. KAISER
National Commander

THE SALVATION ARMY

(Founded in 1865)

WILLIAM BOOTH, FOUNDER

NATIONAL HEADQUARTERS
120-130 WEST FOURTEENTH STREET
NEW YORK, N. Y. 10011
Telephone: (212) 620-4900

July 11, 1977

Senator Joseph R. Biden
Chairman - Senate Judiciary Subcommittee
on Penitentiaries and Corrections
Washington, D. C. 20510

Attention: Mr. James Meeker

Dear Senator Biden:

Re: Senate Bill 1682 - Treaties with Canada and
Mexico on the Transfer of Prisoners

Attached is a statement which I was prepared to give
before the Subcommittee on Penitentiaries and Corrections
if the Committee's time permitted.

In lieu of giving this statement to the Subcommittee
in person, I am sending it to you in behalf of Senate
Bill 1682.

I trust that the information contained herein might be
helpful to the Committee.

Sincerely,

Harry W. Poole
Lt. Colonel
NATIONAL CONSULTANT

Attachment

United States Judiciary Committee
 Subcommittee on Penitentiaries and Corrections
 Hearing on Treaties with Canada and Mexico on the Transfer of Prisoners

July 14, 1977

Statement by Lt. Colonel Harry W. Poole
 The Salvation Army

My name is Lt. Colonel Harry W. Poole. I am the National Consultant for Correctional Services for The Salvation Army in the United States. I was born in 1918 and have been a Salvation Army officer for 36 years. Most of my career has been spent in correctional services. I served as a member of the Pennsylvania Board of Probation and Parole from 1967 through 1971 having been appointed by the then Governor Shafer. I received a Masters Degree in Sociology and a Masters Degree in Social Work from the University of Pittsburgh. I have professional memberships in the Academy of Certified Social Workers, the National Council on Crime and Delinquency, the Pennsylvania Association on Probation, Parole and Corrections, and am a Board Member of the American Correctional Association. I have been a member of the Advisory Committee of the Pennsylvania Joint State Government Commission on Penal Institutions.

I appear before you on the humanitarian implications of Senate Bill 1682 on the transfer of prisoners to their home country.

The Salvation Army is an international organization, serving in 77 countries. A great deal of correctional services work is being done by The Salvation Army in these countries. The Salvation Army operates the Misdemeanant Probation Program in 18 counties in the State of Florida. This is by special legislation enacted by the Florida Legislature in 1976.

In Canada, The Salvation Army has a vast network of courts and correctional services, both federal and provincial. The Salvation Army prison visitors in Mexico have been providing services to many non-nationals incarcerated in Mexico City. In La Paz, Bolivia, a Salvation Army Major has brought comfort materials and American literature to Americans incarcerated there. He also served as an interpreter at their recent trial. (Incidentally, they

were held nearly three years before coming to trial.)

The view we hold on rehabilitation is that of resocialization - to bring the individual back to the normal fold of the community. It is felt that the resocialization process can be better done where the norms of conduct are familiar. You can well imagine the difficulty in trying to rehabilitate someone who does not speak the same language, who has different cultural, religious and political values, different job skills, different dietary habits and whose family support exists at a distance of a few thousand miles and who is simply frightened and home sick.

The National Council on Crime and Delinquency (Mr. Fred Ward, Vice-President) has suggested that there are three categories of possible arrangements which may be negotiated in this transfer of prisoners:

1. The "innocents abroad" or a low risk group, including tourists and migratory workers, whose offenses are non-violent and in the best interest of all concerned, their return home, under whatever circumstances possible would seem to be the most humane and equitable solution possible.

2. The second category may be the "not so innocent" but some what marginal group in terms of risk, where obviously little would be gained by a prolonged prison sentence in an alien land.
3. A more controversial category would include violent offenders, professional, and members of organized crime for whom little enthusiasm might be expected, as far as either country is concerned.

There is a compact among the Scandinavian countries and in the Council of Europe on the exchange of prisoners. Thus this proposal is not without precedent.

I have read Senate Bill 1682 and find that it adequately meets the needs of those who might voluntarily be transferred to their home country.

I am not competent to state whether this Bill is consistent with the constitution. However, there are some unanswered questions in regard to "detainers" which may be on file against an applicant for transfer. There are also questions regarding multiple mandatory sentences and a defendant's right to challenge a conviction or a confession

in another country, that was obtained under duress or even torture.

Despite these limitations, this Bill provides for a much needed process for helping hundreds of people to reestablish themselves as productive citizens in society.

I wish to assure this committee, that The Salvation Army stands ready to help in any way it can to provide services to people who are eligible for transfer under these Treaties.

Statement of Milton G. Rector, President
National Council on Crime and Delinquency

Subcommittee on Penitentiaries and Corrections of
Senate Committee on the Judiciary

July 13 and 14, 1977

SENATE BILL S. 1682 TO PROVIDE FOR THE IMPLEMENTATION OF TREATIES
FOR THE TRANSFER OF OFFENDERS TO OR FROM FOREIGN COUNTRIES

Thank you for this opportunity to urge the implementation of treaties between the United States and Mexico and the United States and Canada, for the transfer of offenders to their home country for the completion of criminal sanctions.

The National Council on Crime and Delinquency supports the underlying concept of such arrangements, and for several years has made studies in this country and abroad with a view toward the development of a workable system for such transfers. In 1972 we found that citizens of 68 countries were reported in the prison populations of 43 states from which data were available. Based on information from these states and the federal system, we estimated that over 2,000 foreign nationals are serving sentences in the United States at any given time. Adding the number in jails would probably increase this figure several times.

From other sources it was estimated that up to 3,000 United States citizens are imprisoned in foreign jails and prisons. Staff and Board members of the National Council on Crime and Delinquency have interviewed hundreds of our citizens imprisoned abroad and agree that the negative consequences of incarceration in a foreign jail or prison are indeed real.

Not always as a matter of physical neglect or abuse, although

in some places this is a problem, but generally because of language barriers, isolation from family and friends, unfamiliarity of the system of justice, strange diets, lack of information, and ineligibility for early release. Because of so many uncertainties the anxiety level among our own citizens in foreign prisons is usually very high, resulting in feelings of desperation, depression, despondency and hopelessness. From a correctional point of view the goals of reintegration, rehabilitation, and treatment, which may be appropriate for offenders in their own country, do not apply to foreigners. In their cases incarceration becomes punishment for punishment's sake.

The concept of allowing an offender to return and serve or complete a sentence in an institution or on probation or parole under the usual circumstances for such cases in his own country, is too sound an idea not to be implemented.

