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

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 7148

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

SEPTEMBER 16 AND OCTOBER 6, 1977

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

FRIDAY, SEPTEMBER 16, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND
INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:15 a.m. in room 2141, Rayburn House Office Building, Hon. Joshua Eilberg [chairman of the subcommittee] presiding.

Present: Representatives Eilberg, Fish, and Sawyer.

Also present: Garner J. Cline, Arthur P. Endres, Jr., Martin H. Belsky, counsel; Raymond P. D'Uva, assistant counsel; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

We are here today to consider an historic, significant, and necessary piece of legislation, H.R. 7148. This bill will provide a mechanism for the transfer of Americans from foreign jails to American jails, and the transfer of foreign prisoners from American jails to jails in their homelands.

While prior laws have implemented extradition treaties, never before have we attempted to provide for imprisonment, probation, and parole of Americans in this country as the result of foreign convictions. It is significant because it will aid in the rehabilitation, and ease the problems, of prisoners by allowing them to return to their homeland to serve their sentence, where they will be closer to families and friends.

This bill is necessary because the problem of Americans in foreign jails is of increasing dimensions. There are over 2,300 Americans in foreign jails; 600 are in Mexico alone. These individuals are often serving disproportionate sentences, far from home, families, and friends.

The history of this legislation starts about 3½ years ago. Numerous individuals complained that their children, spouses, and friends had been severely abused at the time of arrest and were being detained under intolerable conditions in foreign jails. Many of these individuals were being held for drug offenses and being given punishments far in excess of that provided in this country. The issue was brought to the interest of Congress by numerous Members through congressional inquiries and hearings before the House International Relations Committee in 1975 and 1976. These hearings focused on U.S. citizen prisoners in Mexico, but the problems they discussed and the issues

they raised are far more general. Numerous witnesses complained about the treatment of Americans in Mexican jails: that the treatment of an American depended on how much money a person would be willing to pay, or use to bribe, jail officials. Finally, many complained that U.S. consular officials in Mexico failed to provide adequate services to incarcerated Americans. For example, complaints were received that Embassy officials did not secure information and generally assure that an American received fair and just treatment.

As a result of these complaints and congressional pressure, the Department of State evaluated what could be done to improve conditions, and determined that a treaty between Mexico and the United States, to be followed by other treaties with other countries, might resolve some of the problems. Such a treaty was in fact prepared, and on November 25, 1976, it was initialed by Mexico and the United States. The treaty provides that Americans in Mexican jails will be able to serve their terms in the United States, with certain limitations, and that Mexicans could serve their time in Mexican jails. A similar treaty was later signed with Canada, although there have not been any complaints about treatment in Canadian jails. The Senate gave its advice and consent for ratification of the treaties with Canada and Mexico on July 19 and 21 respectively. They are designed to be models for later treaties with other countries, particularly in Latin America and the Middle East.

These two treaties and any future treaty are not self-executing. They require legislation before they can be implemented. Such legislation must assure that adequate protections are provided for the rights of prisoners, that the security of the United States is insured through adequate screening, and that international cooperation is fostered through proper procedures.

To implement these treaties, Chairman Rodino has introduced H.R. 7148 on behalf of the administration. A similar bill, S. 1682, was introduced on the Senate side, has been substantially revised, and has been recently passed by the Senate Judiciary Committee.

The provisions of H.R. 7148 establish a mechanism for prisoner exchange. First, it provides for the actual transfer of prisoners in accordance with directives by the Attorney General. Second, it provides that such transfers can only occur with the consent of all concerned. Third, it provides standards for future legal proceedings after a transfer occurs.

I believe there are some serious problems with H.R. 7148, and we hope today to receive the input of the Departments of State and Justice as to how these problems can be resolved. I am particularly concerned by the severe restrictions on the ability of a transferred prisoner to challenge the actions that led to his conviction and imprisonment in a foreign country. A second problem is the matter of the "voluntariness" of the consent to a transfer. A third issue is the degree of responsibility of the U.S. Government for prisoners who are transferred here. I and other members of the subcommittee will explore these issues during the course of today's hearing.

I am optimistic that we will be able to resolve these problems with appropriate legislative changes. The Senate was concerned with many of these problems as well, and as a result, several amendments to the administration's bill have been considered and approved by the Senate Judiciary Committee.

In all my conversations and correspondence with individuals on this landmark legislation, all have agreed that its enactment is essential. Many have argued that it does not go far enough but that it is a useful first step. Implementation of prisoner exchange treaties could go a long way toward alleviating many of the personal problems of these prisoners, especially as it affects our citizens, mostly young and impressionable. It will also serve to demonstrate that we are truly concerned about our nationals wherever they are. The implementing legislation would also be of benefit to our international policy of human rights by helping foreign prisoners in our jails to be closer to their families and their friends.

These treaties and the instant legislation constitute an interesting and necessary experiment in international cooperation. I am hopeful that our hearings will enable us to explore the numerous issues raised by these documents, and I am most anxious to expedite this subcommittee's consideration of this important matter.

[A copy of H.R. 7148 follows:]

95TH CONGRESS
1ST SESSION

H. R. 7148

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1977

Mr. ROMINO introduced the following bill; which was 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 18, United States Code, is amended by inserting after chapter 305 the following new chapter:

"Chapter 306.—TRANSFER TO OR FROM FOREIGN COUNTRIES

"§ 4100. Scope and limitation of chapter

"(a) The provisions of this chapter relating to the transfer of offenders shall be applicable only when a treaty providing for such a transfer is in force, and shall only be applicable to transfers of offenders to and from a foreign country pursuant to such a treaty. A sentence imposed by a foreign country upon an offender who is subsequently transferred to the United States pursuant to a treaty shall be subject to being fully executed in the United States even though the treaty under which the offender was transferred is no longer in force.

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

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

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

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

"§ 4101. Definitions

"As used in this chapter the term—

"(a) 'imprisonment' means a penalty imposed by a court under which the individual is confined to an institution;

"(b) 'juvenile' means:

"(1) a person who is under eighteen years of age; or

"(2) for the purpose of proceedings and disposition under this chapter because of an act of

juvenile delinquency, a person who is under twenty-one years of age;

"(c) 'juvenile delinquency' means:

"(1) a violation of the laws of the United States or a State thereof or of a foreign country committed by a juvenile which would have been a crime if committed by an adult; or.

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

"(d) 'offender' means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency, or who is accused of an offense but has been determined to be mentally ill;

"(e) 'parole' means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision;

"(f) 'probation' means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the

breach of which the suspended penalty of imprisonment may be ordered executed;

"(g) 'sentence' means not only the penalty imposed but also the judgment of conviction in a criminal case or the adjudication of delinquency in a juvenile delinquency proceeding;

"(h) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(i) 'transfer' means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country and also the transfer of a mentally ill person accused of an offense in one country to the country of which he is a citizen or national for the purpose of treatment;

"(j) 'treaty' means a treaty under which an offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purpose of serving the sentence.

"§ 4102. Authority of the Attorney General

"The Attorney General is authorized—

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

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

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

"(3) to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals;

"(4) to designate citizens of the United States to verify the consent of convicted offenders who are citizens or nationals of the United States to be transferred to the United States;

"(5) to make regulations for the proper implementation of such treaties;

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

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

"(8) to make agreements and establish regulations for the transportation through the territory of the United

States of offenders convicted in a foreign country who are being transported to a third country for the execution of their sentences, when a treaty is in force between the United States and the foreign country provides for such transit;

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

"(10) in concert with the Secretary of Health, Education, and Welfare, to make agreements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of individuals who are accused of an offense but who have been determined to be mentally ill; such agreements and regulations may also provide for the return of the accused person to the country in which he is charged upon his recovery from the mental illness;

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

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

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

"§ 4103. Applicability of United States laws

"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.

"§ 4104. Transfer of offenders on probation

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

"(b) Upon the receipt of an offender on probation from the authorities of a foreign country, the Attorney General shall cause the offender to be brought before the United

States district court which is to exercise supervision over the offender.

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

"(d) The probation may be revoked in accordance with section 3653 of this title and rule 32 (f) of the Federal Rules of Criminal Procedure. A violation of the conditions of probation shall constitute grounds for revocation. If probation is revoked the suspended sentence imposed by the sentencing court shall be executed.

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

"(f) Prior to consenting to the transfer from the United States of an offender who is on probation, the Attorney General shall obtain the assent of the court exercising jurisdiction over the probationer.

"(g) The decision of the court to undertake or not undertake the supervision of an offender on probation referred to in (a) and of the court to assent or not assent to the transfer from the United States of an offender on

probation referred to in (f) shall not be reviewable by any other court.

"§ 4105. Transferred offender serving sentence of imprisonment

"(a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

"(b) The transferred offender shall be given credit toward service of the sentence for any days, prior to the date of commencement of the sentence, spent in custody in connection with the offense or acts for which the sentence was imposed; except that, if the judgment or other documents officially certified by foreign authorities indicate that this time spent in custody prior to sentence has been taken into account in the length of sentence imposed, credit shall not be given by the Attorney General for such presentence custody.

"(c) (1) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the

transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits for good time, computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in section 4161 of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the offender pursuant to section 4164 of this title.

"(2) If the country from which the offender is transferred does not give credit for good time, the basis of computing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in section 4161 of this title.

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

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

"(5) Any additional sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a for-

eign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

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

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

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

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

"(d) An offender transferred to the United States to

serve a sentence of imprisonment who was under the age of twenty-two years at the time of the conviction shall be eligible for parole at any time.

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

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

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

"(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, and by his consent he waives all rights to institute proceedings in the courts of the country to which he is to be transferred seeking to challenge, modify, or set aside his conviction or sentence;

"(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; and

"(3) if a court of 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.

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

"(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified by a United States magistrate, or by a citizen of the United States specifically designated by the Attorney General. The designation by the Attorney General of a citizen who is an employee or officer of a department or agency of the United States other than the Department of Justice shall be with the approval of the head of that department or agency.

"(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 seek-

ing 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; and

"(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.

"§ 4109. Right to counsel, appointment of counsel

"In proceedings to verify consent of an offender for transfer, the offender shall have the right to advice of counsel. If the offender is financially unable to obtain counsel;

"(a) counsel for proceedings conducted under section 4107 shall be appointed in accordance with the Criminal Justice Act (18 U.S.C. 3006A). Such appointment shall be considered an appointment in a misdemeanor case for purposes of compensation under the Act;

"(b) counsel for proceedings conducted under section 4108 shall be provided by the Secretary of State, under regulations to be prescribed by him. The Secre-

tary may, without regard to section 3106 of title 5, United States Code, employ counsel and pay counsel fees and other expenses incident to the representation. Appropriations available to the Department of State for the salaries and expenses of persons under its jurisdiction may be used to carry out the provisions of this subsection.

"§ 410. Transfer of juveniles

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

"§ 4111. Prosecution barred by foreign conviction

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

"§ 4112. Loss of rights, disqualification

"An offender transferred to the United Statse to serve

a sentence imposed by a foreign court shall not incur any loss of civil, political, or civic rights nor incur any disqualification other than those which under the laws of the United States or of the State in which the issue arises would result from the fact of the conviction in the foreign country.

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

"(a) An alien who is deportable from the United States but who has been granted voluntary departure pursuant to sections 1252(b) or 1254(e) title 8, United States Code, and who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have voluntarily departed from this country.

"(b) An alien who is the subject of an order of deportation from the United States pursuant to section 1252 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been deported from this country.

"(c) An alien who is the subject of an order of exclusion and deportation from the United States pursuant to section 1226 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been excluded from admission and deported from the United States.

"§ 4114. Return of transferred offenders

"Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States, the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return.

"The procedures for the extradition of fugitives shall apply to the return of the offender with the following limitations:

"(1) the offense for which the offender was sentenced shall be deemed to be an extraditable offense included in the treaty of extradition;

"(2) a certified copy of the sentence shall constitute evidence sufficient to sustain the charge under the provisions of the proper treaty or convention;

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

"(4) an offender returned under such proceedings shall not be deemed for any purpose to have been extradited; and

"(5) the return of an offender shall be conditioned

upon the offender being given credit towards service of the sentence for the time spent in the custody of or under the supervision of the United States.".

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

"(f) A United States magistrate may perform the verification function required by section 4107 of title 18. When a treaty requires or upon the request of the Attorney General, a magistrate may be assigned by a judge of any United States District Court to perform the verification required by section 4108 of title 18 and may perform such function beyond the territorial limits of the United States. A magistrate assigned such function shall have no authority to perform any other function within the territory of a foreign country.".

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

"§ 2256. Jurisdiction of proceedings relating to transferred offenders

"When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders:

"(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over any proceedings, regardless of their form, seeking

to challenge, modify, or set aside convictions or sentences handed down by a court of such country;

"(2) all proceedings instituted by or on behalf of an offender transferred from the United States to a foreign country seeking to challenge, modify, or set aside the conviction or sentence upon which the transfer was based shall be brought in the court which would have jurisdiction and competence if the offender had not been transferred;

"(3) all proceedings instituted by or on behalf of an offender transferred to the United States pertaining to the manner of execution in the United States of the sentence imposed by a foreign court shall be brought in the United States district court for the district in which the offender is confined or in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents; the Attorney General shall defend against such proceedings;

"(4) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer from the United States shall be brought in the United States district court of the district in which the proceedings to determine the validity of the

offender's consent were held and shall name the Attorney General as respondent; and

"(5) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer to the United States shall be brought in the United States district court of the district in which the offender is confined or of the district in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents; the Attorney General shall defend against such proceedings.".

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

"**§ 955. Prisoners transferred to or from foreign countries**

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

"(b) Whenever the United States is party to an agreement on the status of forces under which the United States may request that it take custody of a prisoner belonging to its

Armed Forces who is confined by order of a a foreign court, the Secretary concerned may provide for the carrying out of the terms of such confinement in a military correctional facility of his department or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Except as otherwise specified in such agreement, such person shall be treated as if he were an offender against chapter 47 of this title.".

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

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

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

Mr. EILBERG. Our first witness this morning is an old friend of the chairman from the State of Pennsylvania, a very distinguished citizen of our commonwealth, Peter F. Flaherty, Deputy Attorney General, Department of Justice.

Mr. Flaherty.

TESTIMONY OF PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY MIKE ABBELL, CRIMINAL DIVISION; AND LARRY SIMMS, OFFICE OF LEGAL COUNSEL

Mr. FLAHERTY. Good morning, Mr. Chairman, members of the subcommittee, staff.

Mr. EILBERG. Mr. Flaherty, may I ask is it your intention to follow the text of your statement as presented to us yesterday?

Mr. FLAHERTY. I would like to submit it for the record.

In your opening remarks, Mr. Chairman, in describing the legislative history of the bill, you've alluded to many of the things that I described in my preliminary remarks in my statement. I think it might be helpful if we just started at the bottom of page 5, and I would like to submit the entire statement for the record.

Mr. EILBERG. And would you identify the people with you?

Mr. FLAHERTY. I was just going to.

On my right is Mike Abbell of the Criminal Division, actively involved in the bill, and on my left is Larry Simms from the Office of Legal Counsel, Department of Justice, very active, especially regarding the constitutionality of the bill.

Mr. EILBERG. Mr. Flaherty, we do have a number of questions and your time is very limited. We'd like to respect that to the extent that is possible. I read the statement carefully last night. What we may do, then, is to ask questions as you proceed with the statement.

Mr. FLAHERTY. Fine. Last sentence at the bottom of page 5. I think it gets right into the heart of the constitutional question.

Mr. EILBERG. Let me ask a few questions, if I may.

Mr. FLAHERTY. Yes.

Mr. EILBERG. I'm concerned about congressional input into the preparation of this legislation. Before H.R. 7148 was forwarded to the Congress were there any meetings, contacts, consultations, or discussions, held with the Congress, in particular the Judiciary Committees of the House or the Senate?

I ask this question because there are some problems that we see in the bill that haven't been worked out, which could have been worked out if such legislation had been forwarded to us in draft form prior to its introduction.

Mr. FLAHERTY. Well, first of all, I have met and testified before the Senate committee, subcommittee, chaired by Senator Joseph Biden on the Senate version of the bill. Some of my staff probably have been in touch with the staff of the Senate, and, presumably, the staff—Mike, could you elaborate?

Mr. ABBELL. Well, before H.R. 7148 was introduced, there were almost no contacts if any. There have been numerous contacts since that time to go over the specific problems that the staff, the subcommittee, has found with the bill. And many of the changes suggested

by the staff of the subcommittee have been adopted and incorporated in the Senate amendments that are now part of the Senate bill as reported out by the Senate Committee on the Judiciary yesterday.

Mr. EILBERG. On this point alone I would simply like to observe that if we had had the advantage of those contacts before the introduction of the bills we might have been able to move them a little more rapidly. That's my concern.

Another concern that I have with regard to these treaties and implementing legislation is the possibility that dangerous or recidivistic offenders might be returned to the United States and subsequently released. What procedures will you establish together with the Department of State to screen such individuals?

Mr. FLAHERTY. First of all, we certainly respect your concern in that area. Not all of the prisoners that are being returned are nominal offenders. We admit that some of them may very well be major offenders doing long-term sentences. The majority, however, as I believe the chairman knows, are not major offenders.

The parole system wouldn't——

Mr. EILBERG. Would you hold just a moment?

Mr. FISH. If I could interrupt you just a moment.

In accordance with our procedural rules, Mr. Chairman, I would ask if this committee hearing can be covered by live television?

Mr. EILBERG. Without objection the request will be granted.

Sorry, Mr. Flaherty.

Mr. FLAHERTY. That's OK.

The prisoners would be transferred but not automatically paroled. They would be subject to the criteria and the standards as any other prisoner is in our system in being paroled, and that would be determined by the many factors involved: not only the Mexican conviction but the recidivistic history. As you mentioned, there is that question; it always comes up in a parole hearing. All of the factors that have been considered by the Parole Commission would be considered in each case bearing on the transferees.

Mr. EILBERG. Do you expect to establish procedures to identify those that we might take back?

Mr. FLAHERTY. I'm not sure. Would you repeat that question?

Mr. EILBERG. Sure. I'm concerned about the possibility of dangerous or recidivistic offenders being returned to the United States and subsequently released. What procedures will you establish, together with the Department of State, to screen such individuals? Will you oppose any request for transfer on this basis?

Mr. FLAHERTY. Again, the parole system would be the determining factor, Mr. Chairman, on the transferees that do come, and that waive and sign a consent form to come. I can't say that all would come, but I would at this point—we assume—that all would want to make the transfer and come to this country. They, then, fall under the parole system—our parole system. They would be subject to the same standards, the same criteria, as any other prisoner would in this country in determining whether they should be released. There would be no automatic release of any transferred person.

Mr. EILBERG. Might I just direct your attention to the preliminary stage in which the transfer of an American back to the United States is being considered, but he has not yet entered the parole system. I'm

concerned about how the Attorney General would determine whether any particular offender will be permitted to come back.

Your response has been in terms of what will happen under the parole system. My question relates to the stage prior to his entrance into the parole system.

Mr. FLAHERTY. Under the transfer, the prisoner would have to sign a waiver and consent form to come back into this country under the treaty and under the implementing legislation. He then comes under the purview of the Attorney General and the parole system when he comes to this country and one of our correctional institutions.

Mr. EILBERG. But what would the Attorney General do to decide which prisoners would be permitted to come back and which ones would not?

Mr. FLAHERTY. Well, actually, this is a matter for—the prisoner will have a hearing if he or she wants to come back, and during that hearing they will be advised of their rights by magistrates that will be sent into—in this case, in the first instance—Mexico to various centralized points. The prisoners who wish to transfer will be advised of what their rights are, and will be entitled to make a decision to sign a voluntary waiver.

Mr. EILBERG. Mr. Flaherty, there may be some lack of communication between us on this point. You're describing the procedure that will take place after the decision has been made to allow the individual offender to come back. I'm trying to find out from you how you will decide what offenders you will allow to come back to the United States.

Mr. ABBELL. We have taken the position that we are not going to bar the return of any prisoner that wants to come back to the United States. If that is his desire, we will accept any American who is a citizen; however, we will be interviewing prisoners there. We will be obtaining information on them, we will be checking their records through the use of fingerprints to determine their prior records. And we have asked that of the Drug Enforcement Administration, and they have provided us with the names of individuals they consider to be major traffickers, and those, a very small minority of the total, that might be coming back. All of this information will be cranked into the parole system, into a broader hearing.

We realize that we will be taking back people who are serious offenders, but we feel that their citizenship and the rights of citizenship of the United States entitles them at least to come back and then be treated as——

Mr. EILBERG. Do I understand that you propose to take back every single offender?

Mr. FLAHERTY. All eligible ones; yes, sir. Right.

Mr. EILBERG. Well, we may disagree with you very substantially on that point. I don't know that we can or will agree with you that all should come back, or that all have the opportunity to come back.

Mr. FLAHERTY. I understand your point of view, but at the present time, all would be eligible.

Mr. EILBERG. As you know this is the Subcommittee on Immigration, Citizenship, and International Law, and we spend a great deal of our time in international law.

Can you tell us why individuals charged with immigration offenses are not included in the treaties? Why was such an exclusion not included in the legislation?

Mr. FLAHERTY. Mike could answer that.

Mr. ABBELL. The basic reason, Mr. Chairman, is that the Mexicans do not regard it to be a criminal offense for a person to seek their economic improvement by coming to the United States—by crossing the border and coming to the United States. It would not be a crime in Mexico to do so, to better their economic condition, and, therefore, they have taken a position that they will not keep in jail, in a Mexican jail, someone who has been convicted in the United States of an immigration offense.

However, I might add that at least 30 of our American citizens, U.S. citizens, in Mexican jails are in Mexican jails for alien smuggling offenses where they were involved in ring operations. These individuals, because they were violating Mexican immigration laws, also would not be eligible to come back to the United States. Mexico has informed us that that is their interpretation of the law, so we have about 30 people—several who have been convicted—who will not be eligible to transfer under the treaty because they have violated Mexican immigration laws.

Mr. EILBERG. And you believe that none of these people should be able to come back and serve within the United States?

Mr. ABBELL. Well, this was part of the treaty, that immigration offenses would not be covered. Mexico regards the alien smuggler as a violator of Mexican immigration law, and at the present time, this is their interpretation of the law, and these people will not be eligible for transfer unless there is a change in Mexican interpretation of its own law.

Mr. EILBERG. Well, there are, of course, many possible offenses of immigration laws, quite apart from entering the country illegally, such as smuggling and/or manufacturing fraudulent documents and so forth. Why are all of these offenses excluded from the scope of the transfer?

Mr. ABBELL. My understanding is that this particular problem was not, really, averted to when the treaty was drawn up. The real problem that was before them—the people that were involved in the negotiation of the treaty—was, the individual comes to the United States for the purpose of improving his economic lot. And the Mexicans say there is no way that we would imprison him in a Mexican prison for doing so.

And I think the other violations were not, specifically, averted to, but the Mexicans are adhering to the letter of the treaty thus far. They may say that the letter does not comply with the spirit of the negotiated treaty, and they may decide to allow these people later to transfer.

It must also be remembered that this is an ongoing treaty, that a change in the legal interpretation by one country can enable people to transfer at a later date who, initially, were not able to transfer.

Mr. FLAHERTY. I might say, too, Mr. Chairman, that in related affairs there are serious offenses in the immigration area. In any event, none would be coming back since they're not eligible under the treaty.

Mr. EILBERG. Yes, well that's the point. The treaty excludes all those involved in immigration offenses, and I can understand what Mexico's position might be with regards to those who enter the United States illegally, but I do not similarly understand the exclusion of the

many other immigration offenses apart from illegal entry. Why exclude all immigration offenses? I don't quite understand the answer that has been given to me.

Mr. ABBELL. I think, Mr. Chairman, it was simply an oversight in the drafting of the treaty which we are enforcing at this time. I would prefer that it had been limited to the persons, individuals, who sought——

Mr. EILBERG. That's what I thought, and that's why I asked the question.

Mr. Fish?

Mr. FISH. Thank you, Mr. Chairman.

Mr. Abbell, thank you. Let's go over this once more so that the record is clear. I understand there are approximately 600 Americans incarcerated in Mexico; is that roughly correct?

Mr. ABBELL. Roughly, yes; about 569, I believe, on the last count.

Mr. FISH. And what you have been saying is that approximately 30 of those have been charged or convicted of immigration offenses under Mexican law.

Mr. ABBELL. Right.

Mr. FISH. Now, are we talking primarily about the Americans who were involved in smuggling rings to bring Mexican aliens illegally into the United States.