The urgency for beginning the process for such transfers is given added emphasis when we consider the ever increasing volume of international travel. For example, in the United States alone the National Education Advertising Service reported that 20% of all college students now travel outside the United States. This is approximately one million students. The number of foreign visitors to the United States has increased, as also has illegal entry. Foreign migratory workers also increase the number of foreign nationals in our country at any one time.

Studies find that most U.S. citizens in foreign prisons are young tourists or students arrested for minor drug related offenses.

Compared with U.S. citizens in foreign prisons, NCCD's analysis of foreign nationals imprisoned in this country provide some interesting contrasts. For example, only 30% of the foreign prisoners were under 26 years of age, whereas 75% of the Americans were under 26 years of age. Only 25% of foreign prisoners were being held for drug related offenses compared to 80% of Americans in foreign jails and prisons. Therefore, foreign prisoners in the U.S. tend to be older and their offenses cover a wider range of conventional offenses.

Despite differences in the characteristics of offenders and offenses, repatriation of offenders should be routine rather than exceptional. In all cases where reintegration of the offender into society can best be achieved in his own country, where language and cultural differences in a foreign land would impede the process, the individual should be transferred back home.

While international relations and cooperation are often complicated and difficult to achieve, and especially in light of the serious problems posed by some of our young people abroad, it would seem fundamental that our government as well as other governments should do more than is being done to assist our citizens in conflict with the law of other countries as well as citizens of other nations here. While we hope that our citizens will respect the laws and customs of countries that they visit, we know that some will not. At the same time, we would seem to have some responsibility for relieving other countries of the burden and expense of dealing with the problem our citizens have created for them, and we should have a means of correcting the behavior of our

citizens for offenses committed abroad as well as at home.

In reviewing the proposed legislation to implement treaties for transfer of offenders to or from foreign countries, we would urge that every effort be made to simplify rather than complicate the procedure by creating bureaucratic processes which may tend to impede rather than to accelerate the transfer of offenders to their home countries.

Before commenting on specific provisions of the proposed legislation, I have several general observations.

It would seem fundamental that the legislation should provide for notification to their home country when one of its citizens has been taken into custody. Also, the individual taken into custody should be immediately informed of the circumstances under which transfers to home country would be possible.

The proposed legislation apparently gives the federal government responsibility for receiving U.S. citizens in federal prisons and under supervision of the federal probation system within a federal court district. In our opinion it would be better to involve the offender's home state at the outset, making as a condition of return that the local authorities will receive the individual in the state institution or under the probation or parole supervision of the state or local county of residence, as the case may require. The federal government would therefore serve as the clearinghouse of information and coordinator and expeditor of transfers of offenders. Unless the state is involved in this way, the federal government will find itself in the position

of having to take responsibility for the custody or supervision of virtually all American citizens returned to their home states or communities, and will need to pay the states for care, custody, and services if offenders are later transferred to the state. Better that states take care of their own citizens at the outset where return to the home state would serve the best interests of all concerned. It is believed that under these circumstances states would cooperate. Two years ago, thirty states replying to an NCCD questionnaire responded that they would take under voluntary supervision, at their expense, any citizens released from a foreign jail or prison in the absence of a formal structure. If states failed to cooperate they would be under pressure from friends and relatives of offenders to do so.

Turning to the Bill, in Section 4100 (c), we would suggest that the offender be enabled to waive any appeal or attack on the conviction of sentence imposed by a foreign court in order to avoid delay. While some may argue that the individual cannot waive his constitutional right to appeal, we do not believe this would apply when the individual is outside the constitutional authority of his own country. In any event, the individual should be given the opportunity to decide this for himself.

In Section 4100 (e), we would urge that in refusing to consent to a transfer of an offender, the reasons for refusal should be given to the offender in writing.

Section 4101 (b) (2) is unclear with respect to proceedings concerning acts of juvenile delinquency.

In any event, the return of juveniles involved in delinquent acts or as status offenders, should also more closely involve officials of their home state and communities..

Section 4104 (g). This would seem to add still another decision-making layer in the process. We suggest this be eliminated. If retained, it is our opinion that any court given discretion to refuse transfers should provide the reasons in writing and there should also be a means for appealing the decision.

Section 4114 (f). The provision for a United States magistrate to perform the verification function seems unnecessary. It should be sufficient for an attorney, a member of the consular staff, or a citizen appointed by the Attorney General to perform this function.

Given these suggestions on behalf of the staff and Board of the National Council on Crime and Delinquency, we believe that the ends of justice will be better served by expediting the transfer of citizens to their home country for service of sentence, either in institutions, or on probation or parole, and would urge that legislation establishing formal procedures be expedited with all possible haste.

We would, however, also suggest that in the absence of formal treaties with other countries, especially those in Europe and the Caribbean countries, that U.S. authorities be encouraged and authorized to initiate informal voluntary arrangements for the transfer of offenders. The federal probation service in several instances has already become involved in such transfers, and in one instance the Governor of Illinois commuted the sentence of a

young Swedish citizen convicted of murder, to enable him to return to his home country for completion of the sentence. As pointed out above, most states have indicated a willingness to receive offenders on a voluntary basis.

It is suggested that legislation authorize the Department of Justice to provide a clearinghouse of information between the states and foreign countries, and to encourage the development of such informal procedures as may be possible, pending the development of more formal structures and even as an added option where formal structures are developed.

Many of our young citizens in conflict with the law in the Netherlands, have been returned home in an otherwise empty KLM Airlines seat. We should be able to do as much for the citizens of Holland or any other country where the circumstances would seem to warrant such action and without the necessity of a slow bureaucratic process.

Our contacts with officials of foreign governments have indicated that in many instances they would be willing to release our citizens on an informal basis. Although the relationship would be a voluntary one on the part of the offender, it is believed that many would accept such options if offered, and undoubtedly so would the citizens of other countries being detained here. Considering the willingness on the part of some countries toward the possibility of informal transfers, there are probably several categories upon which some arrangement could be negotiated in individual cases.

First may be the "innocents abroad" or low risk group, including tourists and migratory workers whose offenses are non-violent, and in the interest of all concerned their return home under whatever circumstances possible would seem to be the most humane and equitable solution possible.

Another category may be the "not so innocent" but somewhat marginal group in terms of risk, where obviously little would be gained by a prolonged prison sentence in an alien land.

Violent offenders, professionals, and members of organized crime for whom little enthusiasm might be expected, as far as either country is concerned, would probably not be considered for informal transfer.

In any event, it would seem that our government, including our states as well as other governments, should do more to assist their citizens in conflict with the law of other countries, to protect their rights, provide possible alternatives besides incarceration, and to insist on minimum standards of care and treatment where our citizens are sentenced to terms of imprisonment.

Winston Churchill in an often repeated quotation said, "The treatment of crime and criminals is one of the unfailing tests of the civilization of any country."

Perhaps willingness to release offenders to complete sentences in their own country as well as accept responsibility for our own citizens in return, would be an even higher test.

I thank you for this opportunity, and on behalf of NCCD may I applaud the initiatives being taken by the State Department, the Department of Justice, and Congress, in the interest of justice and the humane treatment of this special category of offenders.

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STATEMENT OF
SENATOR BIRCH BAYH

at hearings
on July 13, 1977
of the

SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS

I want to compliment the Chairman of this Subcommittee, Senator Biden, and my colleague, Senator Bentsen, for the introduction of S. 1682; legislation to implement treaties with various countries for the transfer of offenders currently serving sentences in foreign prisons to the jurisdiction of United States authorities. Both the treaty and this legislation represent unique and, I believe, beneficial developments in American diplomacy. Their very uniqueness, however, raises a number of difficult constitutional issues which, as chairman of the Subcommittee on the Constitution, I feel deserve particular attention.

I am pleased to note that a considerable portion of these hearings will be devoted to a review of these issues.

Much of the attention engendered by this legislation has been focused on the several hundred Americans currently serving sentences in Mexico. I hope that our legislative process can work expeditiously to return these citizens to America. At the same time, however, our concern for human rights both at home and abroad requires us to seek methods by which the procedures established by the legislation are consistent with the constitutional value we espouse. We must do our best to see that neither our constitutional fabric nor the rights of returning Americans will be damaged by the processes which we will develop to implement the provisions of the exchange treaty.

The constitutional issues presented by this treaty arise from the simple, but essential, fact that our criminal justice system in America differs from many of those found in other countries. Mexico, for example, operates on a civil law system, while much of our procedural and substantive law arises out of the traditions and developments of the common law as interpreted in light of our Bill of Rights. One of the essential questions presented by this legislation, therefore, is whether the American government can confine persons in this country based on a conviction secured in a foreign country through procedures that may not have been consistent with American notions of due process.

Obviously, this presents a difficult question; one that can be disposed of at this point with absolute certainty only by either abandoning this project and leaving our citizens in foreign jails or by insisting that foreign prosecutions of Americans be conducted under procedures consistent with our view of due process. Neither of these alternatives is viable or realistic.

I believe one of the best methods for resolving these issues in a manner consistent with our constitutional heritage is to insure that Americans currently in foreign jails who wish to return to the United States do so voluntarily and with a clear and intelligent understanding of the consequences of this decision. The choice of returning to America or staying in a foreign jurisdiction is an important one for these prisoners and we must do all we can to insure that it is an informed choice, made without coercion or intimidation. Establishing procedures to facilitate an informed choice will, I believe, go a long way toward resolving some of the constitutional issues presented by this unique treaty.

I am pleased to note, therefore, that sections 4108 and 4109 of the implementing legislation establish procedures to determine if an American serving a sentence in a foreign prison is making the decision to return voluntarily and with an awareness of the consequences of such a choice. The right to counsel in these proceedings is especially helpful and I hope that this right will be stringently observed. Additionally, it might be helpful to have the person designated to verify the consent of an American desiring a transfer to be an attorney in order to insure that the prisoner will be able to have any questions about the consequences of his or her transfer answered in full.

I also wish to compliment the Mexican government on the recently announced decision to forego imprisonment of Americans for simple possession of small amounts of marijuana. This new policy should help avoid in the future some of the problems which the treaty and implementing legislation are designed to alleviate.

Obviously, we are embarking on a course which raises constitutional questions of first impression. Some of them are unanswered and will have to await a definitive solution until such time as they are addressed by our courts. Nevertheless, the need for this legislation is apparent and its foundation in the humanitarian spirit of this country is firm. I look forward to an expeditious return of these citizens to the United States.

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Senator BIDEN. I would like to make a brief concluding comment, if I may.

I think that the testimony of witnesses yesterday who were specifically designed to testify on the legality of this treaty and the constitutionality of its provisions clearly established, in my opinion, the constitutionality of this legislation.

The State Department, the Department of Justice, and a legal scholar, a professor of law who is probably one of the most eminent men in this field as a legal scholar—they all testified that in fact they thought it was constitutional.

Two district court judges today testified to that effect.

I think that the testimony of the witnesses who have either been in prison and/or represented and/or are families of anyone in prison further adds corroboration to the fact that this treaty is constitutional and that it would sustain the test of constitutionality in all probability. The factual information with regard to their incarceration and the manner and method of treatment and the availability or lack of availability of that supports this.

I think a record has been made. At this point I think this is the only thing they were able to do. I am very impressed with the testimony that was given this morning. I was particularly impressed with the testimony of Mrs. Marshall. The reason I was is that Mrs. Marshall kept repeating one thing, "Time is of the essence." She wanted us to do something now. Time is a critical issue here.

I think that this legislation can be fairly rapidly dealt with. I think it is my responsibility as chairman of the subcommittee to bring it up in the full committee as rapidly as possible, report it out of the full committee favorably, and get it on the floor as quickly as I can and to move with all dispatch to get it passed into law.

It should be emphasized that the State Department has indicated that it will take some time in terms of implementation. It will not be instantaneous.

We have to get the magistrates in place. We have to get the public defenders in place.

Failure to do that properly will poison the outcome. Failure to get the first several transfers underway to meet our constitutional test will have the potential of leaving the remaining several hundred prisoners, particularly those in Mexico today, in those prisons.

I do not think that the State Department indicated that the time would be exorbitant. However, any time, an additional day, for Mr. and Mrs. Marshall, for example, is exorbitant.

In those terms it will take time. It will take time for the actual implementation of this treaty. I think it can be done in a matter of months. Hopefully it can be done in less than that. That is a lot of time. I am aware of that.

I do not want any of you who have testified here today to think that we are insensitive to that. We obviously do not feel it as you do.

However, I for one and Senator Mathias for another feel very strongly the urgency that is attendant to this legislation. It must be done properly in order for it to sustain the test of time.

We are going to move as rapidly as possible with this. I think that it warrants several amendments that have been suggested by the State Department and by the professor who testified yesterday.

None of the amendments go to any of the basic principles embodied in the legislation, but they assure that they meet the constitutionality test.