Mr. ABBELL. Well, that's my understanding; not only Mexican aliens but aliens from Central and South America as well.

Mr. FISH. I understand. Is there any other offense that you are aware of or that the immigration laws included?

Mr. ABBELL. I'm not aware of any Americans who are in jail for any other kind of offense. Almost every one of them is in violation in the smuggling of——

Mr. FISH. Smuggling of Mexicans, Central Americans, and South Americans into the United States.

Mr. ABBELL. That's correct.

Mr. FISH. Thank you very much.

Mr. EILBERG. Mr. Flaherty, have any specific procedures been developed to insure that offenders in foreign jurisdictions are sufficiently notified prior to the giving of their consent for transfer of the consequences of such consent? What information should be provided in order that a voluntary and intelligent waiver, as measured by U.S. constitutional standards, might be given?

Mr. FLAHERTY. Well, first of all, there will be hearings held at certain centralized points in Mexico. At these hearings they will be entitled to counsel, and if they do not have counsel, they will be furnished with counsel. In addition to that, the magistrates from our own country will be present at the hearings in Mexico to advise the transferee or the inmate there of what his rights would be in waiving and signing the waiver.

Mr. EILBERG. Well, now, do you contemplate putting any of this in writing by means of departmental regulations or otherwise? It seems to me that unless you have a specific procedure that is going to develop on a very ad hoc basis as the operation occurs.

Mr. FLAHERTY. Yes, we do contemplate putting it in writing.

Larry Simms would like to comment on that for you, Mr. Chairman.

Mr. SIMMS. In all of these proceedings, in which a magistrate will be present, and counsel representing the prisoner, there will be a written record taken—it is my understanding—and the waiver itself will be a kind of a consent.

Mr. EILBERG. But once again here you are describing procedure. My concern is that it seems to me there ought to be specific procedures, regulations, outlining what things the prisoner should be notified of, so that the procedure is the same in every case.

Mr. SIMMS. We agree, and there will be regulations to that effect promulgated under the statute.

Mr. ABBELL. Mr. Chairman, may I speak to that point also?

The amendments that were introduced and developed in consultation with the staff of your subcommittee have greatly expanded upon the rights and the procedures that are involved in the verification proceeding. And I think they've made them much more specific, and almost obviated, in many ways, the need for regulations. Although we may, eventually, issue such regulations, we think we can commence the initial transfers without any specific regulations because of the specificity of the statute as pointed out by the Senate Judiciary Committee—and, with a great deal of input, by the way, from your subcommittee.

Also, I might add that we have prepared a booklet in question-and-answer form which is in the process of being distributed to every American prisoner that is in jail.

Mr. EILBERG. Do you have the booklet with you?

Mr. ABBELL. I have a copy that I can provide to the committee; yes.

Mr. EILBERG. Do you have it in your possession here?

Mr. ABBELL. Yes, I do.

Mr. EILBERG. All right, without objection it will be made a part of the record at this point in the record.

[The document follows.]

INFORMATION BOOKLET FOR UNITED STATES CITIZENS INCARCERATED IN MEXICAN PRISONS REGARDING THE OPERATION OF THE TREATY BETWEEN THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA ON THE EXECUTION OF PENAL SENTENCES

United States Department of Justice

Preface

This booklet has been prepared by the United States Department of Justice to familiarize United States citizens who are prisoners in Mexican institutions with:

(1) The terms of the Treaty between the United States and the United Mexican States on the Execution of Penal Sentences;

(2) The terms of the legislation which is expected to be enacted by the United States Congress with respect to the implementation of this Treaty;

(3) The manner in which it is anticipated that the Treaty will be implemented by the respective governments with regard to the transfer of such prisoners from Mexican prisons to United States prisons;

(4) The operation of the United States parole laws which will govern the parole eligibility and the release on parole of prisoners transferring to United States prisons under the Treaty; and,

(5) The operation of the United States federal prison system within which all prisoners transferring to the United States will be incarcerated upon transfer.

The booklet contains three question and answer sections designed to answer the questions in the above-mentioned areas which we believe will be most asked by United States citizens who are prisoners in Mexican prisons. These question and answer sections of the booklet are designed to answer such questions in as simple and direct a manner as possible. Necessarily, this type of treatment of complex legal and technical questions cannot cover every aspect of the Treaty, the implementing legislation, the policies of the respective governments in implementing the Treaty, the United States parole laws, and the United States federal prison system. Rather, it is designed to provide those persons most directly affected by the Treaty with answers, understandable to non-lawyers, to the most important questions they are likely to have with respect to deciding whether to transfer to a United States prison under the Treaty.

For these reasons, this booklet is intended only as an aide to such prisoners to help them better understand the most important considerations affecting their decisions to transfer under the Treaty. It is not a formal statement of

the laws, rules or regulations applicable to prisoners transferring under the Treaty. Although every effort has been made to assure that the answers to all of the questions are in accord with the terms of the Treaty, the implementing legislation (as it will be finally enacted), and the rules and regulations of the various United States agencies having responsibilities with respect to the implementation of the Treaty, to the extent there are any conflicts between these answers and the Treaty, implementation legislation, and such rules and regulations, the latter are controlling.

To further assist such prisoners, Appendix A of this booklet contains a copy of the Treaty, Appendix B a copy of the implementing legislation as reported out by the Subcommittee on Penetentiaries and Corrections of the Senate Judiciary Committee, and Appendix C a copy of the parole Guidelines issued by the United States Parole Commission which set forth the normal range of time persons with different personal and criminal histories would serve in a federal prison, before being released on parole, for the commission of different types of criminal offenses.

Benjamin R. Civiletti
Assitant Attorney General
Criminal Division
U.S. Department of Justice

August 22, 1977

PART I

Questions and Answers Concerning the Prisoner Transfer Treaty between the United States and Mexico and Its Implementation

1. *Are all United States citizens who are prisoners in Mexican prisons eligible to transfer to a United States prison under the treaty between the United States and Mexico on the "Execution of Penal Sentences" (hereinafter referred to as the Treaty)?*

No. The following United States citizens will not be eligible for transfer under the Treaty:

(a) Those convicted of crimes in Mexico which would not generally be punishable as crimes under the laws of the United States or any state;

(b) With certain exceptions, those who lived in Mexico for at least five years immediately preceeding their arrest;

(c) Those convicted under the immigration laws of Mexico;

(d) Those convicted of purely military or political offenses;

(e) Those who have less than six months of their sentence remaining to be served (not taking into account any work credit earned in Mexican prisons);

(f) Those whose convictions or sentences are under appeal (regardless of whether the prisoner, one of the persons with whom he was jointly convicted, or a Mexican prosecutor brought the appeal) and those who have filed amparos. See question 7 below.

(g) Those who have not yet been convicted and sentenced.

2. *If I am credited with all of the work time I have earned in Mexican prisons in connection with the crime for which I am presently incarcerated, I should be released from prison in Mexico in less than six months. Am I eligible to transfer to a United States prison under the Treaty?*

Yes. The Mexican government has informed us that unless a prisoner has served more than his assessed sentence less six months, it will regard him as eligible to transfer under the Treaty. For example, if your original sentence

was eight years, you would be eligible to transfer under the treaty unless you had served more than seven years and six months in Mexican prisons in connection with that sentence.

3. *What proof of my United States citizenship do I have to have for purposes of transferring under the Treaty?*

You must have in your possession either a valid United States passport, or have the State Department, through its consular officers, issue you an identity card. It should be noted that the United States Embassy in Mexico has directed consular officers in Mexico dealing with United States citizens who are prisoners in Mexican jails to verify the citizenship of such prisoners and to prepare the necessary identity cards. Such identity cards, however, may not be distributed to you until immediately prior to transfer.

4. *I have an appeal (amparo) pending which I do not expect to be successful. Consequently, I would like to drop my appeal (amparo) and request transfer under the Treaty. Can I? If so, how?*

Yes. You should ask the Mexican attorney representing you in connection with your appeal (amparo) to withdraw it. If you encounter any problems in either contacting your Mexican attorney or in having him comply with your request in a timely manner, you should seek the assistance of the consular officer responsible for prisoner matters in your consular district. It should be noted, however, that the United States government can take absolutely no position as to the wisdom or desirability of your decision to withdraw any pending appeal (amparo). Such a decision is strictly up to you.

5. *I did not appeal my conviction or sentence, nor have I filed an amparo; however, the prosecutor has filed an appeal. Am I eligible to transfer under the Treaty?*

No. All appeals, whether brought by you or the prosecutor, must be terminated by decision or withdrawal before you are eligible to transfer.

6. *If I am ineligible to transfer soley because of the pendency of an appeal brought by the prosecutor, is there some way he could be prevailed upon to withdraw his appeal?*

If you are represented by Mexican counsel, you should ask him to contact the prosecutor for the purpose of seeking the prosecutor's agreement to withdraw the appeal. If you are not represented by Mexican counsel, you should seek the assistance of the consular officer responsible for prisoner matters in your consular district. However, unless there is substantial reason to believe that a prosecutor's appeal is improperly motivated, his decision as to whether to withdraw an appeal is properly within his discretionary power.

7. *I do not have an appeal pending, but one or more of the prisoners with whom I was jointly convicted and sentenced has an appeal pending. Am I eligible to transfer under the Treaty?*

No. We have been advised by Mexican authorities that under Mexican criminal procedure, as a general rule, an appeal by one person, who has been convicted and sentenced in the same proceeding as other persons with whom he was found to have jointly committed a crime, will be regarded as an appeal by all persons who were jointly convicted and sentenced for the commission of that crime. For example, if the person who brought the appeal is successful, the persons with whom he was jointly convicted and sentenced will fully benefit. Whether an amparo brought by a jointly convicted and sentenced prisoner will affect eligibility for transfer under the Treaty depends on the circumstances of the particular case. However, such an amparo is generally personal to the prisoner bringing it; therefore, it will not have nearly as broad an impact on transfer eligibility as would an appeal brought by the same person.

8. *I was convicted in Mexico for smuggling aliens. Am I eligible for transfer under the Treaty?*

We have been advised by Mexican authorities that they are presently taking the position that since smuggling aliens is a violation of Mexico's immigration laws, it will be regarded as an immigration offense. Therefore, persons convicted and sentenced for this offense will be ineligible for transfer under the Treaty.

9. *I am a citizen of the United States, but I lived in Mexico for more than the five years immediately preceeding my arrest on the charges of which I was convicted and sentenced. Am I eligible for transfer under the Treaty?*

No, unless you can demonstrate a lack of intent immediately prior to your arrest to remain in Mexico permanently.

10. My Mexican sentence included a fine as well as a sentence of imprisonment. Will the fact that I have not paid this fine affect my eligibility to transfer under the Treaty?

We have been advised by Mexican authorities that under Mexican law, the non-payment of such fines will not impair an offender's eligibility to transfer under the Treaty.

11. My Mexican sentence included an imposition of monetary reparations to be paid by me to the victim of the crime. Will the fact that I have been unable to pay these reparations affect my ability to transfer under the Treaty?

We have been informed by Mexican authorities that non-payment of such reparations to the victim of a crime will preclude transfer under the Treaty. However, if you have been unable to pay such reparations prior to release from prison in Mexico, there is a way under Mexican law that such reparations can be forgiven after your release from prison in Mexico. If you are unable to pay such reparations, it is suggested that you contact the consular officer in your consular district responsible for prisoner related matters.

12. If I am otherwise eligible to transfer under the Treaty, can Mexico refuse to let me transfer?

Yes. Under the Treaty the consent of Mexico, the United States, and the offender is required for transfer. If any of them withhold their consent, the transfer cannot be effected.

13. If the Treaty is terminated by either the United States or Mexico after I have transferred to the United States, will I be returned to Mexico for completion of my sentence?

No. The Treaty implementing legislation provides that even though the Treaty may no longer be in force, the sentences of offenders transferred under it will be fully executed in the United States.

14. Would such a termination of the Treaty result in my being released from prison or parole in the United

States if I have previously transferred under the Treaty while it was still in effect?

No. Your Mexican sentence, which you agreed to serve in the United States when you consented to transfer under the Treaty, will be fully executed in the United States.

15. If I'd rather serve the remainder of my sentence in Mexico, may I, or does the Treaty compel me to transfer to a United States prison regardless of my wishes?

The Treaty does not compel anyone to transfer against his wishes. The one possible exception is with respect to juveniles (persons under eighteen years of age at the time of transfer) since the statutory consent with respect to them will be that of their parents, guardians, or the appropriate Mexican courts.

16. If I transfer to the United States under the Treaty, can I be pardoned, granted amnesty, or have my sentence commuted by United States authorities?

No. Under the Treaty, Mexico will retain the sole power to pardon, grant amnesty, or commute the sentences of offenders transferring to the United States. If you are pardoned, granted amnesty, or have your sentence commuted by Mexican authorities after you transfer under the Treaty, you will be given the benefit of such an action upon the receipt by the United States of notification of any such action.

17. What happens if after I transfer under the Treaty Mexico repeals the statute for violation of which I was convicted and sentenced, without replacing it with an essentially similar statute?

Upon the ascertaining of that fact by United States authorities, you would be released from prison or parole in the United States.

18. What happens if after I transfer under the Treaty Mexico reduces the maximum sentence for the offense of which I was convicted and sentenced?

Upon the ascertaining of that fact by United States authorities, your sentence would be reduced proportionately.

For example, if you were convicted in Mexico of an offense which carried a maximum ten-year sentence, but received a sentence of only six years, and Mexico subsequently amended the law under which you were convicted to carry only a five-year maximum sentence, your sentence would be reduced to three years.

19. If I transfer to a United States prison under the Treaty, do I have any legal remedies available to me to challenge, modify, or set aside my conviction and/or sentence in the United States?

No. The Treaty specifically provides that Mexico will have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. However, neither the Treaty nor the implementing legislation in any way seeks to prevent transferring offenders from bringing habeas corpus actions to challenge the constitutionality of the Treaty and/or the implementing legislation, or the manner of the execution of their confinement by United States authorities. Moreover, it does not seek to deprive the United States courts of their supervisory jurisdiction over the activities of United States law enforcement officers abroad. Finally, the implementing legislation specifically provides that transferring offenders can challenge the validity or legality of their transfer to the United States under the Treaty (see Question 73, below).

20. After I transfer under the Treaty, what, if any, legal remedies are available to me in Mexico to challenge, modify, or set aside my conviction and/or sentence?

You will have the same legal remedies available to you under Mexican law that you would have had if you had not transferred, but had completed or terminated all appeals and/or amparos with respect to your conviction and sentence. We have been informed by Mexican authorities that, other than pardon, amnesty, commutation of sentence, or their equivalents, the only available remedy under Mexican law in such instances is Necessary Indulto. Necessary Indulto is applicable only to claims of innocence, primarily based on new evidence and must be petitioned for to the highest court of the jurisdiction in which you were convicted and sentenced.

21. If I transfer under the Treaty, can I be prosecuted by a court of the United States or any state with respect

to the matters which were the subject of my prosecution in Mexico and of which I was either convicted or acquitted by a Mexican court?

No, except in highly unusual circumstances. The Treaty and the implementing legislation provide essentially that for double jeopardy purposes convictions and acquittals in Mexico will be regarded as convictions and acquittals of the jurisdiction in the United States seeking to prosecute. Charges that were dropped by Mexican authorities prior to conviction or acquittal are not encompassed by this double jeopardy type bar to prosecution in the United States. Also, it should be noted that offenders who complete their sentences in Mexico and subsequently return to the United States receive none of the double jeopardy type protection afforded by the Treaty. Nevertheless, as a general rule, persons convicted or acquitted by Mexican courts of offenses committed in Mexico are very unlikely to be prosecuted in the United States for the acts which were encompassed by the Mexican convictions or acquittals.

22. *If I transfer under the Treaty, will I incur any loss of civil, political, or civic rights in the United States which I would not otherwise incur as a result of my Mexican conviction?*

No. Both the Treaty and the implementing legislation specify that transferring under the Treaty is to have no impact on such rights in addition to whatever effect results from the mere fact of a foreign conviction. It should be noted that under federal law the impact of a foreign conviction is relatively limited, but that its impact under state law may vary greatly between states.

23. *I have relatives in Mexico who I would like to visit after completion of service of my sentence. Is there any practical difference, with respect to my ability to re-enter Mexico, between transferring under the Treaty and serving the remainder of my sentence in Mexico?*

It is not clear whether transferring under the Treaty will have any affect on your ability to re-enter Mexico beyond that already arising from your Mexican conviction and sentence. If a precise answer to this question is important to your decision, it is strongly urged that you obtain the advice of competent Mexican legal counsel. It also should be noted that the answer to this question may be affected by whether or not you hold dual United States and Mexican citizenship.

24. If I transfer under the Treaty to a United States prison, will the laws of the United States or of Mexico govern whether I am eligible for, and will be released on, parole?

The parole laws of the United States will govern eligibility for, and release on, parole of offenders transferring to the United States under the Treaty.

25. If I transfer under the Treaty, when will I be eligible for parole in the United States?

You will be eligible for parole upon transfer to a United States prison under the Treaty.

26. Does being immediately eligible for parole in the United States mean that I can expect to be released on parole within a very short time after my transfer?

No. It means only that you are entitled to a hearing before Parole Commission examiners who will make a recommendation to the Parole Commission as to when you should be paroled. You will be advised within 21 days of the hearing of the Parole Commission's decision. For purposes of the initial transfer under the Treaty, arrangements are being worked out with the Parole Commission to expedite both the holding of the parole hearings and the decisions by the Parole Commission. It is hoped that all parole hearings for transferring prisoners in this group can be completed within one to two months of transfer, and that each prisoner will be informed within two weeks of his hearing of the Parole Commission's decision as to the timing of his release.

27. Is there any way I presently can get an idea of when I will be likely to be released on parole if I transfer under the Treaty?

Yes. The Parole Commission has issued Guidelines for general guidance in determining when federal offenders should be considered for release from prison to parole. The principal factors in this determination are the gravity of the offense of which the offender was convicted and his prior personal history, including prior criminal convictions. Since it is anticipated that the Parole Commission's parole release decisions will be based on the principle of treating offenders convicted in Mexican courts as if they had been convicted of the same offense in a United States

federal court, you should be able to get an idea of the probable range of parole release dates that would be applicable to you by locating, in the Guideline table, the type of offense of which you were convicted and computing your salient factor score on the basis of the rules contained in the Guidelines. For your convenience, a copy of the Guidelines has been included as Appendix C of this booklet.

28. If I am released on parole in the United States, can my parole be revoked if I violate the conditions of my parole and/or if I am convicted of an offense after my release on parole?

Yes. For a detailed description of the parole revocation process, see Questions 41 through 49 of this booklet.

29. I was sentenced to six years imprisonment by a Mexican court. I have already served more than four years of that sentence. Does my service of more than two-thirds of my sentence affect my releasibility on parole in the United States if I transfer under the Treaty?

Yes. Under the applicable federal law, a prisoner serving a sentence of between five and forty-five years must be released on parole after having served two-thirds of his sentence unless the Parole Commission determines that he has seriously or frequently violated the rules and regulations of the federal prison in which he is incarcerated or that there is a reasonable probability that he will commit a crime if released on parole. A limited parole hearing may be held to determine if either of the exceptions would bar such a prisoner's release on parole, or he may be paroled on the basis of a review of his prison file. Since all prisoners transferring from Mexico will be accorded full credit for all time served in Mexican prisons with respect to the transferring offense(s), such a prisoner could generally expect to be released on parole within a short period after his transfer under the Treaty.

30. Is there any other way in which my release on parole may be required under United States law if I transfer under the Treaty?

Yes. You will be madatorily releasible "as if released on parole" at the expiration of the term of your sentence less time deducted for good conduct and work credits.

31. What is good conduct or "good time" credit under United States law?

It is the time credit earned for faithfully observing all of the rules and regulations of the federal institution in which you will be confined. The good time credit for your whole term is credited to you upon entry into a federal prison. However, good time credit may be forfeited for violations of prison rules.

32. At what rate are good time credits earned by prisoners?

Five days per month for sentences between six months and one year; six days per month for sentences between one year and three years; seven days per month for sentences between three years and five years; eight days per month for sentences between five years and ten years; and, ten days per month for sentences of ten years or more.

33. Will I earn good time credit at a rate based on my total Mexican sentence, or on the remainder of my sentence at the time of transfer?

You will earn good time credit based on your total Mexican sentence regardless of how much of that sentence remains to be served at the time of transfer. For example, if you received a ten-year sentence in Mexico, but will have served six years at the time of transfer, you will earn good time credit at the rate of ten days per month not seven days per month.

34. Will I be given good time credit from the date of my arrest and imprisonment in Mexico, or only from the date I transfer to a United States prison?

Pursuant to the implementing legislation, you will be given good time credit from the date of your imprisonment in Mexico.

35. Will my conduct while in prison in Mexico affect whether any of my good time credit will be forfeited?

No. Forfeiture of good time credit relates soley to violations of United States prison rules and regulations.

36. *If all or a part of my good time credit is forfeited as the result of violations of prison rules and regulations, can all or part of such forfeited time be restored to me?*

Yes, but only Institutional Disciplinary Committee can restore forfeited good time.

37. *In addition to the good time credit I will receive upon transfer, will I receive credit for the work credit I earned while in prison in Mexico?*

Yes. You will receive full credit for both United States good time credit based on your total sentence, and all documented work credit earned in Mexican prisons in connection with the transferring offense and sentence.

38. *What should I do if my Mexican prison records do not accurately reflect the amount of creditable work I did while in Mexican prisons in connection with the transferring offense and sentence?*

You should work with the consular officer responsible for prison matters in your consular district to cure any material errors in your work credit records. It should be noted that special attention is presently being given to the Lecumberi work credit situation and to work credit policies at the prisons where offenders are given no opportunity to earn work credit because of the unavailability of creditable work.

39. *Can you give me an example of a hypothetical case in which a transferring prisoner could expect to qualify for mandatory release upon transfer under the Treaty?*

Yes. A prisoner sentenced to ten years who has served four years and six months and who has earned work credits at the rate of fifteen days per month, upon transfer, would be mandatorily releasible as if on parole pursuant to the following computation:

120 months	(Sentence)
-40 months	(United States good time credit)
-27 months	(Mexican work credit)
-54 months	(Mexican prison time)
-1 month	(Excess time served)

40. If I will be mandatorily releasible as if on parole upon transfer to the United States under the Treaty, when can I be expected to be released on parole?

We hope to have all transferring prisoners who are mandatorily releasible released to parole status within two weeks of their transfer to the United States.

41. Is there any difference between being released on parole after having served two-thirds of a sentence in excess of five years, and being mandatorily released upon expiration of sentence less credits?

Yes. First, release upon service of two-thirds of a sentence requires a decision by the Parole Commission and the possibility of a parole hearing. Mandatory release does not require any decision by the Parole Commission or the possibility of a hearing of any kind. Second, mandatory release applies regardless of the length of a prisoner's sentence, whereas release after service of two-thirds of sentence applies only to sentences in excess of five years. Third, prisoners mandatorily released will be released from parole 180 days before the completion of their total sentence, whereas prisoners released after service of two-thirds of their sentence will be continued on parole until completion of their full sentence unless the Parole Commission determines that they should be released from supervision (see Question 43 below).

42. Will I be informed of the maximum time I would have to serve in prison in the United States if I transfer under the Treaty and am not granted parole by the Parole Commission?

Yes. As part of the pre-transfer processing interview described below (see Question 51 below), your approximate mandatory release date based on documented Mexican work credit and United States regular good time credit will be computed and provided to you. This computation will be based on the assumption that your conduct in a United States prison(s) will not result in the forfeiture of good time credit. However, it will not take into account extra credit you may be able to earn for work in a United States prison(s). Such extra credit can be earned at the rate of three days per month for the first year in an extra credit program, and at the rate of five days per month after the first year in such a program. The earning of such extra credit, of course, will advance your mandatory release date.

43. *If I am released on parole, how long will I have to remain under parole supervision?*

Normally, for not less than two years nor more than five years unless the expiration of the maximum sentence occurs before two years from the date of release on parole. However, the Parole Commission on its own motion or upon the request of a parolee may terminate parole supervision sooner than two years, and if it determines there is a likelihood that a parolee will engage in criminal conduct, it can extend parole supervision beyond five years. In no case, however, can the parole of prisoners transferring under the Treaty be extended beyond the date at which it would have terminated according to the transferring sentence.