I am most impressed by the fact that the witnesses this morning understood the competing interests that an incarcerated person in a foreign jail would have to consider. You did not come in here naively assuming that if, in fact, my legislation passes and becomes law, then the problems are over. You understood, however, that the gravity of the problems would be reduced significantly.

I know as parents that you would much rather be worried about whether or not Rob would get a job than whether or not Rob would be physically well enough to walk out of jail.

In conclusion, I would like to note that our friends in Mexico, the Mexican authorities who have ratified this treaty, are anxious to have this problem settled. They are anxious for it to be resolved. I am sure that they are not excited about the publicity that relates to their impoverished situation, particularly with regard to their penal system, as has been pointed out here with regard to the rural prison for one. I expect that cooperation to continue.

I would like to thank the Mexican authorities on the record for their cooperation in moving toward resolving this treaty. I just wish that there was some way we could go beyond this in helping to resolve the internal situation for the Mexican persons in addition to the American persons.

I would also like to point out that I think we need additional legislation, even when this passes, hopefully—and I hope it will pass and will meet the constitutional test. However, I am concerned that the situation exists around the world—and again in this case with regard to Mexico—as highlighted by Mr. Robert Miller, where under the terms of the treaty Mr. Miller would not have been eligible to transfer. He would still be in a Mexican jail. This treaty would in no way affect him, assuming that he had not been tried, had not been convicted, and had not been sentenced. This treaty would not apply to Mr. Miller.

There are a number of Mr. Millers around the world who are incarcerated.

Those of you who heard the testimony yesterday heard me raise that issue with one of the professors who testified.

I will make it my business to attempt to draft legislation and work as a member of the Judiciary Committee and as a member of the Foreign Relations Committee to allow for the facility to transfer people who are awaiting trial, in many instances up to years at a time. That is equally as serious, if not more serious, a problem.

There is not even a finding of guilt. There is not even the determination that someone has committed a crime.

Here we are talking about several things. Most probably, the crime has been committed but the gravity is one which we do not agree should attend such a commission and/or once a conviction has been heard, the treatment is inhumane.

There are serious problems. There is one that goes before that, whether or not you increase the likelihood of subjecting someone to the same deprivation when there has not been a chance to determine whether or not they have committed a crime.

I would like to emphasize for the record that the legislation does not govern those people, unfortunately. We need to do that through another method. That is being explored now by me and my staff. We will be attempting to come back with legislation in that regard.

I was deeply moved by the testimony this morning. I think anyone who listened to it and those who read the record will also be moved.

We would be kidding ourselves if we suggested to the American people that this legislation is being moved in the normal course of events and that it came about as a consequence only of increasing comity between nations. That is not true.

The reason why it occurred is because such as you have highlighted for this country the awful situation that exists. That is why it came about. It came about because of a responsible press that has pointed out what, in fact, exists for Americans in foreign jails, particularly Mexico.

I think it is a perfect example of how a country, legislators, and presidents can be moved by people—not staffers, not Senators, not Congressmen, but by people who are affected by an injustice and who call it to the attention, through the help of a responsible press, to the elected officials.

Quite frankly, if it had not been highlighted to the degree that it has now, we probably would not be sitting here. I would not have given it as much attention. I am sure I would have been understanding. I would have considered it equal to the neutron bomb, but it would not have happened if it were not for you. We thank you very much for doing it.

You are not only helping those whom you love, but you are helping a large number of people. It would not have happened but for your efforts.

Without further comment, I will adjourn this hearing.

We will hold the record open for at least 2 weeks so that we can have any testimony that someone would like to submit for the record in terms of how we should or should not perfect this legislation and whether or not the legislation is worthwhile.

We thank you very much for your participation.

The hearings are adjourned.

[Whereupon, at 1:15 p.m., the subcommittee adjourned.]



DEPARTMENT OF STATE
ADMINISTRATOR
BUREAU OF SECURITY AND CONSULAR AFFAIRS
WASHINGTON

AUG 3 1977

AUG 4 11 48 AM '77
SENATOR
JOHN R. BIDEN JR.
WASHINGTON, D.C. 20520

Dear Senator Biden:

Thank you for your letter of July 13 concerning your subcommittee's consideration of S. 1682, legislation to implement the treaties between the United States and Canada and Mexico for the transfer of prisoners. I appreciated very much the opportunity you provided to me to testify before the Subcommittee on Penitentiaries and Corrections on this important matter.

In regard to your first question, I believe that in order to avoid questions of liability of consular officers under 22 U.S.C. 1199, and in view of the special nature of the treaty requirements that the person to be transferred give informed consent, it would be desirable to eliminate any role of the Department of State in the selection of a lawyer in transfer cases. It would be preferable, therefore, if responsibility for securing appointment of counsel in appropriate cases could be placed in the verifying officer. That officer should be able to designate a lawyer other than a Department of Justice or a Department of State employee to perform the function. His voucher to the Secretary of State could then serve as authority for payment. The normal fee would be that provided by the Criminal Justice Act in non-felony cases. If a federal employee were selected, the voucher would be for reimbursement of costs and expenses. I understand that the Department of Justice and the Administrative Office of U.S. Courts would support changes to S. 1682 along these lines.

Your second question deals with the characteristics of these prisoners who may be returned to the United States. Our records show that there are 547 individuals of an average age of 31.68 years.

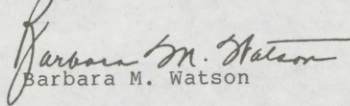
The Honorable
Joseph R. Biden, Jr.
Chairman, Subcommittee on
Penitentiaries & Corrections,
Committee on the Judiciary,
United States Senate.

There is attached the text of Mexico City's telegram 12168 of 22 July 1977, which provides a profile of the American prisoner population in Mexico based on a 40 percent random sampling. You will note that the Embassy is expanding this survey to cover all of the prisoners on the list within the near future. This expanded survey will be forwarded to you upon its receipt from Mexico City.

The Department of Justice has told me that it will respond to your question about the nature and seriousness of the offenses.

I hope that this information will be helpful to you and to the subcommittee. If I can aid you in any further way, please call on me again.

Sincerely,


Barbara M. Watson

Enclosures:
As stated

TELEGRAM

O 220058Z Jul 77
FM Amembassy Mexico
TO Secstate Washdc Immediate 3699
INFO all USCONS mexico

Unclas Mexico 12168

H pass Senator Joseph R. Biden, United States Senate

E.O. 11652: NA

TAGS: CARR, MX

SUBJECT: Profile of American Prisoner Population in Mexico

1. SUMMARY. The Embassy has developed a profile of American prisoner population in Mexico based on random sample of 40 percent of June 1, 1977 list of American prisoners in Mexico. Profile shows 60 percent of prison population under 30 on date of arrest, 91 percent male, 84 percent charged with narcotics violations. Substantial majority of narcotics offenses involved marijuana or cocaine in quantities larger than normal for personal use. END SUMMARY.

2. The Embassy has developed a statistical profile of the American prisoner population in Mexico which may be of use to the Department and constituent posts in responding to inquiries from Members of Congress, news media, and other sources. The profile was drawn from a survey of 40 percent of the prisoner cases in Mexico randomly selected from the prisoner list of June 1, 1977. We propose to expand survey to cover all prisoners on the list within the near future. The survey was intended to show age, sex, type of offense, and type and amount of drugs in narcotics offenses. Of the 230 cases selected for the survey, information was readily available for age in 218 cases and on quantity of drugs for 168 of the drug cases. The survey would have been more useful had we been able to include information on previous arrests and convictions. Unfortunately, this information is not available in consular files, nor is it possible to retrieve reliable information from other sources (DEA, National Crime Information Center) on basis of a name check alone, without fingerprints.

3. NOTE: Statistics on quantity of drugs must be interpreted with care because of the following factors:

(1) in many cases the quantity of drugs shown in our records is taken from prisoner's statement to consular officer, not always verified from official records.

(2) quantity of drugs shown in original charges in many cases is gross weight, including weight of container; this amount may be corrected later by the court but not reflected in consular records.

(3) the amount of drug with which the prisoner was arrested may be a poor indication of the amount which he was involved in transporting. In some cases the amount of drug actually seized represents only the residue of leaves, seeds, etc., found in an aircraft or storage area used to ship or store large quantities.

(4) according to DEA here, average marijuana cigarette contains approximately one gram of marijuana. Thus 76.4 percent of marijuana cases involved sufficient marijuana to produce more than 1,000 "joints"; 57.3 percent involved enough for 20,000 "joints". Nearly all of the cocaine cases involved high-purity cocaine which would normally be reduced to approximately seven percent purity before use. Assuming a ten-to-one reduction, 83.4 percent of the cocaine cases in the survey involved cocaine sufficient for 1,000 doses or more, and 47.9 percent involved enough for more than 10,000 normal strength doses.

4. Prisoner Profile: General profile established by survey is that of young person (79 percent below age 35 and 61 percent below age 30 on day of arrest), male (91 percent), involving amounts of marijuana or cocaine larger than would be normal for personal use. (Of marijuana cases, 76 percent involved more than one kilo and 57 percent involved more than 20 kilos; of cocaine cases, 83 percent involved more than 100 grams and 48 percent involved more than one kilo.) Only ten of the drug cases in the survey involved heroin.

(a) Age on Day of Arrest: of cases in survey, persons under 20 accounted for 4.6 percent of cases, ages 20-24 accounted for 23.1 percent, ages 25-29 accounted for 33.5 percent, 30-34 accounted for 18.8 percent and those over 35 accounted for 19.7 percent. Two-thirds of the large drug cases (over 20 kilos of marijuana or over one kilo of cocaine) involved persons under 30. Survey revealed no significant difference in age pattern between cases involving different types of drugs.

(b) Quantities and Types of Drugs: Marijuana was involved in 110 of the 168 drug cases in the survey for which quantity information is available. Of these marijuana cases, 57.3 percent involved 20 kilos or more, 76.4 percent involved one kilo or more, and only 0.9 percent less than 25 grams

(approximately one ounce). Cocaine accounted for 48 of the 168 drug cases. Of the cocaine cases, 47.9 percent involved one kilo or more, 64.6 percent involved 500 grams or more, and 83.4 percent involved 100 grams or more.

5. Copies of provile study and statistical tables are being pouched Department (SCA/SCS) and constituent posts.

LUCEY

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : The Ambassador
THRU : DCM - Herbert B. Thompson
FROM : ACG - Ruth A. McLendon

DATE: July 21, 1977

SUBJECT: Statistical Profile of the American Prisoner Population in Mexico

The Arrest and Detention Unit has carried out a survey of a large sample (40% of June prison population) of American prisoner cases.

(1) Age on Date of Arrest

The data from this sample, as from the 1975 study, bear out the conclusion that the majority (60%) of those imprisoned, including drug offenders, are below 30 years old (Table 1). There is no significant difference in age pattern between cases involving different types of drugs, for all of which more than 30% of the cases involved people in their late twenties.

There is little overall correlation between age and the quantity of drugs involved. Young people (below the age of 30) were charged in cases involving both large and small amounts of each of the drugs: two-thirds of the large drug cases (over 20 kilos of marijuana or 1 kilo of cocaine) involved people under 30.

(2) Quantities of Drugs Involved in Cases

More than half the cases in the sample involved quantities of drugs larger than would be considered normal for personal use (Table 2). The pattern was most strongly marked for marijuana, and cocaine: there were so few heroin cases that no strong conclusion can be drawn from them. The predominance of large marijuana cases has diminished slightly since 1975 mostly because of an increase in the number of cases involving quantities less than one pound (Table 3).

The interpretation of quantity data is complicated by a number of factors:

(a) We often have inaccurate information on the amounts of drugs involved, for reasons such as that the Agente de Ministerio Publico reports the weight of the whole package rather than the weight of the drug content.

(b) In many cases we cannot verify the drug quantity data by looking at the official criminal charges and specifications.

(c) The amount of drug with which the prisoner was arrested may be a poor indication of the amount with which he was involved in transporting. It will only be accurate in those cases where a trafficker is caught before being able to dispose of any of the shipment.

(3) Participation of Women

The sample contained 21 women, or 9% of the prisoners in the whole sample. Twenty of these women were involved in drug cases, mostly cocaine -- they accounted for 25% of all the cocaine cases in the sample (Table 4). Although the numbers are small, it is possible to discern a tendency for the women involved in cocaine drug cases to be younger than the men. The amounts carried by the women were similar to those carried by the men.

(4) The Sample

The sample used in this study was a randomly chosen (chosen from a list of all Amcit prisoners using a table of random numbers) 40% sample of American prisoners in Mexico as of June 1, 1977. The June 1 date was chosen since it was the latest for which an up-to-date list of all prisoners in all consulates was easily available at the time of the study (July 15, 1977).

There was age information on 218 of the 230 prisoners in the sample, and adequate information on the quantity of drugs involved for 168 of the 190 drug cases in the sample. In the opinion of the researcher, no significant distortions have been introduced by the omission of the missing data.