44. *If I am not released on parole pursuant to the parole hearing which will be held at the United States prison to which I am initially transferred, will the Parole Commission inform me as to when I can expect to be released on parole?*

Yes. If at the time of your initial parole hearing you have less than four years to serve before your mandatory release date, or if your original sentence was less than seven years, and if you are not released on parole at that hearing, the Parole Commission will give you a "presumptive release date" which is the latest date at which you can expect to be paroled if you observe all prison rules and regulations. In addition, it also is possible that your conduct in the United States prison could result in your being paroled in advance of this presumptive release date.

45. *If I am not released on parole as the result of my initial parole hearing, when can I expect to be accorded another parole hearing?*

If your original sentence was less than seven years, the Parole Commission is required to hold a parole hearing within eighteen months of your last parole hearing. If your original sentence was seven years or longer, it is required to hold a parole hearing within twenty-four months of your last hearing. In special circumstances, upon petition by a prisoner, the Parole Commission may grant a hearing before the date originally scheduled for such a hearing.

46. *If I am not paroled as the result of my initial parole hearing, will I be told why?*

Yes. The Parole Commission is required to provide you in writing its reasons for denying parole.

47. If I have further questions concerning parole under United States law, where can I find the answer?

Part II of this booklet should answer almost any other question you have with regard to the operation of parole under United States law. Any other questions of general nature you may have with regard to the operation of these laws should be asked during the pre-transfer processing interview described below. See Question 51 below. If you have any questions of a personal nature with respect to the applicability of these laws to you that have not been answered by the general answers provided in this booklet and in the pre-transfer processing interview, you will be afforded the opportunity to consult with counsel concerning these questions prior to your final consent to transfer under the Treaty. See Question 56 below.

48. If I meet all of the eligibility requirements for transfer, is there any action I must take in order to be considered for transfer under the Treaty?

Yes. In order to be considered for transfer under the Treaty, the Mexican government must notify the United States government that you wish to be considered. The Mexican government is determining your desire to be considered by your response to a non-binding inquiry form which it has provided or will provide to every eligible prisoner and every prisoner who will become eligible upon the completion or termination of pending appeals and amparos. Unless you sign this form, you cannot be considered for transfer under the Treaty.

49. If I sign the inquiry form provided by the Mexican government, thereby indicating my interest in transferring under the Treaty, will I be forced to transfer if I later decide I don't want to?

No. The inquiry form is not binding on anyone. The only consent that will be binding on you is the consent you give at formal verification proceedings which will be held shortly before the actual transfer to the United States takes place.

50. Will I be interviewed by any United States officials, other than consular officers, before I am transferred?

Yes. It is anticipated that teams of Department of Justice attorneys and United States Bureau of Prisons officials will interview each prisoner who has been sentenced,

has no pending appeal or amparo, and has signed the Mexican government's inquiry form. We also anticipate interviewing the great majority of prisoners with pending appeals or amparos. These interviews will not commence until such time as it appears probable that Congress will act favorably on the implementing legislation within four to six weeks of the commencement of such interviews.

51. What is the purpose of these interviews?

The purpose of these interviews is:

(a) To answer questions of a general nature which you may have with respect to the operation of the Treaty and the implementing legislation;

(b) To permit expedited parole processing after transfer by obtaining the information essential for the conducting of parole background investigations in your places of residence and employment in the United States;

(c) To assist in prison assignment decisions should you not be released on parole from the federal institution to which you are initially transferred;

(d) To provide you with information as to the maximum time you will have to serve in a United States prison with respect to the transferring sentence assuming your observance of prison rules and regulations in the United States (i.e., your probable mandatory release date);

(e) To obtain a firmer, but non-binding, indication of your intention to transfer under the Treaty to assist us in planning for the formal transfer processing and the transfer itself; and,

(f) To obtain an indication of your desire to consult with a lawyer appointed by a United States Magistrate (probably from the ranks of United States federal defenders) to enable us to advise the Magistrates as to how many such prisoners desire to consult with such a lawyer and how many such lawyers would be necessary. In this regard, it should be noted that such a lawyer will be appointed only if you are financially unable to retain your own lawyer.

52. Will I be fingerprinted by the interview team in connection with my interview?

If no adequate fingerprint card is readily available

from Mexican authorities, the interview team will ask you to be voluntarily printed [illegible].

53. *For what purpose would [illegible] such fingerprints?*

Such fingerprints would be used for two basic purposes. First, because parole background investigations cannot be completed without a criminal history check based on fingerprints, not obtaining your prints in connection with this interview would be likely to delay your parole processing after transfer to the United States. Second, the United States government would prefer to advise you prior to your formal transfer decision as to whether there are warrants for your arrest pending in the United States which you could expect to be served on you after you transfer to a United States prison, insofar as such warrants are contained in the FBI's computer system. Since your fingerprints are required in order to assure the accuracy of such a check of the FBI's computerized arrest warrant records, such a check will not be undertaken until an adequate set of fingerprints has been provided to the United States government. It also should be noted that part of your in-processing into a United States prison will involve your being fingerprinted.

54. *What would happen to me if I refuse to be voluntarily fingerprinted by the interview team?*

Your refusal to be fingerprinted voluntarily by the interview team will in no way impair your eligibility or ability to transfer under the Treaty. However, it will be likely to delay your parole processing after transfer, and the United States government will not undertake to inform you, prior to transfer, of any outstanding warrants for your arrest.

55. *If I know I am informed of a warrant for my arrest in the United States, is there any practical difference between transferring under the Treaty and serving the remainder of my sentence in a Mexican prison?*

Possibly. To the extent that your transfer to the United States will permit such pending warrants to be disposed of at an earlier date, it may be advantageous for you to transfer. If you are convicted of the charges pending against you in the United States, there is also the possibility that your sentence on these charges might be made to run concurrently with the remainder of your Mexican sentence

if you transfer under the Treaty. In any event, if you are not also a Mexican citizen, it is likely that you will be deported to the United States upon your release in Mexico. If you are deported in this manner, it is likely that you will be arrested on the pending warrants upon entering the United States.

56. *If I cannot afford my own lawyer, will I be given a chance to consult with a lawyer not connected with the executive branch of the United States government prior to making my final decision as to whether to transfer under the Treaty?*

Yes. If you cannot afford your own lawyer and you desire to consult with a lawyer prior to making your final decision with respect to consenting to transfer under the Treaty, a United States Magistrate will appoint one. Most, if not all, of such lawyers will be United States federal defenders experienced in matters relating to the federal criminal law, the federal parole system, and the federal prison system.

57. *At what point in the transfer processing can I expect to be given the opportunity to consult with such a lawyer?*

It is anticipated that you will be accorded the opportunity to consult with such a Magistrate appointed lawyer from one to three weeks before you will be asked for your formal consent to transfer under the Treaty.

58. *Will there be any formal proceeding at which I will be asked if I wish to transfer under the Treaty?*

Yes. Prior to transfer to the United States, there will be a formal verification proceeding, presided over by a United States Magistrate, at which you will be formally advised of the conditions relating to transfer under the Treaty. The Magistrate will ask you if you understand those conditions, and if understanding them, you consent to transfer under the Treaty. The Magistrate will further assure himself of the voluntariness of your consent to transfer by asking you whether your decision was the result of any promises, threats, or improper inducements. He also will assure himself of your awareness of your right to consult with a lawyer concerning your decision to consent to transfer under the Treaty, and if you have consulted with a lawyer, whether you have any further questions you wish to ask him before you give your formal consent to transfer to the Magistrate.

59. What specific conditions of transfer under the Treaty will the Magistrate make sure I understand in the course of the verification proceeding?

(a) That only Mexico has the authority to modify or set aside your conviction or sentence, and any proceedings seeking such action may only be brought in Mexico;

(b) That your sentence will be carried out according to the laws of the United States, and that those laws are subject to change;

(c) That if a United States court should determine, as the result of a proceeding brought by you or on your behalf, that your transfer was not accomplished in accordance with the Treaty or the laws of the United States, you could be returned to Mexico for completion of your sentence if Mexico should request your return; and,

(d) That you consent to transfer, once verified by the Magistrate, is irrevocable.

60. What record of my consent to transfer under the Treaty will be made at the verification proceeding?

Several different records of your consent to transfer will be made at these proceedings. First, the proceedings themselves will be tape recorded. Second, you will be required to sign a Mexican government form and a United States government form reflecting your consent.

61. Where will this verification proceeding take place?

The verification proceeding will take place in the Mexican prison in which you are incarcerated at the time of the proceeding. It is anticipated that for the purposes of the holding of these hearings and to facilitate the physical transfer of the prisoners electing to transfer under the Treaty prisoners preliminarily indicating their intention to transfer will be consolidated in a limited number of prisons throughout Mexico. It also is possible that this consolidation may take place as early as the first or second week after the exchange of ratifications of the Treaty in order to facilitate consultation with legal counsel. However, as yet, the details of the timing of the consolidation and the specific Mexican prisons which will be used for this purpose have not been worked out by the respective governments.

62. If verification proceedings will not be conducted in the prison in which I am presently incarcerated, must I do anything in order to be moved to a prison in which they will be held?

The Mexican government has informed us that no prisoner will be moved for purposes of facilitating transfer under the Treaty without the prisoner's consent. At this point, the respective governments have not determined whether your signing of the initial inquiry form will be sufficient consent for this purpose, absent a subsequent indication to Mexican authorities that you do not desire to transfer. If a separate request is necessary for you to be moved to a Mexican prison at which verification proceedings will be held, a consular officer responsible for prisoner matters in your consular district will advise and assist you in this regard.

63. What if I don't consent to be moved to a Mexican prison at which verification proceedings are to be held?

Your refusal to consent to be moved to such a prison will be regarded as a refusal to consent to transfer under the Treaty.

64. If I have any remaining questions which I would like to discuss with legal counsel before I formally consent to transfer at the verification proceeding, will I have an opportunity to do so?

Yes. If you are financially unable to obtain your own counsel, lawyers appointed by the Magistrates will be available to answer your last minute questions at the Mexican prisons at which the verification proceedings will be held. However, because of the scheduling pressures which necessarily will connected with the holding of these proceedings and the transfer of prisoners to United States prisons, it is strongly urged that you consult with legal counsel at the earliest possible date. If you are financially able to retain your own counsel, such consultation prior to the verification proceedings should present no problem. If you are financially unable to obtain your own counsel, you will have an opportunity to consult with a lawyer appointed by a Magistrate a few weeks before the holding of the verification proceedings.

65. After I formally consent to transfer under the Treaty, how long can I expect to remain in a Mexican prison before transfer to a United States prison?

It presently is anticipated that the actual transfer of prisoners to United States prisons will take place within a few days of the verification proceedings, and in no event more than one week from the holding of such proceedings.

66. To what United States prison can I expect to be first taken upon transfer under the Treaty?

No final decision has been made as to the particular prisons that will be used to receive the initial transferees under the Treaty, although it is likely that most, if not all, of these prisons would be in the southwestern quarter of the United States. In any case, if you are released on parole directly from such a prison, you will be provided with a ticket for transportation to your former place of residence or other approved place for release on parole; unless you have made other arrangements on your own. See Question 31, Part III.

67. If I am not released on parole directly from the United States prison to which I am initially transferred, will I remain in that prison or be reassigned to another federal prison?

If you are not released on parole directly from the prison to which you are initially transferred, your assignment of prison will be reviewed to determine whether you should be assigned to another federal prison.

68. What criteria would be used in determining the federal prison to which I would be assigned if I am not released on parole directly from the prison to which I was initially transferred?

The criteria governing your assignment to another federal prison are set forth in Question 33 Part III of this booklet.

69. What can I expect to happen to me when I arrive at the United States prison to which I am initially transferred?

You will be in-processed in the manner described in Question 1, Part III of this booklet.

70. Generally, what rules are applicable to federal prisoners in the United States?

Part III of this booklet answers the principal questions asked by prospective inmates of federal correctional institutions. If you have any additional questions concerning the general operation of such United States prisons, they should be asked of the United States Bureau of Prisons official assigned to the pre-processing interview team which interviews you.

71. What personal property may I take back with me to the United States if I transfer under the Treaty?

It is anticipated that there will be a limit of one duffle bag or two standard-sized suitcases per person. Other arrangements should be made for any other personal property you have in prison in Mexico. It should be noted that there will be both a Customs and a Bureau of Prisons inspection of whatever you bring back with you when you enter the United States.

72. What personal property will I be able to keep upon arrival at the United States prison to which I am initially transferred?

See Questions 10 through 13, Part III. It should be noted, however, that because a significant number of those transferring in the initial transfer under the Treaty will be mandatorily releasible or will be otherwise paroled directly from the federal prisons to which they are initially brought, the personal property of prisoners transferring under the Treaty may be held by the prison authorities, rather than shipped home, until such time as it is determined whether or not the prisoners will be paroled directly from such institutions.

73. If after I transfer I decide that I'd rather serve the rest of my sentence in Mexico rather than in the United States, is there any way I can either revoke my consent or otherwise transfer back to Mexico?

Since your consent, once verified by a Magistrate at a verification proceeding, is irrevocable, you cannot simply revoke your consent and transfer back to Mexico. However, you can bring a court action challenging the validity or legality of your transfer to the United States, which, if successful, could result in your being returned to Mexico for the service of the remainder of your sentence. The probable success of such an action is, at best, highly conjectural.

74. *If I am not eligible to transfer in connection with the initial transfer under the Treaty because of the pendency of an appeal or amparo with respect to my conviction or sentence or because I have not yet been convicted, will I be able to transfer at a later date if such an appeal or amparo does not result in my release in Mexico or if I am subsequently convicted?*

Yes. The Treaty is to have continuing applicability, thereby enabling prisoners who are not eligible for the initial transfer under it to transfer at a subsequent date. However, should United States courts hold the Treaty to be unconstitutional, or should they otherwise render it meaningless by generally accepting challenges to the validity or legality of the underlying Mexican convictions, then it can be assumed that Mexico will refuse to permit any other United States citizens who have been convicted and sentenced by its courts to transfer under the Treaty.

75. *If I am not presently eligible to transfer under the Treaty, how soon after I become eligible to transfer can I expect to be able to transfer?*

Plans for transfers subsequent to the initial large transfer are only in the earliest stages of formulation. Therefore, it would be premature to make any commitment as to the mechanics of such subsequent transfers.

76. *If I decide not to transfer at this time, even though I am eligible to do so, will I have an opportunity to transfer at a later date should I change my mind?*

Yes, unless the Treaty becomes ineffective for the reasons set forth with respect to Question 74 above.

PART II

Questions and Answers Concerning the Operation of United States Parole Laws

1. What is parole?

Parole is the serving of part of your sentence under supervision in the community. The law says that the Parole Commission may grant parole if (a) the inmate has substantially observed the rules of the institution; (b) his release would not depreciate the seriousness of his offense or promote disrespect for the law; (c) his release would not jeopardize the public welfare. Parole is like probation except that a parolee has been committed to prison and has completed a part of his sentence in an institution.

2. What is the purpose of parole?

Parole has a three-fold purpose: (1) through the help of the United States Probation Officer, each parolee may obtain help with his problems centering about his job, residence, finances, and other personal problems which often trouble a person trying to adjust to life "on the streets;" (2) parole protects society because it helps former prisoners get established in the community and thus prevents many situations in which they might commit a new offense; and (3) parole prevents needless imprisonment of those who are not likely to commit further crime and who meet the criteria for parole set forth in the answer to question 1, above.

3. What does "parole eligibility" mean?

You become "eligible" for parole according to the type of sentence you received from the court. Your "parole eligibility" date is the *earliest* time you might be paroled. If the Parole Commission decides to parole you it will set the date of your release, but that date must be on or after your "eligibility" date.

4. How can I tell when I become eligible for parole?

You are eligible at any time. Your application will be considered at the time of your first appearance before an Examiner panel of the Parole Commission.

5. How do I apply for parole?

You must fill out and sign an application for parole furnished to you as a part of your in-processing after transfer to the United States.

6. What if I do not wish to apply for parole?

You should sign a waiver instead of a parole application. If you should later change your mind you may apply and have a hearing at the next regularly scheduled meeting by an Examiner panel, provided you apply at least 45 days before the month in which the panel is scheduled to visit your institution. Hearings for juveniles may not be waived.

7. How will I know when my hearing will be held?

You will be given a *Notice* before your hearing is scheduled.

8. Will I be allowed to see my file before the hearing?

The *Notice* of your hearing will tell you that you may ask to see your file before the hearing. Certain parts of the file are exempted by law from being shown to you. Such exempted parts will be summarized, however, and the summary furnished to you if you ask to see your file. If you ask to see your file, or part of it, you may inspect any documents, except the exempted ones, which the Parole Commission uses as a basis for its decision about your parole. A Bureau of Prisons caseworker can explain what types of material are exempted by law, and can assist you in requesting your file review. He can also tell you about the possibility of reviewing your file at some time other than just before your parole hearing.

9. May I have someone go into the hearing room with me?

The *Notice* of the hearing provides a place for you to name someone as your representative at the hearing. You must have his permission, however, and you must give him enough time to plan for his appearance. He may enter the hearing room with you and make a brief statement on your behalf. Should you decide not to have a representative your caseworker will provide a waiver form for you to sign.

10. Who else will be present at the parole hearing?

Present at the usual parole hearing is a panel of two Examiners who are members of the staff of the Parole Commission and a caseworker. Observers may ask to come into the hearing room occasionally, and these are usually members of the institution staff or personnel of the Parole Commission.

If you have been released on parole and the hearing is to deal with a possible violation of parole, you should turn to the answers to questions 46 and 47 of this section.

11. What goes on at a parole hearing?

The hearing is an opportunity for you to tell your own story and to express your own thoughts as to why you feel you should be paroled. Many subjects may come up during the course of the hearing. These may include such things as the details of the offense for which you were committed, your prior criminal history, the Guidelines which the Commission uses in making a parole decision, your accomplishments in the institution, the details of your release plan, and any problems you have had to meet in the past or are likely to face in the future. The Commission is interested both in the protection of society against further criminal behavior as well as your needs as an individual. There are no hard and fast rules about the content or length of the hearing.

12. Are the hearings recorded?

Yes, the interview is taken down by an automatic recording machine. The recording is kept confidential and no one other than Parole Commission personnel may listen to it without your permission.

13. When is a decision made concerning my parole?

The Examiner panel studies your case file both before and after your interview. In most instances they come to a recommendation (tentative decision) relative to parole as soon as the hearing is completed. If they cannot agree, the matter is sent to the Commission's Regional Office for further study. All recommendations of the panel are only tentative because a final review must be made at the Regional Office in every case. Usually within 21 days after the hearing (not counting holidays) you will be sent a *Notice of Action* telling what the official decision is.

14. How do the Examiners decide on a recommendation about parole?

The Examiners use their own judgment in addition to the Commission approved *Guidelines* to determine how long you should serve. In using the *Guidelines* three important factors must be considered. These are (1) the severity of your offense

behavior; (2) the "salient factor score" which cover items about you and help predict your chances of success on parole; and (3) your institutional adjustment and program performance.

15. Are the Examiners required to follow the Guidelines?

No, the *Guidelines* serve only as a general indicator for use during their deliberations. The Examiners may agree on any recommendations regardless of the *Guidelines*, but when they recommend a parole or continuance "outside" the time ranges called for in the *Guidelines* they must state in writing what the special reasons are which justify that recommendation.

In making their recommendations the Examiners take into account anything of importance relating to your case. Since no two persons' situations are alike, factors of importance in one case may not be important in another. Codefendants, for example, may not be handled alike because of their different backgrounds or other facts which make their cases different.

16. May I see a copy of the Guidelines and the "Salient Factor Score" sheet?

Yes, a copy is appended to this booklet.

17. How do any of the following situations affect my parole?

A. *Forfeited good time.* The law requires that a prisoner observe the rules of the institution in which he is confined in order to be eligible for parole. Forfeited statutory good time indicates that the institution rules have not been observed and the Commission's policy is to continue such a case for a later review.

Withheld statutory good time is also a poor argument for parole, but does not automatically disqualify the applicant from Commission consideration in the same manner as *forfeited* statutory good time.

B. *Presence of a detainer.* The presence of a detainer does not of itself constitute a reason to deny parole. If you otherwise should be paroled you may be paroled "to the detainer or an approved plan." In that event you will be released to the physical custody of the state or local authorities; or, should the detainer be dropped, to your plan for community living.

In other cases, you may be paroled "to the detainer only." In those cases, should the detainer be dropped, the individual will not be released and a further review will be made by the Commission.

C. Education or vocational training program not finished by the time of the hearing. The person who has obtained more education and acquired a new job skill can present two good reasons for release on parole. If he has finished his course, these arguments are even stronger. The needs of the individual are the deciding factor; in other words, a person whose past failures have been directly related to a lack of education and/or vocational skill may be required to complete a course which a better educated and more skilled person does not need as much. Release dates are seldom determined, however, on this basis alone.

18. Will I be given the reasons if I am not paroled?

Yes, the Examiners will discuss their tentative decision with you at the time of your hearing, and the *Notice of Action* will state the reasons for continuing your case rather than paroling you. It will also state the reasons if the Commission continues you outside the normal ranges called for in the *Guidelines.*

19. If I am not paroled will I be given another hearing?

Within limits, you will be continued for as long as the Commission feels is proper in your case. By law, however, if your sentence is less than seven years you cannot be continued longer than 18 months from the time of your last hearing. If your sentence is seven years or more you cannot be continued longer than 24 months from the time of your last hearing.

20. What if I decide I do not want to have a review hearing?

If the Commission continues you until a future month you will appear as scheduled in or near that month unless you sign a waiver form. If you waive the review hearing you will not be heard again unless you submit a new application for parole. See answer to question 6.

21. If I am not paroled may I appeal the decision?

Yes, within 30 days of the date on your *Notice of Action* you may file an appeal with the Regional Commissioner for the

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area in which your institution is located. Your caseworker can supply you with the form used for this purpose. There are seven bases for such an appeal: (1) technical misapplication of the Guidelines; (2) decision outside Guidelines not supported by facts; (3) mitigating factors justify a different decision; (4) decision based on erroneous information; (5) incorrect decisional procedure resulted in wrong decision; (6) new evidence; and, (7) more lenient decision justified on grounds of compassion.

After receiving your appeal the Regional Commissioner may affirm, reverse or modify the Examiner panel's decision, or may order a new institutional parole hearing. He may also order a regional appellate hearing if he feels one is necessary.

22. *If the Regional Commissioner does not parole me, may I appeal higher?*

Yes, on the same basis of your first appeal and without raising any new issues, you may appeal your case to the National Appeals Board in Washington, D. C. This appeal must be filed within 30 days from the date of the original *Notice of Action on Appeal* which you receive from the Regional Commissioner. The appeal form is sent to the Regional Office of the Commissioner so your file can be forwarded to Washington along with your appeal. A decision by the National Appeals Board is final.

23. *If the Commission does not parole me earlier, may I be paroled later on near the end of my term?*

If your sentence is five years or longer the law provides that you will be paroled by the Commission when you have served two-thirds of your term or terms, unless the Commission makes a finding either that (1) you have seriously or frequently violated institution rules and regulations, or (2) there is a reasonable probability that you will commit a further crime.

24. *Will I be given a hearing just before my "two-thirds" date?*

Your case will be reviewed "on the record" (or at a regular hearing if it is held shortly before your "two-thirds" date arrives) and a decision relative to parole may be made without a special "two-thirds" hearing. If you are not paroled on the basis of a "record review" you will be scheduled for a personal hearing when the Examiner panel next visits the institution. A decision about parole will then follow that hearing.

25. May I waive parole at the two-thirds point of my sentence?

No. Unless the Commission finds that you do not qualify for parole (as stated in question 23) you must be paroled according to law.

26. If I am paroled after two-thirds of my sentence must I comply with the parole conditions like any other parolee?

Yes. You must abide by the conditions of release, and your parole may be revoked if you violate any of them. You will remain under supervision until the expiration of your sentence with no reduction of time unless the Commission terminates supervision earlier as described in question 39 below. The reduction of supervision time by 180 days provided by the mandatory release laws does not apply to this type of parole.

27. If parole is not granted to me at any time on my sentence when do I go out?

Unless you continue to have forfeited statutory good time you will go out on Mandatory Release. The Mandatory Release date is computed by the institution officials according to how much statutory good time you are entitled to, how much "extra good time" you earn, and how much work credit you earned in prison in Mexico. The law states that a mandatory releasee "shall upon release be treated as if released on parole and shall be subject to all provisions of the law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced, less 180 days." This means you should have a release plan as if you were going out on parole, and you will be supervised by a United States Probation Officer as if you were a parolee -- until 180 days before the expiration date of your sentence.