TABLE 1

CHARGE	AGE ON DAY OF ARREST					35 and over	total	no. of cases
	(Percentage of cases involving given charge which fall within age range)	Less than 20	20-24	25-29	30-34			
Marijuana	6.3	22.7	36.4	15.5	19.1	100	110	
Cocaine	2.0	26.0	34.0	22.0	16.0	100	50	
Heroin	0.0	30.0	10.0	40.0	20.0	100	10	
Other drugs	0.0	0.0	53.3	26.7	20.0	100	15	
Total (drugs)	4.3	22.2	35.7	19.5	18.4	100	185	
Other crimes	6.1	30.1	21.2	15.2	27.3	100	33	
Total (all charges)	4.6	23.1	33.5	18.8	19.7	100	218	

TABLE 2

Quantities of drugs involved in cases
(percentage of each type of drug case involving
quantities in ranges specified)

	Marijuana	Cocaine	Heroin
Less than 25 gm	0.9	10.4	40.0
25 gm less than 100 gm	7.2	6.3	0.0
100 gm less than 500 gm	13.6	18.8	10.0
500 gm. less than 1 kg.	1.8	16.7	20.0
1 kg. less than 5 kg.	9.1		
5 kg. less than 20 kg.	10.0		
20 kg. or more	57.3		
1kg. less than 2 kg.		20.8	10.0
2 kg. or more		27.1	20.0
Total	100.0	100.0	100.0
No. of cases included in sample	110	48	10

TABLE 3

CHANGES SINCE 1975 IN QUANTITIES INVOLVED

(percentage of each type of drug case involving quantities in range specified)

	MARIJUANA		COCAINE		HEROIN	
	1975	1977	1975	1977	1975	1977
Less than 25 gm (1)	6	1	5	10	7	40
25 gm. less than 500 gm. (2)	8	21	17	25	28	10
500 gm. less than 1 kg.	2	2	6	16	9	20
1 kg less than 5 kg	3	9	53	37	23	30
5 kg. or more	73	67	0	10	0	0

Notes: (1) In 1975 the cutoff amount used was 1 oz. (28 gm.). This is not expected to affect results significantly.

(2) In 1975 the cutoff amount used was 1 lb. (453 gms.) This may understate the 1975 proportion in this category very slightly.

TABLE 4

Female prisoners
(percentage of cases involving given charge which fall within age range)

Type of case	Age					No. of cases
	less than 20	20-24	25-29	30-34	35 and over	
Marijuana	16.6	50.0	0.0	0.0	33.3	6
Heroin	0.0	50.0	0.0	0.0	50.0	2
Cocaine	0.0	58.3	8.3	16.6	16.6	12
Other charges	100.0					1
TOTAL	9.5	52.4	4.8	9.5	23.8	21

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 PROG 07/20/77
 DCM HBTHOMPSON
 C/C RAMCLENDON/DEA JM*DMCLAUGHLIN/CCS RDENNIS:LCS
 C/C RAMCLENDON/CCS ALPRICE/AMB RHDUNN
 CCCS2 AMB DCM, ADM CG NAU, LEGATT POL ECON, DEA CUS USIS,
 CHRON

AMEMBASSY MEXICO
 SECSTATE WASHDC - IMMEDIATE
 INFO: ALL CONSULATES IN MEXICO

E.O. 11652: N/A
 TAGS: CARR, MX
 SUBJECT: PROFILE OF AMERICAN PRISONER POPULATION IN MEXICO

1. SUMMARY: THE EMBASSY HAS DEVELOPD*ED A PROFILE OF AMERICAN PRISONER POPULATION IN MEXICO BASED ON RANDOM SAMPLE OF 40 PER CENT OF JUNE 1, 1977 LIST OF AMERICAN PRISONERS IN MEXICO. PROFILE SHOWS 60 PERCENT OF PRISON POPULATION UNDER THIRTY ON DATE OF ARREST, 91 PERCENT MALE, 84 PERCENT CHARGED WITH NARCOTICS VIOLATIONS. SUBSTANTIAL MAJORITY OF NARCOTICS OFFENSES INVOLVED MARIJUANA OR COCAINE IN QUANTITIES LARGER TA*HAN NORMAL FOR PERSONAL USE. END SUMMARY.

2. THE EMBASSY HAS DEVELOPED A STATISTICAP*L PROFILE OF THE AMERICAN PRISONER POPULATION IN MEXICO WHICH MAY BE OF USE TO THE DEPARTMENT AND CONSTITUENT POSTS IN RESPONDING TO INQUIRIES FROM MEMBERS OF CONGRESS, NEWS MEDIA, AND OTHER SOURCES. THE PROFILE WAS DRAWN FROM A SURVEY OF 40 PERCENT OF THE PRISONER CASES IN MEXICO RANDOMLY SELECTED FROM THE PRISONER LIST OF JUNE 1, 1977. WE PROPOSE TO EXPAND SURVEY TO COVER ALL PRISONERS ON THE LIST WITHIN THE NEAR FUTURE. THE SURVEY WAS INTENDED TO SHOW AGE, SEX, TYPE OF OFFENSE, AND TYPE AND AMOUNT OF DRUGS IN NARCOTICS OFFENSES. OF THE 230 CASES SELECTED FOR THE SURVEY, INFORMATION WAS READILY AVAILABLE FOR AGE N*IN 218 CASES O*AND ON QUANTITY OF DRUGS FOR 168 OF THE DRUG CASES. THE SURVEY WOULD HAVE BEEN MORE USEFUL HAD WE BEEN ABLE TO INCLUDE INFORMATION ON PREVIOUS ARRESTS AND CN*ONVICTIONS. UNFORTUNATELY, THIS INFORMATION IS NOT AVAILABLE IN CONSULAR FILES, NOR IS IT POSSIBLE TO RETRIEVE RELIABLE INFORMATION FROM OTHER SOURCES (DEA, NATIONAL CRIME INFORMATION CENTER) ON BASE*IS OF A CHECK** NAME CHECK ALONE, WITHOUT FINGERPRINTS.

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3. NOTE: STATISTICS ON QUANTITY OF DRUGS MUST BE INTERPRETED WITH CARE BECAUSE OF THE FOLLOWING FACTORS:

(1) IN MANY CASES THE QUANTITY OF DRUGS SHOWN IN OUR RECORDS IS TAKEN FROM PRISONER'S STATEMENT TO CONSULAR OFFICER, NOT ALWAYS VERIFIED FROM OFFICIAL RECORDS.

(2) QUANTITY OF DRUGS SHOWN IN ORIGINAL CHARGES IN MANY CASES IS GROSS WEIGHT, INCLUDING WEIGHT OF CONTAINER; THIS AMOUNT MAY BE CORRECTED LATER BY THE COURT BUT NOT REFLECTED IN CONSULAR RECORDS.

(3) THE AMOUNT OF DRUG WITH WHICH THE PRISONER WAS ARRESTED MAY BE A POOR INDICATION OF THE AMOUNT WHICH HE WAS INVOLVED IN TRANSPORTING. IN SOME CASES THE AMOUNT OF DRUG ACTUALLY SEIZED REPRESENTS ONLY THE RESIDUE OF LEAVES, SEEDS, ETC., FOUND IN AN AIRCRAFT OR STORAGE AREA USED TO SHIP OR STORE LARGE QUANTITIES.

(3*4) ACCORDING TO DEA HERE, AVERAGE MARIJUANA CIGARETTE CONTAINS APPROXIMATELY ONE GRAM OF MARIJUANA. THUS 76.4 PERCENT OF MARIJUANA CASES INVOLVED SUFFICIENT MARIJUANA TO PRODUCE MORE THAN 1,000 "JOINTS"; 57.3 PERCENT INVOLVED ENOUGH FOR 20,000 "JOINTS". NEARLY ALL OF THE COCAINE CASES INVOLVED HIGH-PURITY COCAINE WHICH WOULD NORMALLY BE REDUCED TO APPROXIMATELY SEVEN PERCENT PURITY BEFORE USE. ASSUMING A TEN-TO-ONE REDUCTION, 83.4 PERCENT OF THE COCAINE CASES IN THE SURVEY INVOLVED COCAINE SUFFICIENT FOR 1,000 DOES**DOSES OR MORE, AND 47.9 PERCENT INVOLVED ENOUGH FOR MORE THAN 10,000 NORMAL STRENGTH DOSES.

4. PRISONER PROFILE: GENERAL PROFILE ESTABLISHED BY SURVEY IS THAT OF YOUNG PERSON (79 PERCENT BELOW AGE 35 AND 61 PERCENT BELOW AGE 30 ON DAY OF ARREST), MALE (91 PERCENT), INVOLVING AMOUNTS OF MARIJUANA OR COCAINE LARGER THAN WOULD BE NORMAL FOR PERSONAL USE. (OF MARIJUANA CASES, 76 PERCENT INVOLVED MORE THAN ONE KILO AND 57 PERCENT INVOLVED MORE THAN 20 KILOS; OF COCAINE CASES, 83 PERCENT INVOLVED MORE THAN 100 GRAMS AND 48 PERCENT INVOLVED MORE THAN ONE KILO.) ONLY TEN OF THE DRUG CASES IN THE SURVEY INVOLVED HEROIN.

(A) AGE ON DAY OF ARREST: OF CASES IN SURVEY, PERSONS UNDER 20 ACCOUNTED FOR 4.6 PERCENT OF CASES, AGES 20-24 ACCOUNTED FOR 23.1 PERCENT, AGES 25-29 ACCOUNTED FOR 33.5 PERCENT, 30-34 ACCOUNTED FOR 18.8 PERCENT AND THOSE

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OVER 35 ACCOUNTED FOR 19.7 PERCENT. TWO-THIRDS OF THE LARGE DRUG CASES (OVER 20 KILOS OF MARIJUANA OR OVER ONE KILO OF COCAINE) INVOLVED PERSONS UNDER 30. SURVEY REVEALED NO SIGNIFICANT DIFFERENCE IN AGE PATTERN BETWEEN CASES INVOLVING DIFFERENT TYPES OF DRUGS.

(B) QUANTITIES AND TYPES OF DRUGS: MARIJUANA WAS INVOLVED IN 110 OF THE 168 DRUG CASES IN THE SURVEY FOR WHICH QUANTITY INFORMATION IS AVAILABLE. OF THESE MARIJUANA CASES, 57.3 PERCENT INVOLVED 20 KILOS OR MORE, 76.4 PERCENT INVOLVED * ONE KILO OR MORE, AND ONLY 0.9 PERCENT LESS THAN 25 GRAMS (APPROXIMATELY ONE OUNCE). COCAINE ACCOUNTED FOR 48 OF THE 168 DRUG CASES. OF THE COCAINE CASES, 47.9 PERCENT INVOLVED ONE KILO OR MORE, 64.6 PERCENT INVOLVED 500 GRAMS OR MORE, AND 83.4 PERCENT INVOLVED 100 GRAMS OR MORE.

5. COPIES OF PROFILE STUDY AND STATISTICAL TABLES ARE BEING PUCHE** POUCHED DEPARTMENT (SCA/SCS) AND CONSTITUENT POSTS.

LUCEY##

TO: The United States Senate,
Subcommittee on Corrections

From: Morley H. Shapiro, Esq.
68 Post Street, Suite 817
San Francisco, California 94104
415-956-3490

Subject: Mexican-Canadian-American Treaty
Prepared testimony

My objective is to have Congress establish guidelines for instructing the Consular Service what to do in the event an American citizen is arrested in a foreign country.

By reason of the fact that certain conditions now exist in connection with the arrests of American citizens in Mexico and Canada it is evident that there should be some guidelines as to the course of conduct of the Consular Service in those particular countries.

The Consular Service mandatorily should go ahead and investigate every arrest of every American to see that they get justice.

Based on my own experience in connection with representing various clients charged with crimes in foreign countries I found that very little effort was exerted by the Consular Service of the particular countries wherein I represented such clients to assist in establishing their innocence and to protect these people from inhuman treatment if they were confined.

Generally the Consular Service maintains a high degree of neutrality and does not do what I believe should be done to protect the rights of these people who do become involved with the authorities of foreign governments.

First, the Consular Service should upon the request of the citizens so involved call upon him or her to see what the Consular Service could do to help said person to secure protection of his rights.

The fact that the Consular Service takes a neutrality stand leads those who are prosecuting the American citizen to take advantage over his or her rights and in many cases inflicts cruel torture upon them in the endeavor of the prosecutors to wring from

the arrested citizen a confession which the citizen would not have given except under the pressure and torture that is inflicted upon him, and in order to stop the infliction of such torture involuntarily confesses to the alleged crime.

Furthermore, the neutrality of the Consular Service leads the foreign government through its prosecutors to take more of an advantage that they would dare to do if they knew that they were being watched by an American Consular Service which would not stand for any infliction of torture upon these people for the purpose of involuntarily securing an admission of guilt.