If you are not paroled and have less than 180 days left on your sentence when you are released, you will be released without supervision.

28. If the Parole Commission paroles me when will I be released?

If your parole plan is complete and has been approved by the Parole Commission following an investigation by the United States Probation Officer, you will be released on the date set by the Commission (assuming, of course, that your parole is not retarded or rescinded for misconduct or for some other reason). If your plan is not approved your release may be delayed

regardless of the effective date which the Commission sets when it granted your parole. An investigation by a United States Probation Officer will commence upon receipt of the information received as the result of your pre-transfer interview.

29. What type of release plan must I have?

Your release plan should normally include a suitable residence and a verified offer of employment. A parole advisor is necessary only if the Commission or the United States Probation Officer specifically says that one should be obtained.

There are exceptions. For example, a definite job is sometimes neither necessary nor possible; the Commission always considers the individual's situation and may waive this or any other standard requirement if it sees fit to do so. On the other hand, special requirements may be added and must be met before release.

30. How can I get a job while I am still in the institution?

Relatives, friends, social agencies in the community you wish to live in or former employers are the ones to contact. Community Programs Officers in the field may be able to help you before release and afterwards as well. If you are released through a Community Treatment Center you may find a job while there. Job offers are investigated by the United States Probation Officer to whom you will report, and that officer reports back to the institution and the Parole Commission.

31. What types of jobs are suitable for a parolee?

In a particular case the Parole Commission may rule specifically against a certain occupation (for example, alcoholics are not encouraged to work as bartenders) but otherwise any legitimate employment is acceptable. Fulltime work is preferable to part-time; work done continuously at one location generally is better than work which makes travel necessary; and of course, a good job calls for the skills you have and provides enough income for yourself and your dependents.

32. What can I do if I have no home to go to?

The Commission is interested in your having a suitable place to live. Sometimes this is with family or relatives but in other cases the Commission may consider an apartment, hotel, or rooming house more suitable. There is no rigid rule which requires that you be paroled to your home if you have one, or that you cannot be paroled if you do not.

33. Must I return to the community from which I came?

In most cases your former community offers the best opportunity for the help and support you will need. If the Commission believes, however, that your chance of success on parole is greater in some other community you need not return to your home community. Sometimes your "old home town" is a poor prospect for any of several reasons -- jobs may be lacking, or former undesirable associates may be numerous, to give two examples.

34. After I am released, to whom and when do I report?

Unless you are released to a detainer, you go to your approved residence and report within three days to the United States Probation Officer shown on your release certificate. If you live in a rural area and cannot report in person you must immediately mail the *Notice of Release and Arrival* form which will be given to you at the institution to your Probation Office.

You continue to report to your Probation Officer as instructed by him; in addition, monthly written reports are required as long as you remain under supervision on your sentence.

35. Upon what conditions am I released on parole or mandatory release?

They are printed on the back of the release certificate presented to you when you are released; a copy of the conditions can be found at the end of Part II of this booklet. Special conditions, if any, will be typed on the back of your *Certificate of Release.*

36. May any of the conditions of release be changed by the Commission?

If you feel the conditions on the reverse of your

Certificate of Release are unfair you may ask your caseworker for an appeal form and submit it to the Regional Commissioner within 30 days after you are released. He will consider your appeal and let you know what his decision is. While your appeal is pending you must continue to abide by the conditions imposed.

37. After I am released may any of the conditions be changed; or can additional ones be imposed?

The Probation Officer or the Commission itself may propose changing or adding to the conditions. You will be notified of any such proposal and will be allowed ten days (if you need that much time) to make any written comments you wish to the Commission. A form for this purpose will be available and you can use it for your comments if you wish.

You may write directly to the Commission (with a carbon copy to your probation officer) if you wish to have any of the conditions amended or deleted and your request will be considered.

38. May I be required to go into a half-way house or undergo some course of treatment for drug or alcohol use while under supervision?

The Federal laws permit the Commission to require you, when necessary, to participate in any of the programs you mention for all or part of your time under supervision. In any such case, however, you will be notified in advance and may submit your comments about the proposal to the Commission before the final decision is made.

39. How long will I remain under supervision after my release?

If you are paroled, you will remain under the jurisdiction of the Parole Commission and under supervision of your Probation Officer until the maximum expiration date of your sentence, unless the Commission terminates supervision earlier. If your supervision is terminated early, you will be presented with a *Certificate of Early Termination.*

If you are not paroled and are instead mandatorily released, your supervision automatically ends 180 days before the maximum term date, unless the Commission terminates your supervision earlier and issues you a *Certificate of Early Termination.*

40. How does the Commission decide whether to terminate my supervision early?

Your Probation Officer will submit annual reports to the Commission about your adjustment in the community. After reading those reports, including any of his recommendations, the Commission may decide to terminate your supervision early. By law, the Commission must consider your case after your second year in the community (not counting any time spent in confinement since your release), and every year thereafter.

After five years of supervision in the community the Commission must terminate your supervision unless it finds that there is a likelihood that you will engage in conduct violating any law. Any finding of that nature will be made only after you have had an opportunity for a personal hearing.

41. What happens if I violate the conditions of parole or mandatory release?

Your Probation Officer reports the violation to the Parole Commission's Regional Office and the Regional Commissioner decides whether to issue a warrant for your arrest or a summons for you to appear at a hearing. The Probation Officer is required to report any and all violations, but may recommend that you be continued under supervision. His recommendation (either for or against a warrant or summons) is one of the factors considered by the Commission in its decision.

42. Who issues a warrant or summons if I violate parole or mandatory release?

Only a Parole Commissioner may issue a warrant or a summons for a violation of the conditions of release.

43. After a warrant or summons is issued, what happens then?

You are taken into custody (or voluntarily appear at a hearing). Such custody is usually served in the nearest government approved jail or detention center. Unless you have been convicted of a new offense, a Probation Officer will then visit you to advise you of your legal rights and to conduct a preliminary interview with you. He will discuss the charges which have been placed against you and then submit a report to the Commission recommending whether you should be reinstated to supervision, or whether there is "probable cause" that a violation actually did occur and whether you should continue to be held in custody pending a revocation

hearing. He will advise you what his recommendation is and the basis for it.

After his report is received, the Regional Commissioner will either order you reinstated to supervision or order you held for a revocation hearing by a panel of Examiners.

If you had been convicted of a new offense you are not entitled to a preliminary interview because the conviction is sufficient evidence that you did violate the conditions of your release. In such case you may be transported without delay to a Federal Institution for your revocation hearing.

44. May I have an attorney and witnesses at my preliminary interview and revocation hearing?

Yes, you are entitled to an attorney of your choice (or have one appointed by the court if you request one because you cannot afford to pay for one). Any voluntary witnesses requested by you may also be present if they have information about your alleged violation. It is your responsibility to keep your attorney and/or witnesses advised as to the time and place of the hearing.

45. Where are the revocation hearings held?

Generally, revocation hearings are held after your return to a federal institution. Such institutional hearings are held within 90 days from the time you were taken into custody on the basis of the Commission's warrant.

If there are sufficient reasons to do so, the Commission may make an exception and hold your revocation hearing in your own community or in the community where you were arrested. You will be entitled to such a hearing only if you deny that you violated any of the conditions of release and if you were not convicted of a crime while under supervision. If you request a local revocation hearing you must complete a form which will be provided to you for that purpose. There is a penalty for false answers on this form, and a denial of violation must be honestly made. Local revocation hearings are held within 60 days from the date the Regional Commissioner finds "probable cause" that you did violate parole or mandatory release.

46. May I have the Probation Officer, the police officer or anyone else who submitted information about me present at the revocation hearing?

You have the right to ask for such "adverse witnesses"

at a local revocation hearing and they will be either invited or subpoenaed to appear unless the Commission feels they should not appear and has cause for not having them there. Any such witnesses may be cross-examined by you or your attorney. If the Commission feels any such adverse witnesses should not appear they might be asked to submit a statement instead, and you would be allowed to see such statement.

47. If my hearing is held in a Federal institution rather than locally may I also have an attorney and witnesses?

Yes, except that you are not entitled to "adverse witnesses" at an institutional hearing.

48. If the Commission revokes my parole or mandatory release do I get any credit on my sentence for the time I was under supervision?

Yes, you will be credited for all of the time you were under supervision in the community.

49. If I am revoked rather than reinstated to supervision or if I am not reparoled immediately, what is the maximum amount of time I will be required to serve?

The remaining time of your Mexican conviction less "good-time credits" from time you were retaken in custody.

CONDITIONS OF PAROLE

1. You shall go directly to the district shown on this CERTIFICATE OF PAROLE (unless released to the custody of other authorities). Within three days after your arrival, you shall report to your parole advisor if you have one, and to the United States Probation Officer whose name appears on this Certificate. If in any emergency you are unable to get in touch with your parole advisor, or your probation officer or his office, you shall communicate with the United States Parole Commission, Department of Justice, Washington, D.C. 20537.

2. If you are released to the custody of other authorities, and after your release from physical custody of such authorities, you are unable to report to the United States Probation Officer to whom you are assigned within three days, you shall report instead to the nearest United States Probation Officer.

3. You shall not leave the limits fixed by this CERTIFICATE OF PAROLE without written permission from the probation officer.

4. You shall notify your Probation Officer within two days of any change in your place of residence.

5. You shall make a complete and truthful written report (on a form provided for that purpose) to your probation officer between the first and third day of each month, and on the final day of parole. You shall also report to your probation officer at other times as he directs.

6. You shall not violate any law. Nor shall you associate with persons engaged in criminal activity. You shall get in touch within two days with your probation officer or his office if you are arrested or questioned by a law-enforcement officer.

7. You shall not enter into any agreement to act as an "informer" or special agent for any law-enforcement agency.

8. You shall work regularly unless excused by your probation officer, and support your legal dependents, if any, to the best of your ability. You shall report within two days to your probation officer any changes in employment.

9. You shall not drink alcoholic beverages in excess. You shall not purchase, possess, use, or administer marihuana or narcotic or other habit-forming or dangerous drugs,

unless prescribed or advised by a physician. You shall not frequent places where such drugs are illegally sold, dispensed, used or given away.

10. You shall not associate with persons who have a criminal record unless you have permission of your probation officer.

11. You shall not have firearms (or other dangerous weapons) in your possession without the written permission of your probation officer, following prior approval of the United States Parole Commission.

PART III

Questions and Answers Concerning the Operations and the Rules and Regulations of the United States Federal Prison System

1. *What will be the nature of the in-processing into the United States prison to which I am initially transferred?*

You will be issued clothing; be given a chance to shower; have a preliminary physical examination to be followed at a later date by a thorough physical examination; have your personal property inventoried; have your money taken, receipted for, and deposited in an inmate account; and, be issued bedding and toilet articles. You will have to fill out various forms relating to your imprisonment. You will be photographed and fingerprinted. And, you will be given briefings and instructions on institution rules and what is expected of you by the institution.

2. *If I am eligible for mandatory release, when can I expect to meet with institutional personnel with respect to my processing for such release?*

It is anticipated that the release processing of prisoners transferring under the Treaty who are eligible for mandatory release will commence within a few days of their transfer, and be completed within two weeks of their transfer barring unforeseen problems. You will meet with institutional personnel during this period with respect to such processing.

3. *I will not be eligible for mandatory release at the time of transfer, but like all transferring prisoners I will be eligible for parole. What arrangements will be worked out for the scheduling of a parole hearing for me?*

One of the forms you will be requested to complete as part of the in-processing procedure will be an application for parole. You must complete this form in order to be given a parole hearing. As discussed in Part I, Question 26, it is anticipated that every transferring prisoner, who is not mandatorily released, will be accorded a parole hearing within one to two months of transfer, and will know the Parole Commission's decision within two weeks of such a hearing.

4. *How soon may I write letters?*

You may write letters upon arrival at the institution. The institution encourages you to write the members of your family and close friends in the community.

5. Who can write to me and to whom may I write?

Open correspondence is authorized in all institutions for those inmates who do not use the mails for illegal activities or violate institution rules. Those who violate these conditions are subject to restricted correspondence.

6. How many letters may I write?

There is no firmly established limit to the number of letters you may send or receive. However, the institution staff will let you know if the number of letters you send becomes excessive.

7. May I write to my lawyer?

Yes. Your letter may be mailed through the Prisoners' Mail Box, sealed and uninspected, or through regular correspondence procedures.

8. May my lawyer visit me?

Yes, but you should make prior arrangements with your case manager.

9. When will I be permitted to have visits and from whom?

Normally members of your immediate family -- mother, father, brother, sister, wife and children -- may start visiting you immediately after you arrive at the institution. Other persons may be added to your visiting list at your request and with the approval of the appropriate institution staff member.

10. What personal property will I be permitted to keep upon arrival at the institution?

Virtually none. The institution is equipped to handle all your needs and does not have space for storage. Almost all personal property (including clothing, unless you donate it to the government) is shipped to your home. Among the few exceptions to this would be eyeglasses, dentures, and similar items required for your physical well-being and plain wedding rings. There are, however, some minimum security institutions which allow the wearing of personal clothing. The personal property of those prisoners who are expected to be mandatorily released, however, will probably be retained at the institution until such release.

11. How much money may I take with me to a Federal institution?

There is no specific limitation. However, the institution authorities prefer, when an inmate has a large sum of money (say a thousand dollars or more), that he leave most of it on deposit in the community or with his family. All money will be deposited in an account; you may not keep cash.

12. May I take cigaretts into the prison?

No. Any cigaretts that you may have in your possession when you arrive at the institution will be confiscated. However, free tobacco is immediately available and you will soon be given an opportunity to purchase cigaretts in the institutional commissary.

13. May I have a musical instrument?

You may not take your instrument with you to the institution. However, upon your arrival you may ask the educational supervisor if you are authorized to receive one; he will decide whether or not you should be accorded this privilege.

14. May my family send me presents?

Not normally. At Christmas the warden will issue special instructions to let you know what type of presents your family can send you.

15. Will I be able to earn money while in the institution?

There are two methods of earning while at the institution. One is through the Meritorious Service Award or Performance Pay programs, and the other is through the Industries program. Men on Meritorious Service Award payroll can receive from $5.00 to $50.00 each month. This award is granted to those inmates who set themselves above the general population in conduct, behavior, work and efforts to overcome the problems which contributed to their commitment to the institution. In the Industries program there are several levels of hourly wages. Industrial programs are in operation in most Federal institutions.

16. May I send money home from this Industries program?

Yes. One of the basis upon which inmates are selected for the Industries program is family need. In that situation the inmate is expected to sent most Industries earnings to dependents. If the family does not require these earnings the inmate is expected to save most for post-release assistance.

17. Is there a place in the institution where I can buy cigarettes, candies, cookies, shaving equipment, tooth paste, etc.?

Yes. This is known as the Commissary where many items of this nature are sold. It should be pointed out at this time that you are not allowed to retain cash in your possession while in the institution. The funds which you take with you into the institution, receive from outside sources, or receive through earnings are placed in your account in a United States Treasury Trust Fund. When you make purchases in the Commissary unit the cost of these various itmes are charged against your account.

18. How much may I spend a month in the Commissary?

The limit is now $60.00, and this limit is increased from time to time. Special purpose items (recreation equipment, etc.) may be obtained and not counted against the limit.

19. May I receive money from outside sources and from whom?

You can ordinarily receive funds from your correspondents, visitors, and such sources as income tax refunds, veterans benefit checks, etc.

20. What kind of treatment may I expect to receive from the prison personnel?

The personnel will treat you as a person entitled to a full measure of human dignity. It is their job to assist you in making full use of the institutional opportunities for self-improvement, and you are expected to go to see them whenever you have a personal problem, involving either your institutional program or your affairs outside the institution, on which you need counsel or assistance. Incidentally, it sometimes happens that a stranger in the

community (ex-prisoner, confidence man, etc.) will approach an inmate's family and suggest that upon payment of a specified sum he can obtain special institutional or parole privileges for the inmate. You should warn your family that all such representatives are spurious and that they should not pay anyone on such promises of favors. As a matter of fact any money paid over in this fashion will be lost and it may have unfortunate consequences in terms of the decisions ultimately affecting your welfare.

21. What will be expected of me at the institution?

You will be expected to keep your person and your personal living quarters clean and neat. You will be expected to get along with fellow inmates, to respond willingly and courteously to any direction that may be given you by staff members and to conduct yourself at all times as a morally responsible person. The customs and procedures of the institution will be explained to you during Admission and Orientation and you are expected to abide by these guides, so necessary when a large group of people must live together under relatively restricted circumstances. You should also be reminded that you are expected to honor all trust that may be placed in you to observe the prison regulations regarding contraband, and to make no effort to escape from custody. There is a statutory penalty of five years for escape or an attempt to escape from Federal custody, and there is also a statutory penalty of ten years for introducing or conspiring to introduce contraband into or upon the grounds of any Federal penal or correctional institution.

22. Will I have a job in the institution? If so, what kind?

Every able-bodied inmate is given a job assignment, and the nature of this assignment will depend upon the inmate's qualifications, interest, and his need for on-the-job training and to a certain extent the institution's requirements for certain types of services. Assignments may range from almost any type of trade to farm labor, hospital work, clerical occupations, truck driving and so on.

23. What vocational training will I be allowed to take?

Although training is available for most standard trades, your assignment to vocational training will depend on your aptitude for that training, the extent to which you need trade training, and the availability of the training. Sometimes, for example, the auto shop will have its full quota

of trainees, and further assignments there will depend on whatever vacancies may occur. But training opportunities will be offered you within a reasonably brief time following your commitment, and the extent to which you take advantage of them will largely be up to you.

24. May I go to school? If so, what schooling is available?

Yes. If you wish, you can earn a high school equivalency certificate which in most instances will be issued by the state in which the institution is located and the diploma will bear no indication that it was earned in an institution. College courses are available in many federal institutions.

25. Will there be opportunities for recreation?

Every Federal institution has a recreational program, which includes athletics, inmate forums, talent shows, movies, radio, television, and other activities intended to appeal to a variety of recretional interests. Most institutions have libraries and available reading material.

26. What about Medical and Dental Services?

A full range of health services are available for all inmates. Community services will be used if necessary. Serious medical conditions may require transfer to the Medical Center for Federal Prisoners at Springfield, Missouri or to the Federal Correctional Institution, Lexington, Kentucky.

27. May I make a phone call from the institution?

Yes. Each institution has an inmate telephone program which allows collect calls to family and friends. The procedure and frequency varies from institution to institution.

28. May I have a newspaper or magazine sent to me?

Yes. For specific details you should see the Supervisor of Education.

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29. What arrangements are made for haircuts?

The institution will provide barber services. Normally the timing for your haircut will be left up to you, but if you let your hair become unmanagable you may be reminded to get it cut. Beards are not allowed.

30. Will I be furnished money and clothing when I am released?

Yes, you may be furnished a set of discharge clothing and gratuity not to exceed $100.00, if needed, or you may be permitted to have clothing purchased and sent to the institution for release purposes. The actual amount of gratuity granted depends on the availability of other funds to you, the extent of your actual need, and similar considerations. However, if you are released to the custody of another jurisdiction, you will be given a form indicating that if you are discharged from this detainer before the end of whatever may be left of your Federal term you will be entitled to transportation, certain clothing and any gratuity approved.

31. When I am released, how will I be returned home?

The institution will provide you with a ticket for transportation to your legal residence or to your place of conviction or other locale as approved by the institution staff and local probation officer. If you request permission from your case manager soon enough, you may also arrange to have someone from your family pick you up at the institution by automobile. In the latter instance, however, the cost of transportation must be borne entirely by you or your family.

32. If I have state charges pending against me, will the state drop them if I am sentenced to a Federal institution?

That is left to the discretion of the State authorities; institutional staff will help you determine the answer to this question. If the state is a member of the Interstate Agreement on Detainers, you may file for a disposition under this agreement. Your case manager will assist you in this matter.

33. If I am not released on parole from the institution to which I initially transfer, how will the institution to which I will be ultimately assigned be designated?

Most designations are made by the central office staff of the Bureau of Prisons. Generally, you will be sent to an institution where there are other inmates of your age and background, and which has the type of program for which you are considered best fitted. If the institution to which you are initially transferred is far from your home, consideration will be given to your transfer to a suitable institution nearer your home at the time of your classification. Part of the institutional admission process is to totally review your situation to make sure that you are properly classified. Many factors are considered in transferring an inmate from one institution to another. Some of the most important factors are type and location of the institution and the age, prior record, length of sentence and type of offense of the individual inmate. In some cases inmates may be placed in appropriate institutions farther from their homes because of overcrowded conditions in institutions nearer their homes.

34. What type of clothing do inmates wear?

In some institutions the inmates wear khaki shirts and trousers; as previously indicated, some institutions permit the wearing of personal clothing. In severe climates inmates are issued jackets or mackinaws, as well as other appropriate heavy clothing, for winter wear.

35. How can I take care of my business while in confinement?

You must appoint someone else to run your business while you are confined. In an emergency or if necessary to protect your interest you may with the special permission of the Warden, receive a special visit from whomever you have appointed to operate your business; however, you may not expect to operate your business while confined.

36. How does my family know where I am going?

You will be given a chance to write or call them as soon as you arrive at the institution. Hence, it will be up to you to inform your family.

37. Will I have opportunities to become involved in community programs?

Yes. The classification committee or unit team will determine if you are suitable or in need of community programs. If so, you might be approved for study-release at a school near the institution, work-release in the nearby community, or transfer to a Community Treatment Center. Your case manager can answer specific questions about community programs as well as questions about other aspects of the institution.

38. What happens if my personal property is lost by staff or I receive a personal injury?

You may file a Tort Claim to collect the damages you are due. To file such a claim you must consult with the institution's Safety Officer.

39. What happens if I am denied things I think I should be given?

The Bureau of Prisons has an inmate grievance procedure known as the Administrative Remedy process. You may initially file for an administrative remedy to your complaint with the warden. You may later appeal the warden's decision to the Regional Director if you desire. The final level of appeal is with the General Counsel of the Bureau of Prisons in Washington, D.C. In addition, you may petition the U.S. District Court for relief.

Appendix A: The Treaty

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES

The United States of America and the United Mexican States, desiring to render mutual assistance in combatting crime insofar as the effects of such crime extend beyond their borders and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation, have resolved to conclude a Treaty on the execution of penal sentences and, to that end, have named their plenipotentiaries Joseph John Jova, Ambassador Extraordinary and Plenipotentiary by the President of the United States of America and Alfonso Garcia Robles, Secretary of Foreign Relations by the President of the United Mexican States.

Who, having exchanged their full powers and having found them in proper and due forum, have agreed on the following Articles:

ARTICLE I

(1) Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty.

(2) Sentences imposed in the United States of America on nationals of the United Mexican States may be served in penal institutions or subject to the supervision of the authorities of the United Mexican States in accordance with the provisions of this Treaty.

ARTICLE II

This Treaty shall apply only subject to the following conditions:

(1) That the offense for which the offender was convicted and sentenced is one which would also be generally punishable as a crime in the Receiving State, provided, however, that this condition shall not be interpreted so as to require that the crimes described in the laws of the two States be identical in such matters not affecting the character of the crimes such as the quantity of property or money taken or possessed or the presence of interstate commerce.

(2) That the offender must be a national of the Receiving State.

(3) That the offender not be a domiciliary of the Transferring State.

(4) That the offense not be a political offense within the meaning of the Treaty of Extradition of 1899 between the parties, nor an offense under the immigration or the purely military laws of a party.

(5) That at least six months of the offender's sentence remains to be served at the time of petition; and

(6) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

ARTICLE III

Each State shall designate an authority to perform the functions provided in this Treaty.

ARTICLE IV

(1) Every transfer under the Treaty shall be commenced by the Authority of the Transferring State. Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.

(2) If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the Authority of the Receiving State.

(3) If the Authority of the Receiving State approves the request, it shall promptly so inform the Transferring State and shall initiate the necessary procedures to effect the transfer of the offender. If it does not approve the request, it shall so notify promptly the Authority of the Transferring State.

(4) In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the

nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State.

(5) If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required. The Federal Authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(6) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(7) The Transferring State shall furnish the Receiving State a statement showing the offense of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behavior or pretrial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Transferring State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the convict with a view of his social rehabilitation.

(8) If the Receiving State considers that the documents supplied by the Transferring State do not enable it to implement this Treaty, it may request additional information.

(9) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for the purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other Party.

ARTICLE V

(1) Delivery of the offender by the authorities of the Transferring State to those of the Receiving State shall occur at a place agreed upon by both parties. The Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer,

that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(2) 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. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty release the offender.

(3) 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.

(4) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(5) The Authorities of each party shall, every six months, exchange reports indicating the status of confinement of all offenders transferred under this Treaty, including in particular the parole or release of any offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

(6) 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.

ARTICLE VI

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. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.

ARTICLE VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal or state.

ARTICLE VIII

(1) 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 Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) By special agreement between the Parties, persons accused of an offense but determined to be of unsound mental condition may be transferred for care in institutions in the country of nationality.

(3) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

ARTICLE IX

For the purposes of this Treaty --

(1) "Transferring State" means the party from which the offender is to be transferred.

(2) "Receiving State" means the party to which the offender is to be transferred; and

(3) "Offender" means a person who, in the territory of one of the parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, suspended sentence, or any other form of supervision or conditional sentence without confinement.

(4) A "domicilary" means 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 therein.

ARTICLE X

(1) This Treaty is subject to ratification. The exchange of ratifications shall take place in Washington.

(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.

(3) Should neither contracting party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to let the Treaty terminate, the Treaty shall remain in force for another three years, and so on every three years.

DONE at Mexico City in duplicate, this twenty-fifth day of November, one thousand nine hundred seventy six, in the English and Spanish languages, each text of which shall be equally authentic.

FOR THE UNITED STATES OF AMERICA:	FOR THE UNITED MEXICAN STATE:
/s/ Joseph John Jova	/s/ Alfonso Garcia Robles

[CONFIDENTIAL COMMITTEE PRINT]

AUGUST 9, 1977

95TH CONGRESS
1ST SESSION

S. 1682

IN THE SENATE OF THE UNITED STATES

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That title 18, United States Code, is amended by inserting after chapter 305 the following new chapter:

"Chapter 306.—TRANSFER TO OR FROM FOREIGN COUNTRIES

"§ 4100. Scope and limitation of chapter

"(a) The provisions of this chapter relating to the transfer of offenders shall be applicable only when a treaty providing for such a transfer is in force, and shall only be applicable to transfers of offenders to and from a foreign country pursuant to such a treaty. A sentence imposed by a foreign country upon an offender who is subsequently transferred to the United States pursuant to a treaty shall be subject to being fully executed in the United States even though the treaty under which the offender was transferred is no longer in force.

"(b) An offender may be transferred from the United States pursuant to this chapter only to a country of which the offender is a citizen or national. Only an offender who is a citizen or national of the United States may be transferred to the United States. An offender may be transferred to or from the United States only with the offender's consent, and only if the offense for which the offender was sentenced satisfies the requirement of double criminality as defined in this

chapter. Once an offender's consent to transfer has been verified by a verifying officer, that consent shall be irrevocable. If at the time of transfer the offender is under eighteen years of age the transfer shall not be accomplished unless consent to the transfer be given by a parent or guardian or by an appropriate court of the sentencing country.

"(c) An offender shall not be transferred to or from the United States if a proceeding by way of appeal or of collateral attack upon the conviction or sentence be pending.

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

"§ *4101. Definitions*

"As used in this chapter the term—

"(a) 'double criminality' means that at the time of transfer of an offeneder 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;

"(b) 'imprisonment' means a penalty imposed by a court under which the individual is confined to an institution;

"(c) 'juvenile' means—

"(1) a person who is under eighteen years of age; or

"(2) for the purpose of proceedings and disposition under chapter 403 of this title because of an act of juvenile delinquency, a person who is under twenty-one years of age;

"(d) 'juvenile delinquency' means—

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

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

"(e) 'offender' means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency;

"(f) 'parole' means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence,

subject to conditions imposed by the releasing authority and to its supervision;

"(g) 'probation' means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed;

"(h) 'sentence' means not only the penalty imposed but also the judgment of conviction in a criminal case or a judgment of acquittal in the same proceeding, or the adjudication of delinquency in a juvenile delinquency proceeding or dismissal of allegations of delinquency in the same proceedings;

"(i) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(j) 'transfer' means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country; and

"(k) 'treaty' means a treaty under which an offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purpose of serving the sentence.

CONTINUED

1 OF 4

"§ *4102. Authority of the Attorney General*

"The Attorney General is authorized—

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

"(2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;

"(3) to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals;

"(4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter;

"(5) to render to foreign countries and to receive from them the certifications and reports required to be made under such treaties;

"(6) to make arrangements by agreement with the States for the transfer of offenders in their custody who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals and for the confinement, where appropriate, in State institutions of offenders transferred to the United States;

"(7) to make agreements and establish regulations for the transportation through the territory of the United States of offenders convicted in a foreign country who are being transported to a third country for the execution of their sentences, the expenses of which shall be paid by the country requesting the transportation;

"(8) to make agreements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of juveniles who are transferred pursuant to treaty, the expenses of which shall be paid by the country of which the juvenile is a citizen or national;

"(9) in concert with the Secretary of Health, Education, and Welfare, to make arrangements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of individuals who are accused of an offense but who have been determined to be mentally ill; the expenses of which shall be paid by the country of which such person is a citizen or national;

"(10) to designate agents to receive, on behalf of the United States, the delivery by a foreign government of any citizen or national of the United States being transferred to the United States for the purpose of serving a sentence imposed by the courts of the foreign

country, and to convey him to the place designated by the Attorney General. Such agent shall have all the powers of a marshal of the United States in the several districts through which it may be necessary for him to pass with the offender, so far as such power is requisite for the offender's transfer and safekeeping; within the territory of a foreign country such agent shall have such powers as the authorities of the foreign country may accord him;

"(11) to delegate the authority conferred by this chapter to officers of the Department of Justice.

"§ 4103. Applicability of United States laws

"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.

"§ 4104. Transfer of offenders on probation

"(a) Prior to consenting to the transfer to the United States of an offender who is on probation, the Attorney General shall determine that the appropriate United States district court is willing to undertake the supervision of the offender.

"(b) Upon the receipt of an offender on probation from the authorities of a foreign country, the Attorney General shall cause the offender to be brought before the United

States district court which is to exercise supervision over the offender.

"(c) The court shall place the offender under supervision of the probation officer of the court. The offender shall be supervised by a probation officer, under such conditions as are deemed appropriate by the court as thought probation had been imposed by the United States district court.

"(d) The probation may be revoked in accordance with section 3653 of this title and rule 32(f) of the Federal Rules of Criminal Procedure. A violation of the conditions of probation shall constitute grounds for revocation. If probation is revoked the suspended sentence imposed by the sentencing court shall be executed.

"(e) The provisions of sections 4105 and 4106 of this title shall be applicable following a revocation of probation.

"(f) Prior to consenting to the transfer from the United States of an offender who is on probation, the Attorney General shall obtain the assent of the court exercising jurisdiction over the probationer.

"§ 4105. Transferred offender serving sentence of imprisonment

"(a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General

shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

"(b) The transferred offender shall be given credit toward service of the sentence for any days, prior to the date of commencement of the sentence, spent in custody in connection with the offense or acts for which the sentence was imposed.

"(c)(1) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits for good time, computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in section 4161 of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the the offender pursuant to section 4164 of this title.

"(2) If the country from which the offender is transferred does not give credit for good time, the basis of comput-

ing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in section 4161 of this title.

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

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

"(5) Any sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a foreign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

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

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

"(b) The United States Parole Commission and the Chairman of the Commission shall have the same powers

and duties with reference to an offender transferred to the United States to serve a sentence of imprisonment or who at the time of transfer is on parole as they have with reference to an offender convicted in a court of the United States except as otherwise provided in this chapter or in the pertinent treaty. Sections 4201 through 4204; 4205 (d), (e), and (h); 4206 through 4216; and 4218 of this title shall be applicable.

"(c) An offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.

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

"(a) Prior to the transfer of an offender from the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified by a United States magistrate or a judge as defined in section 451 of title 28, United States Code.

"(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:

"(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 counrty, he may be returned to the United States for the purpose of completing the sentence if the United States requests his return; 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, and that the offender accepts the transfer subject

to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

"(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

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

"(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

"(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:

"(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 only 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 if that country requests his return; 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, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and

acceptance shall be on an appropriate form prescribed by the Attorney General.

"(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

"§ 4109. Right to counsel, appointment of counsel

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

"(a) counsel for proceedings conducted under section 4107 shall be appointed in accordance with the Criminal Justice Act (18 U.S.C. 3006A). Such appointment shall be considered an appointment in a misdemeanor case for purposes of compensation under the Act;

"(b) counsel for proceedings conducted under section 4108 shall be appointed by the verfying officer pursuant to such regulations as may be prescribed by the Director of the Administrative Office of the United States Courts. The Secretary of State shall make payments of fees and expenses of the appointed counsel, in amounts approved by the verifying officer, which shall not exceed the amounts authorized under the Criminal Justice Act (18 U.S.C. 3006(a)) for representation in a misdemeanor case. Payment in excess of the maxi-

mum amount authorized may be made for extended or complex representation whenever the verifying officer certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the chief judge of the United States court of appeals for the appropriate circuit. Counsel from other agencies in any branch of the Government may be appointed: Provided, That in such cases the Secretary of State shall pay counsel directly, or reimburse the employing agency for travel and transportation expenses. Notwithstanding section 3648 of the revised statutes as amended (31 U.S.C. 529), the Secretary may make advance payments of travel and transportation expenses to counsel appointed under this subsection.

"§ 4110. Transfer of juveniles

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

"§ 4111. Prosecution barred by foreign conviction

"An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United

States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, or if prosecution would have been barred by the laws of the jurisdiction seeking to prosecute the transferred offender if the sentence on which the transfer was based had been issued by a court of the United States or by a court of another State.

"§ 4112. Loss of rights, disqualification

"An offender transferred to the United States to serve a sentence imposed by a foreign court shall not incur any loss of civil, political, or civic rights nor incur any disqualification other than those which under the laws of the United States or of the State in which the issue arises would result from the fact of the conviction in the foreign country.

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

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

"(b) An alien who is the subject of an order of deportation from the United States pursuant to section 1252 of title 8,

United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been deported from this country.

"(c) An alien who is the subject of an order of exclusion and deportation from the United States pursuant to section 1226 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been excluded from admission and deported from the United States.

"§ 4114. Return of transferred offenders

"(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days.

"(b) Upon receiving a request from the sentencing country that the offender ordered released be returned for the completion of his sentence, the Attorney General may file a complaint for the return of the offender with any justice or judge of the United States or any authorized magistrate within whose jurisdiction the offender is found. The complaint shall be upon oath and supported by affidavits establishing that the offender was convicted and sentenced by the courts of the country to which his return is requested; the offender was transferred to the United States for the execution of his sentence; the offender was ordered released by a court of the United States before he had completed his sentence because the transfer of the offender was not in accordance with the treaty or the laws of the United States; and that the sentencing country has requested that he be returned for the completion of the sentence. There shall be attached to the complaint a copy of the sentence of the sentencing court and of the decision of the court which ordered the offender released.

"A summons or a warrant shall be issued by the justice, judge or magistrate ordering the offender to appear or to be brought before the issuing authority. If the justice, judge, or magistrate finds that the person before him is the offender described in the complaint and that the facts alleged in the complaint are true, he shall issue a warrant for commitment

of the offender to the custody of the Attorney General until surrender shall be made. The findings and a copy of all the testimony taken before him and of all documents introduced before him shall be transmitted to the Secretary of State, that a Return Warrant may issue upon the requisition of the proper authorities of the sentencing country, for the surrender of offender.

"(c) A complaint referred to in subsection (b) must be filed within sixty days from the date on which the decision ordering the release of the offender becomes final.

"(d) An offender returned under this section shall be subject to the jurisdiction of the country to which he is returned for all purposes.

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

"(f) Sections 3186, 3188 through 3191, and 3195 of this title shall be applicable to the return of an offender under this section. However, an offender returned under this section shall not be deemed to have been extradited for any purpose.

"(g) An offender whose return is sought pursuant to this section may be admitted to bail or be released on his own recognizance at any stage of the proceedings.

"§ 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 moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be transmitted through diplomatic channels to the treaty authority of the transferring country for distribution to the victim.".

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

"(f) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of this title and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no

authority to perform any other function within the territory of a foreign country.".

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

"§ 2256. Jurisdiction of proceedings relating to transferred offenders

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

"(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country;

"(2) all proceedings instituted by or on behalf of an offender transferred from the United States to a foreign country seeking to challenge, modify, or set aside the conviction or sentence upon which the transfer was based shall be brought in the court which would have jurisdiction and competence if the offender had not been transferred;

"(3) all proceedings instituted by or on behalf of an offender transferred to the United States pertaining to the manner of execution in the United States of the sentence imposed by a foreign court shall be brought in the United

States district court for the district in which the offender is confined or in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings;

"(4) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer from the United States shall be brought in the United States district court of the district in which the proceedings to determine the validity of the offender's consent were held and shall name the Attorney General as respondent; and

"(5) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer to the United States shall be brought in the United States district court of the district in which the offender is confined or of the district in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings.".

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

"§ 955. *Prisoners transferred to or from foreign countries*

"(a) When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders, the Secretary concerned may, with the concurrence of the Attorney General, transfer to said foreign country any offender against chapter 47 of this title. Said transfer shall be effected subject to the terms of said treaty and chapter 306 of title 18, United States Code.

"(b) Whenever the United States is party to an agreement on the status of forces under which the United States may request that it take custody of a prisoner belonging to its armed forces who is confined by order of a foreign court, the Secretary concerned may provide for the carrying out of the terms of such confinement in a military correctional facility of his department or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Except as otherwise specified in such agreement, such person shall be treated as if he were an offender against chapter 47 of this title.".

SEC. 5. (a) There is authorized to be appropriated such funds as may be required to carry out the purposes of this Act.

(b) The Attorney General shall certify to the Secretary of State the expenses of the United States related to the return of an offender to the foreign country of which the

offender is a citizen or national for which the United States is entitled to seek reimbursement from that country under a treaty providing for transfer and reimbursement.

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

Appendix C: United States Parole Commission Guidelines for Times of Service Sentences

PAROLE GUIDELINES

To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

The evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of rish may override this predictive aid.

Form R-3
Effective 8/1/77

ADULT

Guidelines for Decision-Making

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior (Examples)	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW Escape [open institution or program (e.g., CTC, work release) - absent less than 7 days] Marihuana or soft drugs, simple possession (small quantity for own use) Property offenses [theft or simple possession of stolen property] less than $1,000	6-10 months	8-12 months	10-14 months	12-18 months
LOW MODERATE Alcohol law violations Counterfeit currency [passing/possession less than $1,000] Immigration law violations Income tax evasion (less than $10,000) Property offenses [forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell] less than $1,000 Selective Service Act violations	8-12 months	12-16 months	16-20 months	20-28 months
MODERATE Bribery of a public official (offering or accepting) Counterfeit currency [passing/possession $1,000 to $19,999] Drugs: Marihuana, possession with intent to distribute/sale [small scale (e.g., less than 50 lbs.)] "Soft drugs", possession with intent to distribute/sale (less than $500) Escape [secure program or institution, or absent 7 days or more - no fear or threat used] Firearms Act, possession/purchase/sale (single weapon; not sawed-off shotgun or machine gun) Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $1,000 to $19,999 Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	12-16 months	16-20 months	20-24 months	24-32 months
HIGH Counterfeit currency [passing/possession $20,000 to $100,000] Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale [medium scale (e.g., 50 to 1,999 lbs)] "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) Mann Act (no force - commercial purposes) Theft of motor vehicle for resale Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $20,000 to $100,000	16-20 months	20-26 months	26-34 months	34-44 months
VERY HIGH Robbery (weapon or threat) Breaking and entering [bank or post office-entry or attempted entry to vault] Drugs: Marihuana, possession with intent to distribute/sale [large scale (e.g., 2,000 lbs. or more)] "Soft drugs", possession with intent to distribute/sale [over $5,000] "Hard drugs", possession with intent to distribute/sale (not exceeding $100,000) Extortion Mann Act (force) Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] over $100,000 but not exceeding $500,000 Sexual act (force)	26-36 months	36-48 months	48-60 months	60-72 months
GREATEST Aggravated felony (e.g., robbery, sexual act, aggravated assault) - weapon fired or personal injury Aircraft hijacking Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of $100,000) Espionage Explosives (detonation) Kidnapping Willful homicide	(Greater than above - however, specific ranges are not given due to the limited number of cases and the extreme variation in severity possible within the category).			

NOTES:
1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 days (1 month) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.
7. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.

Form R-4
Effective 8/1/77

YOUTH/NARA

Guidelines for Decision-Making

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior (Examples)	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW Escape (open institution or program (e.g., CTC, work release) - absent less than 7 days) Marihuana or soft drugs, simple possession (small quantity for own use) Property offenses (theft or simple possession of stolen property) less than $1,000	6-10 months	8-12 months	10-14 months	12-18 months
LOW MODERATE Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses (forgery/fraud/theft from mail/ embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $1,000 Selective Service Act violations	8-12 months	12-16 months	16-20 months	20-26 months
MODERATE Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999) Drugs: Marihuana, possession with intent to distribute/ sale (small scale (e.g., less than 50 lbs.)) "Soft drugs", possession with intent to distribute/ sale (less than $500) Escape (secure program or institution, or absent 7 days or more - no fear or threat used) *Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun)* Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses (theft/forgery/fraud/embezzlement/ interstate transportation of stolen or forged securities/receiving stolen property) $1,000 to $19,999 Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	9-13 months	13-17 months	17-21 months	21-28 months
HIGH Counterfeit currency (passing/possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/ sale (medium scale (e.g., 50 to 1,999 lbs)) "Soft drugs", possession with intent to distribute/ sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) Mann Act (no force - commercial purposes) Theft of motor vehicle for resale Property offenses (theft/forgery/fraud/embezzlement/ interstate transportation of stolen or forged securities/receiving stolen property) $20,000 to $100,000	12-16 months	16-20 months	20-26 months	26-32 months
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GREATEST Aggravated felony (e.g., robbery, sexual act, aggravated assault) - weapon fired or personal injury Aircraft hijacking Drugs: "Hard drugs", possession with intent to distribute/ sale (in excess of $100,000) Espionage Explosives (detonation) Kidnapping Willful homicide	(Greater than above - however, specific ranges are not given due to the limited number of cases and the extreme variation in severity possible within the category).			

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R-15 part 2 (SFS 76A)
(Ed. 4/77)

NOTICE OF ACTION - PART II - SALIENT FACTORS

Register Number _____ Name _____

ITEM A _____ ☐

No prior convictions (adult or juvenile) = 3
One prior conviction = 2
Two or three prior convictions = 1
Four or more prior convictions = 0

ITEM B _____ ☐

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

ITEM C _____ ☐

Age at first commitment (adult or juvenile):
26 or older = 2
18 - 25 = 1
17 or younger = 0

*ITEM D _____ ☐

Commitment offense did not involve auto theft or checks(s) (forgery/larceny) = 1
Commitment offense involved auto theft [X], or check(s) [Y], or both [Z] = 0

*ITEM E _____ ☐

Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole [X], or is a probation violator this time [Y], or both [Z] = 0

ITEM F _____ ☐

No history of heroin or opiate dependence = 1
Otherwise = 0

ITEM G _____ ☐

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

TOTAL SCORE _____ ☐

* NOTE TO EXAMINERS:
If item D or E is scored 0, place the appropriate letter (X, Y or Z) on the line to the right of the box.

Mr. ABBELL. Basically, this booklet in question-and-answer form shows how we regard the treaty, implementation of the treaty, the procedures that would be involved for each prisoner; and, also, it describes the U.S. parole system and the U.S. prison system, and then has a copy of the treaty and of the legislation as reported out by the Senate Judiciary Committee yesterday, being the latest version that we had, and also of the U.S. parole guidelines so that the prisoners can make some determination of what their likely release date would be if they were to come to the United States.

Mr. EILBERG. As I read the bill, an American transferred to a U.S. prison would be entitled to parole under U.S. laws. Is every offender entitled to immediate parole, or would a certain period of time have to be spent in American prisons before he would be eligible?

With regard to parole, one proposal under consideration is application of language contained in title 18 U.S.C. 4205(B), which came out in the Senate version of the bill, which would make all transferred prisoners immediately eligible for consideration for parole.

Do you forsee any foreign policy problems arising out of this proposal?

Mr. ABBELL. We have discussed that point with the Mexican Attorney General. He has raised no objection to it because he understands, as we made clear to him, that the Parole Commission intends to treat these offenders as if they had committed the same offense in the United States for the purposes of determining when they actually would be released as opposed to their eligibility.

Now, they all will be eligible for parole. They all will be given a parole hearing unless they are mandatorily releaseable first. And at that parole hearing, they will be given a prospective release date. Some of those prospective release dates will be very soon after the hearing, others will be quite a bit later. In fact, some of them will be told that you are not going to get out before your mandatory release date.

Mr. EILBERG. All right, does not the procedure that we're talking about give preferential treatment, from a parole standpoint, to transferred prisoners since it is not available to offenders convicted in the United States unless recommended by the sentencing court?

Mr. ABBELL. Well, as pointed out in the Deputy's testimony, which is a part of the record, we have checked with the administrative office of the U.S. courts and found out that two-thirds of all drug offenders in the United States who are sentenced to more than 1 year in the U.S. Federal prisons are sentenced under 4205(b)(2), and, therefore, would have similar eligibility.

Mr. EILBERG. What about the other third that do not receive that kind of sentence?

Mr. ABBELL. Well, we're simply trying to accord it to the majority situation. Moreover, the parole guidelines are pretty well fixed in any case, and if these people were involved in importing very large quantities of narcotics, they would be in the highest category of course.

Mr. EILBERG. But under the provision as passed in the Senate, and which you have supported, every single prisoner brought up from Mexico to a prison in the United States may, conceivably, be given parole immediately, and that person would, in effect, have an unfair

advantage over one who has been sentenced here, possibly for a very similar offense, where the judge has ordered that he serve one-third of his sentence before becoming eligible. I question whether such a procedure is fair.

Mr. ABBELL. I don't believe that, one, the thing would occur; two, that it would be any less fair if these people had to serve one-third of their sentence whereas the majority of the people convicted in the United States on a similar offense were sentenced under a provision that permitted them——

Mr. EILBERG. I'm asking for equality for all Americans. By your system, those that are sentenced here, perhaps by tougher judges, are relatively penalized as compared with all of those that would be coming from Mexico. And, further, you seem to categorize all of the offenses as drug related, when, obviously, they're not all drug cases.

Mr. ABBELL. I'm saying the majority of people convicted in the U.S. Federal courts are sentenced under a very similar parole provision, and we are simply making the people coming back from Mexico eligible for parole under that same provision that the majority of the offenders in Mexico are, already, being——

Mr. EILBERG. You see, this concept and use of the term "majority" is, in my opinion, a very weak one upon which to base a law, which will apply to all prisoners. It does not seem to be precise enough.

Mr. ABBELL. We are talking only about marihuana. We checked first as to marihuana offenders, and also as to hard narcotics offenders; and the result was very much the same. Two-thirds of marihuana offenders and about two-thirds of——

Mr. EILBERG. What about nondrug offenders, other offenders?

Mr. ABBELL. Well, the vast majority of our people in prisons outside the United States are in prisons for drug offenses. Eighty percent—over 80 percent—of those in Mexico are in prison for drug offenses. We are simply trying to do our best to make the provisions, parole provisions, as flexible as possible to allow the Parole Commission to treat these people, essentially, as if they had been convicted of the same offense in the United States. And that is the basic standard that we have been informed the Parole Commission intends to use.

Mr. EILBERG. Would you be agreeable to an amendment that would limit our legislation to drug-related offenses?

Mr. ABBELL. Under immediate parole eligibility?

Mr. EILBERG. Yes.

Mr. ABBELL. I wouldn't have any great objection other than I believe it would delay the legislative process because you would have a difference from what is likely to come out in the Senate, and, of course, we believe that the Parole Commission is going to end up treating these people the same way. There won't be any real——

Mr. EILBERG. Mr. Flaherty.

Mr. FLAHERTY. Mr. Chairman, I see your point, and you are trying to make it uniform, but I think this is what this bill, by placing it in the hands of the parole system, is also trying to do. For instance in Mexico it very well may be that for an offense in Mexico a person could receive a much larger sentence than for the same offense in this country, and to have to await the mandatory parole minimum would create a greater disparity than if the offense had occurred in this country.

So, what we have done on this bill has been to place the discretion in the Parole Commission to alleviate the disparity. And I agree with you, you're placing a lot of discretion in the Parole Commission, but I think it's necessary in the bill.