A more progressive stand is indicated. The American Consular Service should be instructed that the policy of the United States is to protect all of its citizens in every land and if they should be incarcerated by reason of alleged offenses in those particular countries that the American Service is there to be of service to the prisoner and to make sure that his rights are protected.

It should be made known in strong, positive language that the stand of this government is that they will see to it that no American suffers inhumane infliction or is tortured into confessions.

It is important that this be done because of the fact that a negative approach such as neutrality gives the communication to the foreign prosecutors that the American Consular Service is not interested and as a matter of fact will do nothing to protect the rights of the arrested citizen.

The policy should be unequivocally made and the proper guidelines set for the Service so that every case of arrest is checked out in accordance with the traditional method that is used in the United States where the accused is entitled to the benefit of counsel, to know his rights in a particular country in which he may be imprisoned,

and to have every effort to be made to establish his innocence if that is possible.

It is to be noted that there is a distinction between the administration of justice in Canada and Mexico.

In Canada the language is understood by the accused. However, the pressures are brought about by unscrupulous lawyers in extracting fees by reason of their so called political pull and is utilized for the purpose of getting extraordinary compensation which generally is of no value because eventually the accused is found guilty and receives a very heavy sentence and feels that it is to no avail to keep spending money with lawyers as they receive no good from such attorneys.

Some of my experiences in representing Americans in foreign countries has been documented in the Congressional Record.

THE MEXICAN EXPERIENCE

In 1971 a State Department official was incredulous that the American government would intervene to give special aid to my client who was incarcerated in Spain. Embassy officials had promised to "help" secure his release because of a recognition that in the Canary Islands Americans were being persecuted not prosecuted. He stated as a fact that the then Attorney General, John Mitchell, had informed the Mexican government that economic aid from the United States would be cut off in essential areas unless there was more cooperation by Mexico with respect to Operation Intercept. We question whether American dollars built the new prison in Hermosillo.

A unique tape reflects a "first phone call" from the Consular Service to a loved one at home in which it is communicated that an

American has been arrested, the Embassy will do nothing and that there is a necessity for American dollars or else. The tape further reflects the opportunity to torture which surfaces dramatically.

THE CANADIAN EXPERIENCE

In 1973 an organization with a wonderful concept and a catchy name, i.e., JAIL (Justice for Americans Imprisoned and Lost) opened up hundreds of files and touched base with Embassies all over the world.

As a volunteer I advised this organization and found that the Canadian experience was different in kind from the experience of Americans incarcerated in all other countries throughout the world. It was common to all Americans arrested in all foreign countries to scream for help except in Canada. No one incarcerated in Canada wanted help from home. It would interfere with their parole. "It is not the same here in Canada as in Mexico. Please don't do anything."

A sentence for smuggling narcotics in Canada carried a 15 year sentence in some cases. Here it is submitted that parole in these cases would be predicated upon cooperation with drug enforcement agencies.

This cooperation would be consistent with the social rehabilitation feature of this Treaty which is one of the primary purposes of said Treaty.

I have access to at least ten Canadian files; the study of which tells us that Americans have been over reached in Canada.

The situation in Canada differs essentially from our Mexican experience because of the fact that English is spoken in Canada and the law is predicated on English Common Law principles. In Canada an early parole date is predicated on cooperation and the lack thereof

provides protracted incarceration. In one case, an American citizen was sentenced to ten years. He had no funds to appeal. The lawyer who represented him became the Crown Prosecutor. He did not contact the Consulate because of what he describes as a "hands off policy." When he was convicted Judge Harrogen congratulated defense counsel John P. King, "On as fine a defense as he had ever seen." He said that, "Mr. King had presented to him during the case a number of difficult problems." King became the public prosecutor as hereinabove set forth.

I quote another convicted American citizen in Canada, "I am told too much action on my behalf from outside can be harmful towards an early parole/deportation."

PRISON EXPERIENCE

In the United States there is an irony that so called middle weight dope dealers do heavier time in state penitentiaries than heavy weight dope dealers who ultimately do time in light weight Federal penitentiaries.

State penitentiaries have problems of racism and homosexuality which have been deemed more serious than what is experienced in Federal penitentiaries. One of the purposes of the Treaty is the social rehabilitation of the prisoner. Does this mean cooperation with the Drug Enforcement Agency or else parole time in the United States will be put off?

The Attorney General of Texas testified before the Senate Subcommittee on Foreign Relations in June of this year that the prisons of Texas were ready to receive those prisoners who had met the requirements of the Treaty. Does this mean that these prisoners from Mexico who have heretofore been described as pawns and mules and not

primary perpetrators will serve out their sentence in Federal or in State penitentiaries?

SUGGESTED SOLUTIONS

The Treaty and its proposed enabling legislation provides that a waiver of fundamental rights is necessary in order to come back to the United States and serve out a sentence. At the time of waiver and consent the issue of United States governmental interference in each case of a returning American should materialize by way of a hearing. Said hearing should highlight the role of the Embassy in each case and the role of the Drug Enforcement Agency without constitutional guidelines.

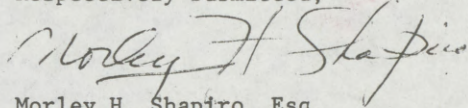
Imagine a United States Drug Enforcement Agency which is not hampered by a United States Consitution operating hand in glove with an American Embassy which does practically nothing to protect the rights of its citizens so as to facilitate an overzealousness in connection with international narcotics enforcement, the likes of which the world had not seen before and for which there is no room in a civilized world.

I urge the Congress to make it possible for those returning prisoners to obtain immediate parole where said prisoner proves by a preponderance of the evidence that he or she suffered from over punishment on account of: One, our antiquated Embassy policy of hands off with active cooperation of said Embassy with foreign governments, and, Two, an overzealous drug enforcement administration.

I urge the Congress to make it possible for these prisoners to enter into a contract by which they are granted immediate parole in exchange for their waivers -- not only with reference to giving up their fundamental rights, but also with reference to a waiver not to sue those entities which have been responsible for said over punishment.

Ultimately, with a reformed Embassy and a more powerful Consular Agent who is motivated and activated by a desire to help our own kind we can obviate the torture and reduce it by over 90 percent.

Respectively Submitted,

A handwritten signature in dark ink, reading "Morley H. Shapiro". The signature is fluid and cursive, with the first name "Morley" being more prominent and the last name "Shapiro" following in a similar style.

Morley H. Shapiro, Esq.
July 25, 1977

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