Mr. EILBERG. What assurance do we have that the Parole Commission will adopt such a reasonable attitude?

Mr. FLAHERTY. Well, it's difficult to give you assurances because they are, basically, an independent commission. They do use criteria.

Mr. EILBERG. Don't you feel a provision in the law might be more effective?

Mr. FLAHERTY. There would be difficulty if you did do that, but I understand your feelings on it. Let's say that an American in Mexico had received a very large sentence for a drug offense, two or three times larger, perhaps, than one would have received from a judge in this country; then, if you tinker with it, that person may well have to wait for one-third of their sentence before they're eligible, whereas this way I think it's better to place the discretion in the Parole Commission as we do now. You place your discretion in the Parole Commission as we do in this country to achieve uniformity.

Mr. EILBERG. We still have the problem described in 4205 (A) and (B), and I don't know that we have received a satisfactory answer to that, because the legislation under consideration clearly results in the probability that some prisoners will be dealt with differently. It is to the disadvantage of those that have been sentenced in the United States, and this strikes me as an unfair result.

Mr. FLAHERTY. Of course, even within the United States you have, always, an attempt by the parole commissioner to make uniform the standards. The more you try to legislate that, the more difficult—the more you get into their discretion.

Mr. EILBERG. You'd rather that we do not legislate and they have the discretion.

Mr. FLAHERTY. Yes; in this instance, I think discretion is necessary because of the disparity between the two countries in sentencing.

Mr. FISH. For the record and the continuity of subject matter, let me see if I understand this. What we're considering is permanent law, effective transfer of prisoners immediate, future, and years to come. And what you have been saying is that if a lot of these prisoners from Mexico come back to the United States and are paroled immediately, this is in keeping with the sentencing—the indeterminate sentencing—that would avail if they had been apprehended and convicted in this country.

And I guess what is bothering the committee is that we may be in a situation where, in the future, a treaty is negotiated with a country where few of the American prisoners would be there for drug offenses; it may be for robbery, it may be serving on the wrong side—the loosing side—of a civil war in that country, or a great number of other matters.

And just what would the standards be under 4105, 4106(C)? What would be the standards of the Parole Commission for releasing those individuals under parole?

Mr. ABBELL. The only real difference is that these people will be accorded a hearing. The people who are sentenced under similar provisions in the United States, let's say for robbery, would not be given

a hearing until they had served that minimum one-third or whatever the provision of the sentence.

However, the Parole Commission, through the adoption of its guidelines, has added a great deal of uniformity in the treatment of offenders in seeing to it that the disparity in sentences between judges in the United States—and that was the intention of the guidelines—are mitigated or ameliorated by the fact that the Parole Commission can more uniformly treat these individuals under a set of parole guidelines.

Basically, what we are asking for in this legislation is the flexibility for the Parole Commission to do the same here, because we simply do not know what kind of sentences are going to be accorded in other countries; for instance, some other country may impose a sentence of 40 years for robbery, whereas in the United States the sentence may be 10 years. Now, this person wouldn't be eligible for parole in the United States under transfer until he had served one-third of that 40 years, and that would——

Mr. FISH. One-third of the 10 years you mean.

Mr. ABBELL. One-third of the 10 years here, but with the person with a 40-year sentence coming back, he wouldn't be eligible until he had served 10 years actually in the United States in prison before he would be given a parole hearing.

So, there is a material disparity that we are asking for the greatest degree of flexibility to deal with. We simply aren't going to be able to deal with foreign sentences that great in excess of our sentences if we don't have this kind of flexibility.

Mr. FISH. Thank you, Mr. Abbell, very much.

Mr. EILBERG. Mr. Flaherty, we're deeply aware that your time is limited, and we have a lot of questions in the areas that we have already touched on, which we will, if you have no objection, submit them to you in writing. Would you agree to such a procedure?

Mr. FLAHERTY. I would appreciate it.

Mr. EILBERG. You wanted, I think, to get to the bottom of page 5. We're anxious for you to do that also. Would you proceed with the discussion of the constitutionality?

Mr. FLAHERTY. At the bottom of page 5 we begin the discussion of the constitutionality of the provision which disallows Federal and State court jurisdictions to entertain an attack on foreign convictions ratifying transfer of prisoners. We would also like to discuss the effectiveness of the consent given by an American held in a foreign prison as a condition of a transfer. I think these are the two areas in which there are constitutional questions.

The Office of Legal Counsel has examined both of these questions, concluding: One, the treaties and the proposed implementing legislation do not strip prisoners held in a Mexican jail by Mexican authorities of any existing right to challenge in the United States their foreign convictions; and two, even if such a right were found to exist, that right could be properly waived pursuant to the procedures outlined in the proposed legislation.

Mr. EILBERG. Mr. Flaherty, I'd like to interrupt you there. You st. that "the treaties and the proposed implementing legislation do not strip prisoners of any existing right to challenge in the U.S. their foreign convictions."

Mr. FLAHERTY. That's right.

Mr. EILBERG. Is this an accurate statement? Isn't it true that there is no existing right to challenge the foreign convictions since there is no existing opportunity?

Mr. FLAHERTY. That's right. That's right. That's why we say it doesn't "strip" them of an existing right, they don't have that right anyway. You're correct.

Mr. EILBERG. All right.

Mr. FLAHERTY. I asked the same question during the briefing.

Mr. EILBERG. All right. Please proceed. Please go ahead.

Mr. FLAHERTY. And the second, of course, is the effectiveness of consent; can a person viably give consent under these conditions—do they have any other alternative? And that would be a question that would come up. And there are cases in point that while there is not a lot of law going into that matter, there are a lot of cases in point that the legal counsel has set forth in the brief in the attached memorandum, that he can give proper consent even under those difficult circumstances that these prisoners would be in, and it would still be a legal consent. And that's set forth in the memorandum by the Office of Legal Counsel. Basically, those are the two constitutional areas that I wanted to cover.

Mr. FISH. May I have one more question?

Mr. EILBERG. Mr. Fish.

Mr. FISH. Could you tell me the age of the prisoners, roughly—prisoners in Mexico?

Mr. FLAHERTY. The State Department is here to testify, and I think they have the ages on that.

Mr. FISH. How about the length of the sentences that have been served in Mexico?

Mr. FLAHERTY. We have those, too.

Mr. ABBELL. Yes. The length of the sentences do not vary that materially in Mexico from what they would be in the United States. Of course, we have great disparity even within the United States in how different individuals would be treated under the jurisdiction in which they were sentenced. But all in all, in looking at the sentences, there are very few people, Americans, in Mexican prisons who have been sentenced to more than 12 years in prison, only a few murderers and so on.

On the other hand, a few people who have been convicted of relatively minor offenses may have been given more of a sentence than they would have been in the United States. But even within the United States we have these kind of disparities, as I'm sure you're well aware.

Mr. FISH. The alternative for being incarcerated in Mexico on a drug charge and exercising waiver is to stay there.

Mr. ABBELL. Right; and our indications are that as many as 20 percent of the Americans in Mexican prisons are going to stay—elect to stay—in Mexico.

Mr. EILBERG. Mr. Flaherty, neither of the treaties provides for automatic return of an offender who secures release through a U.S. court decision. Why was this provision included in the proposed legislation? As a practical matter, do you believe the foreign country will want these prisoners to be returned? H.R. 7148 provides that these offenders "may be returned." Will standards be developed to assist our Govern-

ment in determining whether an individual should be returned after a court orders his release? Who will develop and apply these standards?

Actually, that's a whole series of questions?

Mr. FLAHERTY. I'm going to ask Larry to answer that.

Mr. SIMMS. That question might arise in two contexts. First, if the prisoner attacks the validity of the consent itself, and the court—and we can see that a prisoner may do so in a habeas corpus proceeding—and he successfully attacks it, for example the prisoner is able to demonstrate to the court that it wasn't even he who was present at this hearing and somehow he got thrown on a plane and got sent back to the United States, the statute specifically calls for giving the Mexican Government at that point the right, if it chooses, to have the prisoner returned. At that point I think he's in a situation where, essentially, Mexico would ask for his extradition. If they chose it, he would be in the custody of the Attorney General, and if Mexico wanted him back, then we could go in and really go through an extradition type situation.

The other context in which it can arise is if a prisoner were able to convince a court that his underlying Mexican conviction was somehow invalid and, therefore, we say he won't be able to do *that*—and, of course the treaty prohibits it—but assuming it got to that point, then the question would be what relief the U.S. district court could provide to that prisoner. And at that point we may be—his release may be—sent back to Mexico or sent to foreign judgment if Mexico asked for his return. And, again, you'd end up in an extradition type situation.

Mr. EILBERG. Finally, if I may—and it is getting late—because there are difficult constitutional issues raised by this legislation and I've had occasion to discuss them briefly with the Senate body and we know that in its present state the legislation invites litigation to determine its constitutionality, do you think a provision for expedited judiciary review should be included?

I see you're shaking your head. I don't understand the negative response.

Mr. ABBELL. Well, I think the judicial review will come in due course, and we expect a number of these prisoners to—even though they will be afforded parole hearings very quickly—to file a habeas corpus motion. I don't think that any extradition is going to be necessary. I think the courts are going to give them and treat them as if they were filed—they were U.S. prisoners sentenced by U.S. courts or State courts, and, in due course, they will litigate the issue.

Mr. EILBERG. And then if the disposition is one that Mexico or Canada doesn't like that's the end of the treaty.

Mr. ABBELL. It may well be. I think we have to seriously look at the treaty, but our opinion, and Mr. Simms' opinion involving legal counsel, is very strongly that no district court will ultimately hold that, or if a district court does so hold it, that by the time it gets to the court of appeals or the Supreme Court, ultimately, we will prevail on the issue of constitutionality.

Mr. EILBERG. I wish that I could share your optimism. I just can't at this point.

Mr. Sawyer, I've given you no opportunity, and I apologize to you. I'm so anxious to get at Mr. Flaherty and his associates here.

This is such a meaty, interesting, and complicated question that we denied you the opportunity.

Mr. Sawyer.

Mr. SAWYER. One thing I'm curious about, presuming someone is sentenced to 40 years for what, on the average, would carry the 10-year sentence in the United States and he is paroled, does he then stay under the parole authorities for the full 40 years as he would on American sentence?

Mr. ABBELL. Well, if he's transferred to the United States on such a matter, the U.S. Parole Office normally would not keep a person on parole for longer than 5 years unless they thought he was a very severe risk. Under the regulations issued by the U.S. Parole Commission, a person is not normally continued on parole more than 5 years without being released from the conditions of parole.

Mr. SAWYER. I see.

Another thing that rather startles me is the 20 percent you estimate would opt to stay in Mexican prisons.

Mr. ABBELL. There are a number of Mexican prisons, such as the one in Hermosillo about which Congressman Gilman testified before the Senate Foreign Relations Committee, which are new facilities. They are actually undercapacity. The prisoners have certain rights such as conjugal visits, ability to have certain refinements of living such as stereos and televisions in their cells, which they would not be able to do in the United States. A lot of them say, "Under these conditions I would rather stay in Mexico than go back to the United States."

Mr. FLAHERTY. That's a limited number.

Mr. SAWYER. That had been my impression; that's why I was surprised.

That's all I have, Mr. Chairman.

Mr. EILBERG. Mr. Flaherty, we have enjoyed your testimony, and we will be submitting additional questions to you. And I'm sure you will respond as quickly as you can because we would like to move with this legislation as rapidly as we can.

Mr. FLAHERTY. Thank you, Mr. Chairman. We'll be happy to respond.

Mr. EILBERG. Thank you very much. Thank you, gentlemen.

[Complete statement and written questions and answers submitted to Department of Justice follow:]

STATEMENT OF PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee. Thank you for the opportunity to appear before this Subcommittee today on behalf of the Justice Department in support of H.R. 7148, which is essential for the implementation of treaties on the Execution of Penal Sentences. The concepts embodied in this measure are strongly endorsed by the Administration. As you know, a companion bill, S. 1682, has been introduced in the Senate by Senator Joseph Biden, Chairman of the Subcommittee on Penitentiaries and Corrections.

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 more humanely served in his or her own country. This is a principle which we wholeheartedly endorse.

The Senate has given its advice and consent to the ratification of both treaties. Those actions are subject to declarations in the Senate resolutions of ratification that the United States will not deposit its instruments of ratification until

after the implementing legislation has been enacted. The actions of the Senate and the declarations in the resolutions of ratification emphasizes the fact that these treaties are not self-executing, but require legislation before they can be implemented. H.R. 7148 would accomplish this purpose. H.R. 7148 is designed to permit the implementation not only of the present treaties, but also of any future treaties on the execution of penal sentences. It should be noted, however, that the implementing legislation is operative only where there is an underlying treaty.

Neither H.R. 7148 nor the treaties confer a right on an offender to be transferred. They merely authorize the countries to transfer offenders. The treaties and H.R. 7148 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 in fact will be voluntarily and understandingly given, including providing an offender an opportunity to consult counsel prior to giving final consent.

Benefits 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 had been issued by a court of the particular jurisdiction seeking to prosecute. This provision, in effect, is an extension of the policy behind the double jeopardy clause of the Bill of Rights to a situation to which that clause otherwise would not apply.

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 timing and conditions of release from prison.

Canada will not be prepared to implement its treaty until late this year at the earliest. Mexico, however, is presently ready to implement its treaty, and we have 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. We presently anticipate that the first transfers under the Treaty with Mexico could occur within a matter of days of the effective date of the treaty.

It should be noted that at least nine agencies are actively involved in making the 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, Magistrates Division, and the Criminal Justice Act Division of the Administrative Office of the United States Courts are developing plans to expedite the transfer processing and the determination of parole eligibility after the transfer.

As a result of our internal review of the proposed legislation and having taken into consideration comments and suggestions from this Subcommittee and other committees, various amendments have been made to S. 1682 and, as amended, it has been reported to the full Senate Judiciary Committee. The original version of S. 1682 was identical to H.R. 7148. I request, Mr. Chairman, that the amended version of S. 1682 be made a part of the record of this hearing. Also, I would urge that this Committee consider amending H.R. 7148 to conform to the amended version of S. 1682. The proposed amended bill does not deviate from the basic objectives expressed in the original bill, but rather enhances our ability to attain them.

I also request, Mr. Chairman, that the section by section analysis of the amended S. 1682 be made a part of the record of this hearing.

Under the treaties and the proposed implementing legislation, American prisoners confirmed in Mexican (Canadian) prisons under sentences imposed by Mexican (Canadian) courts may be transferred, subject to their consent, to the United States to serve their sentences in the custody of the Attorney General. The treaties and the proposed legislation bar prisoners transferred to the United States from

collaterally attacking their Mexican (Canadian) convictions in any courts other than Mexican (Canadian) courts. Thus, an American prisoner returning to the United States retains whatever right he or she may have to attack collaterally the conviction in the courts of the sentencing country, but may not challenge that conviction in an American court.

I would like to discuss the constitutionality of the provision which disallows federal and state court jurisdiction to entertain an attack on foreign convictions brought by transferred prisoners. I would also like to discuss the effectiveness of consent of an American held in a foreign prison, as a condition of the transfer.

The Office of Legal Counsel of the Department of Justice has examined these constitutional questions and has concluded (1) the treaties and the proposed implementing legislation do not strip prisoners held in a Mexican jail by Mexican authorities of any existing right to challenge in the United States their foreign convictions; and (2) even if such a right were found to exist, that right could be properly waived pursuant to the procedures outlined in the proposed implementing legislation.

The unique nature of the prisoner transfer treaties and proposed implementing legislation means that there are no judicial decisions precisely on point. There is, however, judicial precedent in analogous situations that underscores the opinion of the Office of Legal Counsel that the treaties and implementing legislation are constitutional. For example, in that legal memorandum, which I request be made part of the record, it is pointed out that the Supreme Court has, in extradition cases, concluded that the Constitution has no relation to crime committed without the jurisdiction of the United States against the laws of a foreign country, and that the courts are bound to accept the determination implicit in an extradition treaty that the foreign trial is presumptively fair. Therefore, an American accused of crime or having been convicted of crime in a foreign country may not challenge the fairness of the foreign proceedings in an extradition proceeding.

Does the fact of transfer into the custody of the Attorney General carry with it the right to challenge the conviction? Again we believe the extradition analogy is appropriate here.

Neelcy v. *Henkel*, in which an extradition treaty was challenged as unconstitutional because it did not guarantee rights, privileges and immunities guaranteed by the Constitution to those accused of crime in the United States, supports the proposition that there is no constitutional right to have a federal or state court examine into the fairness of the foreign proceedings. The Court concluded that the provisions of the treaty, in the judgment of the Congress, were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country. If the "Great Writ" may not be invoked to prevent extradition to a country which may not follow procedures compatible with American notions of constitutional fairness, it would seem logical to conclude that habeas corpus would not be available to a United States citizen returned to this country after his foreign conviction.

It should be noted here that we do not view the treaties or the implementing legislation as limiting the right a transferred prisoner might have to habeas corpus relief or civil damages where the prisoner alleges and can prove that American officials engaged in conduct connected with his foreign detention or conviction which would not have been constitutionally permitted if the conduct had been in the United States. In such a situation the gravamen of the transferee's complaint would not go to the validity of the foreign conviction but would instead focus on the right of the United States to hold in custody a person against whom unconstitutional acts by Government agents have been perpetrated which are connected with his incarceration. In short, neither the treaties nor the implementing legislation require the transferee to waive whatever right he might have to seek redress for constitutional violations committed against him by the United States or its agents.

If, however, a court were to hold that the fact of transfer to the custody of the Attorney General for the purpose of serving a sentence imposed by a foreign tribunal triggers a constitutional right to test the fairness of the foreign proceeding in either a federal or state court, we think that the consent procedures established in S. 1682 would be held constitutionally adequate to establish a waiver of that right. The issue, as we understand it, is whether such consent may be voluntarily given because the prisoner has, in reality, no viable options. While consent that is inherently involuntary cannot be cured by the employment of elaborate procedures, we see no basis for concluding that the consent here would be "inherently involuntary."

Two recent Supreme Court cases—*Jackson* v. *United States* and *Brady* v. *United States*—deal with the waiver of a constitutional right and whether or not alternative means existed whereby the Government might obtain its objectives without impermissibly encouraging the waiver of a constitutional right. In *Brady*, the Court determined that even faced with the possibility of a death penalty, a defendant could knowingly and intelligently plead guilty although the plea would automatically preclude a death sentence. If a guilty plea entered in part in fear of the death penalty is not "inherently involuntary," we do not think the consent to be given by prisoners under the transfer treaty and legislation would be said to be so.

Unlike the situation in Jackson, there is no alternative means to provide the benefits of these treaties to the prisoners. Unless the treaties contained the provision prohibiting collateral attack by American prisoners in American courts, they would not have been negotiated. We think a court would be reluctant to hold that the Government may not, under these circumstances, confer the benefits accruing from the transfer with condition requiring waiver of any habeas corpus rights attached.

The treaties authorize the Receiving State, if it so desires, to verify that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof. Both H.R. 7148 and S. 1682, as introduced, required that such verification be by a U.S. magistrate or by a specifically designated citizen of the United States. S. 1682 has been amended to provide that such designation be by a judge of the United States in order to avoid even the lightest appearance of a conflict of interest.

In the proceedings to verify consent the offender has the right to the advice of counsel, and if the offender is financially unable to obtain counsel, counsel will be assigned. For the offender being transferred from the United States the Criminal Justice Act (18 U.S.C. 3006A) is made applicable. For the offender being transferred to the United States, H.R. 7148 provides that the Secretary of State shall provide counsel. Again, to avoid even the slightest appearance of a conflict of interest, S. 1682 has been amended to provide that the Verifying Officer shall make the appointment of counsel pursuant to regulations to be prescribed by the Director of the Administrative Office of the Courts. The Secretary of State will pay for such appointed counsel.

H.R. 7148 lists three major consequences of the transfer which must be brought to the attention of the offender at the verifying proceedings. In order to make these consequences even more explicit, and further assure the voluntariness of the consent of the prospective transferring offender, S. 1682 has been amended to provide even more detailed directions for the conduct of the verification proceedings and to require that they be recorded.

H.R. 7148 basically provides that a transferred prisoner will be eligible for parole upon service of one-third of his or her sentence, except in the case of an offender who was under the age of twenty-two years at the time of conviction. Such an offender would be eligible for parole at any time. S. 1682, as amended, provides that an offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.

This change was made because:

(1) The majority of United States nationals serving sentences in foreign countries for offenses committed in those countries were convicted of drug offenses. More than two-thirds of Federal drug offenders who receive sentences of more than one year are presently sentenced under section 4205(b) (2) which permits them to be released on parole at such time as the Parole Commission determines. Thus S. 1682, as amended, is more in accord with present sentencing practices in the Federal courts.

(2) 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 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.

Again, I wish to emphasize that the amendments to S. 1682, developed in conjunction with this Subcommittee and other congressional committees, greatly

enhance our ability to attain the objectives of treaties on the execution of penal sentences. Therefore, I strongly urge the adoption of these amendments by this Subcommitee. As you may know, S. 1682 was reported out of the Senate Judiciary Committee yesterday.

This concludes my statement, Mr. Chairman. We will be happy to answer any question the Committee may have.

Thank you.

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 nonreviewability 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 nonreviewability of discretionary decisions of refusal of consent to transfers of offenders from the United States as well. The nonreviewability 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 proceedings."

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 delate 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 legisla-

tion. 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 no 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 narcotic 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 5, insert the phrase "in the country in which the sentence was imposed." Delete the words "Attorney General" in line 7, 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 5, 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.

U.S. GOVERNMENT MEMORANDUM FROM LARRY A. HAMMOND, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL TO PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, ON THE CONSTITUTIONALITY OF PRISONER TRANSFER TREATY AND IMPLEMENTING LEGISLATION

This responds to your memorandum of August 26, 1977 in which you ask our opinion concerning certain constitutional questions arising out of the treaties for transfer of prisoners between the United States and Mexico and the United States and Canada.

Under the treaty and the implementing legislation (S. 1682, H.R. 7148), American prisoners confined in Mexican prisons under sentences imposed by Mexican courts [1] may be returned to the United States to serve their sentences in the custody of the Attorney General. The treaty bars prisoners transferring to the United States from collaterally attacking their Mexican convictions in any courts other than Mexican courts.[2] Thus, an American prisoner returning to the United States retains whatever right he may have collaterally to attack his Mexican conviction in the Mexican courts, but may not attack that conviction in an American court. See § 3 of S. 1682.

The constitutional questions of concern to Senators Biden, Griffin and possibly others arise out of this feature of the treaty, which would effectively deny federal and state courts jurisdiction to entertain any attack on foreign convictions brought by returned prisoners.[3]

We fully recognize at the onset that the unprecedented nature of the prisoner transfer treaty deprives those considering its ratification of judicial precedent that would remove any and all doubts as to its constitutionality. There is, however, judicial precedent in roughly analagous situations that indicates convincingly that the treaty [4] and its implementing legislation would be upheld as unconstitutional. Two questions are presented by the treaty. First, what constitutional right would a transferred prisoner have to attack collaterally a foreign conviction in a federal or state court? Second, assuming some constitutional right to such an attack, may that right constitutionally be waived?

With regard to the first question, we would point out that an American prisoner held in a Mexican jail by Mexican authorities has no right, at that point in time, to attack collaterally his conviction in any American court. Thus, any constitutional right to collateral attack, presumably based on the Suspension Clause, Art. I, § 9, cl. 2,[5] must necessarily be grounded in the theory that the fact of transfer into the custody of the Attorney General carries with it a constitutional right to challenge the underlying conviction. Stated another way, the denial of such a right must be seen as a "suspension" of the power of courts to entertain writs of habeas corpus even though no such right existed until the prisoner came into the custody of the Attorney General. Although a prisoner in such circumstances may not be denied access to habeas corpus relief regarding for example, the voluntariness of his consent to the transfer itself, cf. *Waley* v. *Johnston*, 316 U.S. 101 (1942), we think that he has no constitutional right to review of his underlying foreign conviction in habeas corpus or any other proceedings.

In *Neeley* v. *Henkel*, 180 U.S. 109 (1901), a United States citizen sought a writ of habeas corpus to prevent his extradition to Cuba to stand trial for a crime he had allegedly committed there. His extradition was subject to a treaty between the United States and Cuba. One argument he advanced was that the treaty itself was unconstitutional because it did not guarantee to him the rights, privileges and immunities guaranteed by the Constitution to those accused of crime in the United States. In rejecting this argument, Mr. Justice Harlan, writing for a unanimous Court, stated that the Constitution has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." Id., at 122. He went on to say that

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[1] Our comments are equally applicable to the treaty with Canada. Mexican and Canadian prisoners serving prison terms in the United States are eligible to be returned to their respective countries under the same conditions.

[2] No prisoner is eligible for transfer until his opportunity for direct review of his conviction has been exhausted or otherwise has expired in the Mexican judicial system.

[3] We have no doubt that Congress may make this provision binding on state courts under the Supremacy Clause.

[4] We note that it is in fact the constitutionality of the treaty itself that is in issue and that, to our knowledge, no treaty to which the United States is a party has ever been held to be unconstitutional. *See generally* L. Henkin, Foreign Affairs and the Constitution 137 (1972).

[5] "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."

> When an American commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people . . . provided such trial be had without discrimination against the accused because of his American citizenship. *Id.*, at 123.

We think that an American citizen transferring from the custody of Mexican officials to the Attorney General is in much the same position as was the habeas petitioner in Neeley. Neeley was extradited to Cuba to stand trial in that country pursuant to procedures that may or may not have been compatible with American notions of constitutional fairness. Assuming a conviction followed, Neeley would have had available only those post-conviction remedies that Cuba chose to grant. No collateral attack in this country's courts would have been available. A prisoner incarcerated today in Mexico after conviction and exhaustion of direct post-conviction review would become eligible to be repatriated to the United States under the treaty and implementing legislation. No collateral attack in this country's courts will be available. If the "Great Writ" may not be invoked to prevent extradition, we do not think it can be logically asserted that habeas corpus must necessarily be available to a United States citizen returned to this country after his foreign conviction.

Of course, in the extradition context it may be argued that the attack is anticipatory and therefore less susceptible to judicial resolution than a habeas corpus proceeding brought to challenge a final conviction, but such a distinction is without constitutional significance. Neeley supports the proposition that there is no constitutional right to have a federal or state court examine into the fairness of the foreign proceedings. Although Neeley argued—without contradiction by the Government—that his trial in Cuba would be conducted without an indictment, without the protections of a jury trial, without the right to confrontation, and without presumption of innocence,[6] the Supreme Court nonetheless concluded that he could be extradited. In declining to examine beyond the terms of the treaty itself, the Court concluded:

"In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country . . . and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion . . ." Id.

We think this passage stands for nothing less than the proposition that a decision reached by the political branches of Government regarding the adequacy of criminal proceedings conducted by a foreign country is to be subjected to the most limited judicial scrutiny. Indeed, Mr. Justice Holmes, a decade after Neeley was announced, wrote for another unanimous Court in a case in which the petitioner was to be extradited to Russia that the Court was "bound by the existence of an extradition treaty to assume that the trial will be fair." *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911).[7] We think that *Neeley* and *Glucksman* taken together provide ample authority for sustaining the validity of the prisoner transfer treaty and its implementing legislation. Thus, it would be a complete answer to any writ of habeas corpus filed by a returned prisoner that the treaty and implementing legislation were complied with.

If, however, a court were to hold that the fact of being in the custody of the Attorney General for the purpose of serving a sentence imposed by a foreign tribunal triggers a constitutional rig[illegible]o test the fairness of the foreign proceeding in either a federal or state court. [illegible]e think that the consent procedures established in S. 1682 would be held constitutionally adequate to establish a waiver of that "right." As we understand the thrust of congressional concern on this point, the question is not whether the particular procedures are adequate but whether, in an abstract sense, such consent may be voluntarily given because the prisoner has, in reality, no viable options. This is so, to quote Senator Griffin, because the "alternative of remaining in Mexico is so unattractive to most prisoners that in reality these individuals are left with but one choice—incarceration in this country." While consent that is "inherently involuntary" cannot be

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[6] See Petitioner's Brief in *Neeley* v. *Henkel*, *supra*, at 152.

[7] This language has been described elsewhere as "betray[ing] a lingering concern for the fairness of the system to which extradited persons were sent . . . ." Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 Harv. L. Rev. 1500, 1505 n. 25 (1977). Rather than a "lingering concern," it is our opinion that this language stands for the proposition that the fairness of the foreign trial is a question for the political branches rather than for the judicial branch. *See also* 22 U.S.C. § 1732, which empowers the President to use all means short of an act of war to secure release of an United States citizen who has been unjustly deprived of his liberty by a foreign country.

cured by the employment of elaborate procedures, we see no basis for concluding that the consent here would be "inherently involuntary."

Two recent Supreme Court cases serve to make our point. In *Jackson* v. *United States*, 390 U.S. 570 (1968), the Supreme Court struck down as unconstitutional the death penalty provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that only a jury could impose the death penalty for violation of that statute. The statute essentially gave defendant the choice between asserting his right to a jury trial along with the possibility of capital punishment or waiving that right and removing possibility of execution. The Court held that the statute encouraged impermissibly the waiver of a constitutional right—the right to a jury trial—where other alternatives existed to achieve the valid congressional purpose of limiting the imposition of the death penalty to cases in which a jury recommended that sentence. *Id.*, at 583.

Despite the apparent coerciveness of the statute, the Court refrained from concluding that it would always occasion involuntary relinquishment of the jury trial right. The Court specifically stated that

> "the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." *Id.*

The Court subsequently confirmed that a defendant faced with the choice of a possible death penalty could nonetheless voluntarily, knowingly and intelligently plead guilty even though such a plea would automatically preclude a death sentence.

See *Brady* v. *United States*, 397 U.S. 742 (1970). If a guilty plea entered in part in fear of the death penalty is not "inherently involuntary," we do not think that the consent to be given by prisoners under the treaty and implementing legislation could or would be said to be so.

Nor do we think that returning prisoners will be able to contend successfully that their "waiver" of ordinary habeas corpus rights was involuntary on the facts of particular cases. The simple controlling point is that the returning prisoner is not waiving any right he had before his return.

A somewhat broader question implicated by the "waiver" involved here is whether, assuming the worst possible conditions in some Mexican prisons, the Government may, consistent with the Constitution, extract a waiver of a constitutional right in return for transfer to better conditions in the United States. It is, of course, fundamental that the States may not, in dispensing benefits, require the recipients of those benefits to waive certain constitutional rights. See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958). And in *Jackson* v. *United States*, *supra*, the Court placed some emphasis on the fact that alternative means existed whereby the Government might attain the objective sought without impermissibly encouraging the waiver of a constitutional right.

These cases certainly support the proposition, with which we agree, that the Government should not use its position as dispenser of benefits to extract waivers of constitutional rights unnecessarily and that procedures tailored to preserve constitutional rights should generally be followed. Here, unlike the situation in Jackson, it appears that there were no alternative means to provide the benefits of transfer to American prisoners because the treaty would not have been negotiated without the provision prohibiting collateral attack by American prisoners in our courts. In such a situation, the "waiver" question reduces to whether the Government, given the realities in which the transfer program was negotiated, may constitutionally extend a benefit to these prisoners with the condition attached or whether the Government is simply precluded from extending the benefit of transfer altogether. We think a court would be reluctant in the extreme to hold that the Government may not, under these circumstances, confer the benefit involved with the conditions attached. See also *Shick* v. *Reed*, 419 U.S. 256 (1974); *United States* v. *Marchetti*, 466 F. 2d 1309 (4th Cir. 1972); *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 95–101 (1947).

Because some concern was expressed during the hearings on this point, we would add that we do not view the treaty or the implementing legislation as limiting the right a transferred prisoner might have to habeas corpus relief or civil damages where he alleges and can prove that American officials engaged in conduct connected to his Mexican detention or conviction similar to that involved in *United States* v. *Toscanino*, 500 F. 2d 267 (2d Cir. 1974). In such a situation, we think that the gravamen of the transferee's complaint would not

go to the validity of his Mexican conviction but would instead focus on the right of the United States to hold in custody a person against whom unconstitutional acts by Government agents have been perpetrated which are connected to his present incarceration. In short, neither the treaty nor its implementing legislation require the transferee to waive whatever right he might have to seek redress for constitutional violations committed against him by the United States or its agents.[8] The fact that Toscanino itself has been given extremely limited reach by the Second Circuit suggests that this issue will not prove vexatious in the context of the treaty. See *United States* v. *Lira*, 515 F. 2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1976).

CONCLUSION

The treaty and its implementing legislation do not strip returning prisoners of any constitutionally protected right to challenge here their foreign convictions. Even if such a right were found to exist, that right could be properly waived pursuant to the procedures outlined in the treaty's implementing legislation.

THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., October 3, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR JOSH: This is to thank you again for the opportunity to appear before the Subcommittee on behalf of the Justice Department in support of H.R. 7148, legislation to implement treaties for the transfer of prisoners. As you know, the Administration strongly endorses this legislation, and we appreciate your efforts to bring about the speedy enactment of this humanitarian measure.

Enclosed are my responses to the prepared questions transmitted to the Department to supplement my testimony on this matter. If you should desire additional information concerning this legislation, I shall be happy to obtain it for you.

Sincerely,

PETER F. FLAHERTY.

Enclosures.

DEPARTMENT OF JUSTICE RESPONSES TO QUESTIONS DATED SEPTEMBER 16, 1977

Question 1. The most obvious issue is the severe limitation on the ability or an American transferred here to attack the basis for his imprisonment. I understand the foreign policy reasons why it was thought that any challenge to a Mexican conviction and sentence should be in Mexico, but do you believe that foreign policy justifies the severe restraints in this bill?

A. The Mexican Treaty (Article VI) provides: "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."

The Canadian Treaty (Article V) provides: "The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State."

These provisions reflect a keystone concept of the treaties, i.e., the sentence or conviction imposed by the courts of one country are to be executed in the country of which the offender is a citizen or national. Presumably neither the United States nor any other country which is currently a party to a treaty for the execution of penal sentences would have acquiesced to a provision which would permit the courts of the Receiving State to set aside or modify a sentence imposed by the courts of the Transferring State. Otherwise the fundamental sovereignty of a nation over crimes committed within its territorial boundaries would be impugned.

The proposed legislation implements this basic principle of the treaties. The offender will, of course, be made aware of the fact that one of the conditions of the transfer is that the Transferring State retains exclusive jurisdiction over challenges to the sentence or conviction and that neither the treaty nor legislation, nor the fact of transfer confers jurisdiction to the Receiving State over the

[8] We are also of the opinion that the fact that counsel for the prisoners who advise them regarding this waiver, except where privately retained, will be paid for by the Government raises no conflict-of-interest problems. Such arrangements are commonplace in the administration of criminal justice.

validity of the sentence or conviction. In short, if the offender wishes to attack the sentence or conviction this must be done in the courts of the country which imposed the sentence.

Question 2A. Do you believe that if an American government agent was in any way involved with the arrest, seizure of evidence, trial, or sentencing of an American in Mexico or any other foreign country, that that American can and should be able to challenge his conviction and sentence on the basis of any improprieties by U.S. law enforcement officials?

Answer. We do not view the treaties or the implementing legislation as limiting the right of a transferred prisoner to habeas corpus relief or civil damages where the prisoner can prove that American officials engaged in conduct connected with his foreign detention or conviction which would not have been constitutionally permitted in the United States. In such a situation, the gravamen of the transferee's complaint would not go to the validity of the foreign conviction, but would instead focus on the supervisory authority of the court over government agents and the right of the United States to hold in custody a person against whom unconstitutional acts by government agents have been perpetrated which are connected to the prisoner's present incarceration. Neither the treaties nor the implementing legislation require a waiver of a right the transferee might have to seek redress for constitutional violations committed by the United States or its agents.

Question 2B. Do you feel that the United States' acceptance of prisoners from foreign countries pursuant to a prisoner exchange treaty such as the Mexican and Canadian treaties constitutes such United States Government involvement so as to require application of U.S. constitutional protections as was held in *U.S.* v. *Toscanino*, 500 F. 2d 267 (2d Cir. 1974)?

Answer. It is our position that acceptance of the transfer of prisoners pursuant to the treaties would not represent such involvement in the prior proceedings in those countries as to render the Constitution of the United States applicable to such prisoners retroactively. We base this conclusion on the cases dealing with extradition and surrender under Status of Forces Agreements which hold that such activity at the beginning of the criminal process does not render the United States Constitutional applicable to foreign trials. Transfers within the United States have not been regarded as making the trial of the transferred prisoner subject to the criminal laws of the State to which he is moved. We would further note that prevailing authority stands for the proposition that direct involvement by American authorities in foreign procedures is required before American standards of the due process apply in sustaining the validity of a conviction or sentence. The case of *United States* v. *Toscanino*, 500 F. 2d 267, involved allegations of misconduct in securing the presence of the defendant before the court for trial and not improper activities of a United States official in the trial which had occurred in a foreign country. Our views on the legal implications of misconduct by United States officials which contributes to conviction in a foreign trial have been set forth in the answer to Question 2A.

Question 3. H.R. 7148 provides that the Attorney General designate citizens of the United States to verify the consent of offenders to be transferred under the terms of the treaty. Do you feel that this is a function properly vested in the Department of Justice, or is it more appropriate to visit it in the Judicial Branch?

Answer. Your views concerning the authority to designate a citizen as the verifying officer being vested in the Attorney General were communicated to us by your staff and we support a change in section 4108(a) which would eliminate any vestige of a conflict of interest because it would require both designation by a judge and approval of the head of the executive agency in which the attorney is employed. This amendment is reflected in S. 1682, as passed by the Senate, and reads as follows:

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

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

Question 4. H.R. 7148 requires that the time for appeal of a conviction and sentence must have expired in order to be eligible for a transfer. It has been suggested that a provision allowing for waiver of appeals rights by all parties involved also be included in this proposal. As an alternative this could provide more flexibility in possible future treaties. What is your position?

Answer. Section 4100(c) provides that only sentences which have become final may be the basis of a transfer. If an appeal concerning the conviction or sentence is pending, such litigation must be finally resolved before the offender is eligible to be considered for transfer.

It should be noted that in Mexico, Canada, and many other countries an appeal may be taken by the prosecution and in some countries the injured party who has joined in the criminal case as a party may appeal. Therefore, under the laws of these countries, until the expiration of the time for appeal, the sentence is not final and the offender is not eligible to be considered for transfer.

The prescribed time for filing an 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, or in the Code of the particular State by which the sentence was imposed. In Canada the time for appeal is regulated by the rules of the court which imposed the sentence.

Since both the Mexican and Canadian treaties bar a transfer until the time for appeal, perhaps a more appropriate way of assuring that the right to appeal may be waived would be to have a memorandum of understanding or exchange of diplomatic notes to the effect that the requirement that time for appeal must run before prisners are eligible for transfer does not preclude waiving the right to appeal. This method of interpreting a treaty is not uncommon. This then would set the precedent for inclusion in future treaties and the legislation could provide for future treaties.

Question 5. H.R. 7148 provides that the Receiving State be barred from prosecuting a transferee on the charge upon which his conviction in the foreign court was based. It has been suggested that language be changed to substitute the word "sentence" for "conviction" which under the definition set forth in the bill includes judgments of acquittal as well as convictions. An offender would thereby be protected from prosecution in the receiving country of charges of which he had been acquitted in the Transferring State. What are your views on such a proposal?

Answer. As a direct result of work done by your staff and the Senate staff, the Senate in S. 1682 reflected this view in section 4101(h), in which the definition of sentence has been changed to read as follows:

(h) "sentence" means not only the penalty imposed but also the judgment of conviction in a criminal case or a judgment of acquittal in the same proceeding, or the adjudication of delinquency in a juvenile delinquency proceeding or dismissal of allegations of delinquency in the same proceedings.

Section 4111 has also been rewritten to read as follows:

§ 4111. Prosecution barred by foreign conviction

An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, or if prosecution would have been barred by the laws of the jurisdiction seeking to prosecute the transferred offender if the sentence on which the transfer was based had been issued by a court of the United States or by a court of another State.

Question 6A. Outline generally what criteria will be used in your Department's determination regarding (1) where transferred offenders will be incarcerated, and (2) where the mentally ill, and juveniles will be institutionalized.

Answer. The same criteria will be utilized in determining the institution in which a transferred offender is to be confined as are used in the determination of the place of confinement for an offender convicted by an United States District Court. The most cogent factors are the type and location of available institutions, the age, prior record, length of sentence and type of offense of the individual offender. Where appropriate, every effort is made to confine the offender in an institution as near to home as possible.

A mentally ill offender who has been convicted and subsequently transferred to the United States will be placed in a facility having a specialized staff and, if necessary, in a hospital facility. The placement of such a convicted person will be made with the advice of a competent psychiatrist or psychologist.

Juveniles will be placed only in state institutions with which the Federal Bureau of Prisons has contracts. Such institutions have been inspected and have been found to be suitable for the boarding of juvenile offenders.

Question 6B. The bill provides that prisoners transferred to the U.S. can, in appropriate cases, serve their sentences in state prisons. How do you propose to implement this, specifically, what type of cases and what types of offenders should be kept in state prisons?

Answer. Except in the case of juvenile offenders, we anticipate that state institutions will rarely be used to confine transferred offenders. When offenders are boarded in state institutions it will be pursuant to a contract between the Bureau of Prisons and the appropriate state authority.

Question 7. With regard to those individuals declared to be mentally ill, who are transferred under the treaties, neither the treaties nor the legislation establishes specific procedures to be followed with respect to disposition of these cases. Have you formulated any procedures; will existing procedures concerning similarly-situated Americans be applied?

Answer. If there are indications or there has been a determination that an American in prison in Mexico is mentally ill, a further determination will be made with the assistance of experts as to the degree of illness. Assuming that although the offender is mentally ill, he or she is competent to consent to the transfer, the transfer will be accomplished. Thereafter, the offender will receive appropriate care and treatment as though he or she had been convicted by a court of the United States.

If the mental illness of an offender is such that he or she cannot consent to a transfer, the consent of a guardian will be required. If a guardian has not been appointed, efforts will be made to have the family secure the appointment of a guardian.

Question 7A. H.R. 7148 provides that the Attorney General in concert with H.E.W. may make agreements and regulations including return of an individual, transferred after having been determined to be mentally ill, to the transferring state "upon his recovery from mental illness." How would this be accomplished? Are the laws regarding mental incompetency etc. in Mexico, Canada, and other countries similar to ours? If not, and if different standards are applied in determining mental insanity or illness, how will you reconcile these differences? (e.g.— a situation may arise whereby one treaty country, applying its standards, finds mental soundness, while the other treaty country does not).

Answer. This provision was included in the legislation to provide a remedy in case of the feigning of mental illness by the accused. It was contemplated that the return would be accomplished by extradition. In our view the elimination of the provision does not bar the possibility of the return by way of extradition of an accused who has recovered from a mental illness. S. 1682, as passed by the Senate, does not contain the provision pertaining to the return of an offender upon recovery from mental illness.

We are not presently able to furnish detailed information concerning the laws of Mexico, Canada, and other countries pertaining to mental incompetence. It is our position, however, that the laws of the United States will be satisfied in every case of a transfer of a person accused of a crime but who cannot be proceeded against because of a mental illness.

Before we could agree to the transfer of an American declared to be incompetent to stand trial under Mexican law because of "unsound mental condition" for care in an institution in the United States, we would have to be satisfied that the person's mental condition was such that a commitment to an appropriate institution could be obtained. This determination would be made on the basis of the law of the jurisdiction in which the commitment would be obtained. The decision to discharge such an offender from the institution would also be made pursuant to the laws of the jurisdiction in which the institution is located. Upon the discharge of the accused person from the institution or recovery, the Transferring State would be notified.

In the case of a Mexican accused of a crime in the United States but who cannot be tried because of mental illness, the determination of mental illness would be settled by United States law.

The agreements for the transfer of persons referred to in this question would supplement the provisions of Title 24, United States Code, Sections 321 et seq., and would be made in conjunction with the Secretary of Health, Education, and Welfare.

Question 7B. The Canadian treaty includes a provision that "the Receiving State may treat under its laws relating to youthful offenders, any Offender so

categorized under its laws regardless of his status under the laws of the Sending State" (Article IV, 2). The Mexican treaty does not include a comparable provision, but instead provides that the parties shall "agree to the type of treatment" to be accorded youthful offenders. Can you elaborate on the meaning of these two provisions and explain the differences? Isn't the Canadian provision more acceptable from a U.S. perspective and is it possible to include a provision in the implementing legislation which is designed to insure that transferred youthful offenders shall be treated according to the laws of he U.S.? Would such a provision be inconsistent with the Mexican treaty?

Answer. Before addressing your specific questions it should be noted that the expression "youthful offender" is not to be equated to the technical term "youth offender" as used in Chapter 402, Title 18, United States Code (Federal Youth Correction Act). The concept of "youth offender" is not present in the criminal laws of Canada or Mexico. Canada has a Juvenile Delinquents Act under which a juvenile is, in most provinces, a person under the age of sixteen, but in some provinces, a juvenile is a person under the age of eighteen. Mexico also has special provisions for the treatment of offenders under the age of eighteen.

The Mexican treaty contemplates that with regard to an offender under eighteen at the time of the offense for whom supervision or other measures have been ordered, an agreement will be made as to the type of treatment to be accorded such individuals upon transfer. It is contemplated that a general agreement as to the treatment of transferred juveniles will be made with the Mexican authorities.

There are no American juvenile offenders presently being held in Mexico.

The Canadian provision simply authorizes the Receiving State to treat as a "youthful offender" under its laws any person so categorized under its laws regardless of the offender's status under the laws of the Sending State.

Under both the Mexican and Canadian treaties, an American youthful offender transferred to the United States will be treated according to the laws of the United States. The agreement with Mexico will provide that the type of treatment to be accorded a youthful offender transferred to the United States must be a type of treatment which could be administered had the treatment been prescribed by the United States.

Question 8. With regard to youthful offenders transferred under these treaties, what procedures will be followed relating to disposition and confinement of these individuals. Where a conflict arises between the two treaty countries regarding treatment of youthful offenders, which country prevails?

Answer. The procedures which will be followed relating to disposition and confinement of youthful offenders transferred to the United States will, as far as possible, be the same as those which would be followed had the particular offense been committed by the particular offender in the United States.

Question 9. Because there are difficult constitutional issues raised by this legislation, do you think a provision for expedited judicial review should be included?

Answer. It is our position that a provision for expedited review of any habeas corpus petition filed by returning prisoners would be unwarranted. With regard to the rights of the returning prisoner, we would be reluctant to suggest that his application for habeas relief should be processed any more quickly than applications filed by other prisoners. Were a prisoner to be successful in a habeas corpus proceeding, a direct appeal to the Supreme Court would be available under 28 U.S.C. § 1252 should the Government choose to exercise that right. (We do not think a prisoner could prevail in a habeas corpus action unless the district court held the implementing legislation to be unconstitutional, a prerequisite of review under § 1252.) Thus, we think that existing procedures provide sufficient means for the Government and the returning prisoners to obtain a resolution of the constitutionality of the treaty.

Question 10. In a previous hearing on separate legislation, I discussed with Justice Department officials the issue of extending U.S. criminal jurisdiction to certain extraterritorial offenses. Has the Department given any detailed consideration to an approach of this nature which would allow delivery to, and trial in, the U.S. rather than transferring prisoners after a foreign conviction. In other words, wouldn't it be possible, practical, and constitutional for the U.S. to assert jurisdiction over certain activities engaged in abroad where there is a U.S. nexus, such as a violent or property crime by one U.S. citizen against another U.S. citizen, a victimless crime committed by a U.S. citizen, or where there will be an impact in the U.S. as a result of criminal activities abroad—smuggling of drugs through a transit country?

Answer. Your suggestions concerning giving extraterritorial effect to the criminal laws of the United States in those cases in which there is a United States nexus are being studied by the Department. However, even if these laws were made applicable beyond the territorial limits of the United States and we could try an American for a crime committed in a foreign country, such a trial would encounter great difficulties in view of the Sixth Amendment "right to confrontation". We are continuing to study the problems caused by Americans who commit crimes abroad to insure that they will be appropriately and promptly punished and at the same time that their rights be protected.

Question 11. With regard to eligibility for transfer, the Mexican treaty includes persons who are "nationals" of the Receiving State while the Canadian treaty includes "citizens". What is the reason for this difference? What would happen in the case of a bi-national marriage where both spouses are incarcerated in a particular country (for example, a U.S. citizen may be incarcerated in Mexico along with his permanent resident spouse)? In your judgment, does the treaty preclude the transfer of the permanent resident spouse to the U.S.? In view of this problem shouldn't the treaties have included those persons who are also permanent resident aliens of the Receiving State?

Answer. When negotiating the treaties, the United States wanted to be sure that a national of the United States who is not a citizen of the United States would be eligible for transfer. This was accomplished in the Mexican treaty by the use of the word "national" and in the Canadian treaty by the use of "citizen", with the proviso contained in Article 1(d) that in the case of the United States "citizen" includes "nationals". The term "national" is not defined in the Mexican treaty and hence the domestic law of the countries involved must be utilized.

A Mexican does not acquire Mexican citizenship unless the following conditions are satisfied: the Mexican has (1) attained the age of eighteen, and (2) has an honest means of livelihood. In view of this, the term "citizen" would not have been acceptable to Mexico.

A Mexican national is one who possesses Mexican nationality. Mexican nationality is acquired by birth or by naturalization:

(A) Mexicans by birth are:

1. Those born in the territory of the Republic, regardless of the nationality of their parents;

2. Those born in a foreign country of Mexican parents, or of a Mexican father or Mexican mother;

3. Those born on Mexican vessels or airships, either war or merchant.

(B) Mexicans by naturalization are:

1. Foreigners who obtain letters of naturalization from the Secretariat of [Foreign] Relations;

2. A foreign woman or man who contracts marriage with a Mexican man or woman and establishes domicile within the national territory.

Question 12. One provision in the bill would establish procedures in the U.S. for the enforcement and collection of civil damage awards which are made to the victim of a criminal offense (In many foreign jurisdiction criminal fines or awards are imposed as a part of the criminal process). To what extent is this a significant problem and would it be possible to finalize the civil aspects of the criminal judgment prior to the transfer? Since the treaties do not make specific reference to this matter, why is the provision included in the proposed bill? What problems would be created if this provision were removed from the bill?

Answer. As you have noted, in many countries a sentence will include not only deprivation of liberty but also a fine and an award to the injured party. In some countries, forfeiture and confiscation may also be imposed. The treaties do not provide for the execution of sentences which include fines, reparations or restitution, or confiscation or forfeiture. However, the treaties do not specifically exclude the transfer of an offender whose sentence includes not only imprisonment but also a fine, an award of reparations, or confiscation or forfeiture of property. A criminal fine imposed together with imprisonment should not pose a significant impediment to the transfer or the offender because of the ability of the affected governments to work out between themselves the procedures for dealing with such fines. However, an award of reparations to the victim of a crime committed by United States citizens presents a more substantial problem. Mexican authorities have advised that an offender whose sentence includes reparations will not be transferred until the award is satisfied. Therefore, it was thought desirable to provide a mechanism whereby an award of reparations could be collected within the United States from a transferred offender.

If this provision is eliminated, an offender whose sentence includes an award of reparations will have to satisfy that award before transfer to the United States. If the provision is retained, there is a possibility that the transfer could be made. At this time, it is not thought appropriate to attempt to enforce the portion of a sentence which relates to confiscation or forfeiture of property.

The Department of Justice has been requested by the Department of State to respond to the following question transmitted to the Department of State by the Subcommittee.

Question. Under the legislation, a consent to transfer and the subsequent transfer itself of any person who is under an order of deportation is viewed from an immigration standpoint as the removal of an alien pursuant to an order of deportation. Recognizing that the deportation of an alien has severe consequences on that alien's later ability to re-enter the United States, shouldn't such alien be provided a separate opportunity to contest the deportability question, either prior to or following the transfer?

Answer. 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 4112 of the legislation is to maintain the status quo with respect to the immigration law by treating aliens transfered 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.

The offender will have all the rights to question his deportability prior to the transfer that any other alien within the United States has to challenge deportability under the Immigration Laws.

Question 1. I am concerned about congressional input into the preparation of this legislation. Before H.R. 7148 was forwarded to the Congress, what meetings, contacts, consultations, and discussions, if any, were held with the Congress, and particularly the Judiciary Committee and my Subcommittee? I ask this question because I believe that some problems I saw in this bill could have been worked out if such legislation could have been forwarded to us in draft form prior to its final introduction.

Answer. The Department appreciates the wisdom and desirability of consultation with Committees and Subcommittees of Congress having competence of the subject matter of proposed legislation prior to its being transmitted to the Congress for introduction. In this instance, the attorney who initially prepared the proposed draft of the legislation was contacted by a member of your staff and was requested to furnish the staff member with a copy of the rough draft of the proposal. Since that time the draft had not been reviewed by anyone in the Department, the attorney advised that he could not furnish a copy of the initial draft at that time, but would do so once it received preliminary approval. Our attorney did express a willingness to discuss the matter with the staff member but, unfortunately, because of time constraints and staff scheduling conflicts, no such conference could be arranged. Once the draft was approved in the Department it was immediately sent to the Congress for introduction. Thereafter, close liaison has been maintained with your staff and suggestions made through your staff were accepted as amendments to the Senate bill. It should be noted that the Department adopted the same course of action with representatives of the Senate Committee.

Question 2A. One concern that I have about these treaties and the implementing legislation is the possibility that dangerous or recidivistic offenders might be returned to the U.S. and subsequently released. What procedures will you establish together with the Department of State to screen such individuals? Will you oppose any request for transfer on this basis?

Answer. An offender who is a citizen or national of the United States whose transfer is offered by Mexico or Canada and who consents to the transfer will be accepted by the United States regardless of the offense for which sentenced or prior record. The fact that the offender may be dangerous or a recidivist will be taken into consideration in determining the place of confinement and the measures to be utilized regarding that confinement. The overriding consideration

is that the sentence can be more effectively and more humanely executed in the country of which the offender is a citizen or national than in a foreign country.

It should be noted that a foreign country can at any time deport such an offender to the United States and we would have to admit the offender regardless of his or her prior record or dangerous propensities. An offender deported to the United States would be free; an offender transferred to the United States pursuant to the treaties and the implementing legislation must serve the sentence imposed by the foreign court.

Question 2B. This Subcommittee is particularly concerned, obviously, about Immigration Law; and its violations. Could you tell us why individuals charged with immigration offenses are not included within the treaties? Why was such an exclusion not included in the legislation?

Answer. The reasons why individuals charge with immigration offenses are not included within the treaties will be answered by the Department of State. The reason for not including any specific exclusion, e.g., immigration offenses, in the legislation was that the Transferring State has the option to refuse to transfer any offender. The exclusion of immigration offenses from the Mexican and Canadian treaties is in no way an expression of a national policy which would require their exclusion from future treaties.

Question 2C. Both treaties are very explicit as to the criteria to be considered by both the Transferring and Receiving States with regard to a particular transfer (for example, they stipulate that the transfer be determined to be "appropriate" and in making such a determination the parties "shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including . . . the severity of the sentence . . . previous criminal record . . . medical condition . . . [and] family relations").

On the other hand, the legislation does not restate this criteria nor provide any additional factors that should be considered by the Attorney General in transferring or accepting offenders.

Shouldn't the legislation specifically include provisions relating to this subject?

Answer. If the country whose laws have been violated by an American citizen is willing to transfer the offender for the execution of the sentence imposed by its courts, and the American consents to the transfer, it is our view that the United States should consent to the transfer. This is in keeping with the principle that a sentence can be more effectively and humanely executed in the country of the offender. Therefore, discretionary criteria have not been included in the legislation.

Question 3A. Have any specific procedures been developed to insure that offenders in foreign jurisdictions are sufficiently notified, prior to the giving of their consent to be transferred, of the consequences of such a consent? What information should be provided in order that a voluntary and intelligent waiver, as measured by U.S. Constitutional Standards, might be given?

Answer. Attorneys from the Department accompanied by representatives of the Bureau of Prisons will interview each prisoner eligible for transfer prior to their giving final consent to insure that such prisoner understands the consequences of the transfer and the procedure of transfer. Each eligible prisoner will be furnished with a copy of a monograph entitled Information Booklet for United States Citizens Incarcerated in Mexican Prisons Regarding the Operation of the Treaty Between the United Mexican States and the United States of America on the Execution of Penal Sentences. Copies of this monograph have been furnished to you for each member of the Committee.

Question 3B. H.R. 7148, as presently written, generally provides for a "waiver" as justifying limitations on a transferred prisoner's ability to challenge his conviction and sentence. Do you believe a waiver in this case is equal to consent, and do you believe that such consent can be truly voluntary when an individual is consenting in order to leave Mexico jails, and possibly intolerable conditions there?

Answer. Since an offender confined in a Mexican prison has no constitutional rights to challenge his Mexican conviction in the Courts of the United States, he does not waive any rights by transfer. Your views concerning this point and the verification proceedings generally have been accepted and are reflected in section 4108 of S. 1682, as passed by the Senate. Section 4108, as amended, reads as follows:

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in

which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451, title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:

(1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seekings such action may only 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 if that country requests his return; 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, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

It should be noted that the reference to waiver has been eliminated and consent substituted.

The question of whether a prisoner in a Mexican jail may voluntarily consent to transfer to the United States is somewhat analogous to whether an individual charged with a crime for which the death penalty may be imposed can voluntarily plead to a lesser offense. That such a person may do so, even though claiming to be not guilty, is established by *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

Question 3C. Does the proposed legislation make it clear that a transferred offender does not waive his right to challenge the transfer itself to the procedures utilized during the transfer; U.S. exception of a foreign sentence; or the treaty and legislation as being an unconstitutional restriction on the jurisdiction of federal courts.

Answer. Section 3 of the legislation does not refer to the rights of a transferred offender to challenge the transfer itself, the procedures utilized during the transfer, United States execution of the foreign sentence, of the constitutionality of the treaty and legislation as being an unconstitutional restriction on the jurisdiction of federal courts. However, Section 3 of the legislation, which adds a new section 2256 to Title 28, United States Code, recognizes such rights and specifies the venue for such challenges. The only restriction imposed by the treaties and the legislation on the offender is the condition that the conviction or sentence of the foreign court may not be challenged in our courts.

Question 3D. Would you please elaborate on the issue of "consent". In other words, is this merely consent to the transfer itself or does it also represent consent to waive certain possible challenges to federal custody after transfer?

Answer. The consent is not only to the transfer but also to the conditions of the transfer. See response to question 3B.

The consent does not include a waiver of possible challenges to federal custody after transfer. However, it should be noted that a condition of the transfer is that challenges to the foreign conviction must be made in the courts of the sentencing country.

Question 3E. Mr. Flaherty, I note from your testimony that the verification proceeding will include notice to the offender as to the ramifications of his consent or

transfer, including "parole eligibility dates", and the "pendency of warrants for their arrest in the U.S."

I note from the proposed legislation that these two particular items are not specifically included, although most of the others such as right to consult counsel and the affect of their consent on their ability to attack the Mexican convictions are specifically set forth in the proposed bill. Should the two items to which I have referred also be included?

Answer. An offender considering consenting to transfer should be made aware of the operation of the parole system of the United States and the meaning of the parole eligibility date. This will be accomplished by furnishing the offender with a copy of the monograph referred to in the answer to question 3A and by the interviewing team also mentioned in that answer. It is very important too that the offender be informed of any warrants known to the Justice Department to be outstanding. However, it is our view that such details should not be included in the legislation.

Question 4. As I read the bill, now an American transferred to the U.S. prisons will be entitled to parole under U.S. laws. Is the offender entitled to immediate parole or will a certain period of time have to be spent in American prisons before he will be eligible? With regard to parole, one proposal under consideration is application of language contained in Title 18 U S.C. 4205(B) which would make all transferred prisoners immediately eligible for consideration for parole. Do you foresee any foreign policy problems arising out of this proposal? What would be the basis for application of Sec. 4205 (B) rather than 4205 (A)? Does not 4205 (B) require an exercise of discretion by a sentencing court, on a case-by-case basis, as a condition to parole eligibility? Would not inclusion of the language contained in 4205 (B) in the present legislation, in effect, create a new parole policy, separate and apart from that already in existence? Doesn't this give preferential treatment from a parole standpoint to transferred prisoners, since it is not available to offenders convicted in the U.S., unless recommended by the sentencing court? Is this equitable? What procedures will be undertaken to review the Mexican prison records and other documents to see whether an individual should be released on parole?

Answer. As introduced, the legislation provided that a transferred offender would be eligible for parole in accordance with the statutory provisions applicable to one convicted in a United States District Court, with one exception. This exception provided that an offender who at the time of conviction was under 22 years of age would be eligible for parole at any time.

During the proceedings before the Senate Judiciary Subcommittee on Penitentiaries and Corrections, S. 1682 was amended to provide that all transferred offenders may be released on parole at such time as the Parole Commission may determine. The basis for this amendment was the fact that whereas offenders sentenced to more than one year by a United States court could have the benefit of section 4205(b)(2) under which the offender may be released on parole at such time as the Parole Commission may determine, the offender convicted abroad did not have an opportunity to have the benefit of section 4205(b)(2).

A further consideration for providing that transferred offenders could be released at such time as the Parole Commission may determine was that it would permit the adjustment of the term of confinement imposed by a foreign court which was so disproportionate to that which would have been imposed by a United States court as to raise Eighth Amendment problems. Such problems are not anticipated with the sentences of Mexican and Canadian courts; however, this problem may arise should treaties with other countries be executed.

The conferring of authority on the Parole Commission to determine the time of release from confinement, in our view, is not expected to create any foreign policy problems. The amended legislation does not mandate that an offender be released at a time other than that set by statute. It merely confers him a parole eligibility which might have been granted had the sentence been imposed by a United States court. The transferred offender does not have the benefit of 4205(g).

The decision of the Parole Commission to grant parole will be made on the basis of the guidelines for parole and a review of the Mexican court and prison records and a background study of the offender which will be made by the United States Probation Service with information furnished by criminal justice agencies.

It should be noted that Mexican offenders transferred to Mexico will have the benefit of those provisions of Mexican law which are comparable to our parole laws. However, Mexican law provides that offenders convicted of drug offenses, habitual offenders and recidivists may not be accorded parole (preparatory liberty).

Question 5. We have been told that some Americans in foreign jails will not wish to return to the U.S. because of pending criminal charges unrelated to that charge for which they were imprisoned in the foreign country. What review will be undertaken to determine if there are charges at the present time pending in the U.S. for prisoners in foreign jails? What, if any, will be the policy of the Department of Justice as to prosecution of these offenses? Do you believe it appropriate that charges many years old should be prosecuted when a prisoner is returned to the U.S.? Should a person be advised if there are any outstanding warrants for his arrest?

Answer. Each prisoner will be requested during the preliminary phase of the proceedings to voluntarily furnish fingerprints in order that a check of the FBI's computerized arrest warrant records may be made. The offender should and will be advised of all warrants known to be outstanding.

The Department of Justice policy as to prosecution of pending cases will be to make a case-by-case determination taking into consideration all relevant factors. It would be inappropriate not to prosecute a case solely because the defendant had been convicted of an offense in a foreign country.

Question 6A. Neither of the treaties nor the implementing statute indicate what part, if any, the U.S. Department of Justice and/or the Department of State would play in collateral proceedings instituted by or on behalf of a prisoner transferred to the U.S. system, in the courts of the transferring country challenging his/her conviction and/or sentence. Such an attack is not precluded under either the treaties or the implementing legislation.

Has either Department considered the situation? Have any arrangements been made to deal with it, if it should arise? The U.S. Government would certainly have an interest in such proceedings, particularly if modification of sentence or reversal of a conviction would result in the emancipation of an individual serving time for a violent or heinous offense.

What, if any, arrangements have been or will be made regarding notification of the receiving country, by the transferring country, of the institution of such proceedings.

Answer. It is not contemplated that the United States Department of Justice will participate in collateral proceedings instituted by or on behalf of a transferred offender challenging his/her conviction in the courts of the sentencing country. Such collateral attacks will be conducted as though the offender had not been transferred.

The sentencing country is under an obligation to notify the Receiving State of any changes in the sentence. If the change is an ameliorating one, the United States will upon notification give the offender the benefit of the change. No provision is made for notification of the institution of such proceedings.

Question 7. On page 6 of your statement you indicate that the treaty and proposed legislation do not strip prisoners "of any existing right to challenge in the U.S. their foreign convictions." Is this an accurate statement? Isn't it true that there is no existing right to challenge a foreign conviction since there is no existing situation which necessitates or occasions judical review in the U.S. of a foreign conviction?

Answer. The reference to the fact that the treaty and proposed legislation do not strip prisoners of any existing right to challenge in the United States their foreign convictions was intended to emphasize that an American in a foreign prison pursuant to a sentence of a court of that country has no right to challenge his confinement in the courts of the United States.

Question 8. On pages 6 and 7 of your statement you rely heavily on Supreme Court holdings relating to extradition. Do you believe that it is fair and logical to compare the policies, procedures, and cases governing extradition with the procedures to be followed in transferring prisoners under this legislation? Isn't it true that extradition deals only with the delay in anticipation of trial, whereas the transfer of prisoners deals with giving force and effect to a foreign conviction?

Answer. Our reliance on Supreme Court cases involving extradition is both fair and logical. Those cases are premised upon the same constitutional principles that would be applied in cases that may be brought under the prisoner

transfer treaty. Contrary to the suggestion in the question, extradition does not deal "with the delay in anticipation of trial, whereas the transfer of prisoners deals with giving force and effect to a foreign conviction . . . ." The essence of extradition is that the United States, by treaty and statute, agrees to "recognize" the validity of a criminal complaint filed by a foreign government against a United States citizen or non-citizen. Thus, on a showing of "reasonable" or "probable" cause, a person may be transported against his will to a foreign country. See *Fernandez* v. *Phillips*, 268 U.S. 311 (1925).

Furthermore, the rules laid down in extradition cases such as *Neeley* v. *Henkel*, 180 U.S. 109 (1901), are applicable whether the person to be extradited is to be tried for an offense or has already been convicted of an offense and the foreign country wishes to execute a sentence imposed for that conviction. See *Gallina* v. *Fraser*, 278 F. 2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960) (person to be extradited could not complain that prior Italian trial was held and conviction obtained in absentia). Indeed, under Gallina a United States citizen incarcerated pursuant to a Mexican conviction would not, were he to escape to the United States, be able to attack collaterally his Mexican conviction in an attempt to forestall his extradition to Mexico. So far as we are aware, virtually all extradition treaties apply to both types of situations.

Given this line of constitutional authority, we find no support for the notion that a United States citizen could be returned involuntarily to a Mexican prison without a right to attack collaterally his Mexican conviction in American courts while the same person, in this country as the result of his voluntary decision to accept the benefits of this treaty, should have such a right. While the two situations are not distinguishable in our view, there are two differences between the escapee and the transferee. First, the escapee would normally be held in custody in this country for a shorter period of time. But we are unaware of any cases that suggest that such a factor should affect the availability of the Great Writ. Secondly, an escapee faces the very uncertainties and evils that the treaty was negotiated to obviate, whereas the transferee voluntarily accepts the benefits of the treaty. If the Great Writ were to be available to either escapees or transferees but not both, logic would seem to us to compel that it be available to an escapee. Under settled law, however, it is not available to attack the foreign proceeding. We therefore believe that it is both logical and, in a very genuine sense, "fair" to use extradition cases to support the constitutionality of the treaty and the implementing legislation.

Question 9. Neither of the treaties provides for automatic return of an offender who secures release through a U.S. court decision. Why was this provision included in the proposed legislation? As a practical matter, do you believe the foreign country will want these prisoners to be returned? H.R. 7148 provides that these offenders "may be returned". Will standards be developed to assist our government in determining whether an individual should be returned after a court orders his release? Who will develop and apply these standards?

Answer. Neither the Mexican nor the 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 deals with one instance under which the United States could return the transferred offender—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 procedures to obtain the return of a transferred offender, in general, correspond to those utilized in extradition proceedings. However, an extradition treaty is not required, the offense need not be included in a list of extraditable offenses, the conviction substitutes for probable cause, and an offender returned is subject to the jurisdiction of the country to which he is returned. The return of the offender is conditioned upon his being given credit toward service of the sentence for time spent in the custody of or under the supervision of the United States. This section incorporated by reference sections 3186–3195 of title 18.

The provisions for the return of an offender have been modified in S. 1682, as passed by the Senate, and presently read as follows:

§ 4114. Return of transferred offenders

(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days.

(b) Upon receiving a request from the sentencing country that the offender ordered released be returned for the completion of his sentence, the Attorney General may file a complaint for the return of the offender with any justice or judge of the United States or any authorized magistrate within whose jurisdiction the offender is found. The complaint shall be upon oath and supported by affidavits establishing that the offender was convicted and sentenced by the courts of the country to which his return is requested; the offender was transferred to the United States for the execution of his sentence; the offender was ordered released by a court of the United States before he had completed his sentence because the transfer of the offender was not in accordance with the treaty or the laws of the United States; and that the sentencing country has requested that he be returned for the completion of the sentence. There shall be attached to the complaint a copy of the sentence of the sentencing court and of the decision of the court which ordered the offender released.

A summons or a warrant shall be issued by the justice, judge, or magistrate ordering the offender to appear or to be brought before the issuing authority. If the justice, judge, or magistrate finds that the person before him is the offender described in the complaint and that the facts alleged in the complaint are true, he shall issue a warrant for commitment of the offender to the custody of the Attorney General until surrender shall be made. The findings and a copy of all the testimony taken before him and of all documents introduced before him shall be transmitted to the Secretary of State, that a return warrant may issue upon the requisition of the proper authorities of the sentencing country, for the surrender of offender.

(c) A complaint referred to in subsection (b) must be filed within sixty days from the date on which the decision ordering the release of the offender becomes final.

(d) An offender returned under this section shall be subject to the jurisdiction of the country to which he is returned for all purposes.

(e) The return of an offender shall be conditioned upon the offender being given credit toward service of the sentence for the time spent in the custody of or under the supervision of the United States.

(f) Sections 3186, 3188 through 3191, and 3195 of this title shall be applicable to the return of an offender under this section. However, an offender returned under this section shall not be deemed to have been extradited for any purpose.

(g) An offender whose return is sought pursuant to this section may be admitted to bail or be released on his own recognizance at any stage of the proceedings.

Question 10. H.R. 7148 authorizes provision of and payment for the offender's attorney for the purpose of representing him during verification of consent procedures. Funds would be provided and appointment made by the Secretary of State. Is it your view that such a procedure is proper? Or, might the responsibility for the appointment of counsel in the verification proceedings better be left to the court?

Answer. The provisions relating to the appointment of counsel have been refined in S. 1682, as passed by the Senate, to reflect your views. The appointment of the attorney is to be made by the verifying officer pursuant to regulations prescribed by the Director of the Administrative Office of the United States Courts. The Secretary of State will pay the fees and expenses of the appointed counsel.

Section 4109 as amended reads as follows:

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

(a) counsel for proceedings conducted under section 4107 shall be appointed in accordance with the Criminal Justice Act (18 U.S.C. 3006A). Such appointment shall be considered an appointment in a misdemeanor case for purposes of compensation under the Act;

(b) counsel for proceedings conducted under section 4108 shall be appointed by the verifying officer pursuant to such regulations as may be prescribed by the Director of the Administrative Office of the United States Courts. The Secretary of State shall make payments of fees and expenses of the appointed counsel, in amounts approved by the verifying officer, which shall not exceed the amounts authorized under the Criminal Justice Act (18 U.S.C. 3006(A)) for representation in a misdemeanor case. Payment in excess of the minimum amount authorized may be made for extended or complex representation whenever the verifying officer certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the chief judge of the United States court of appeals for the appropriate circuit. Counsel from other agencies in any branch of the Government may be appointed: *Provided*, That in such cases the Secretary of State shall pay counsel directly, or reimburse the employing agency for travel and transportation expenses. Notwithstanding section 3648 of the revised statutes as amended (31 U.S.C. 529), the Secretary may make advance payments of travel and transportation expenses to counsel appointed under this subsection.

Question 11. Because there are difficult constitutional issues raised by this legislation, do you think a provision for expedited judicial review should be included?

Answer. It is our position that a provision for expedited review of any habeas corpus petition filed by returning prisoners would be unwarranted. With regard to the rights of the returning prisoner, we would be reluctant to suggest that his application for habeas relief should be processed any more quickly than applications filed by other prisoners. Were a prisoner to be successful in a habeas corpus proceeding, a direct appeal to the Supreme Court would be available under 28 U.S.C. § 1252 should the Government choose to exercise that right. (We do not think a prisoner could prevail in a habeas corpus action unless the district court held the implementing legislation to be unconstitutional, a prerequisite of review under § 1252.) Thus, we think that existing procedures provide sufficient means for the Government and the returning prisoners to obtain a resolution of the constitutionality of the treaty.

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES PAROLE COMMISSION,
Washington, D.C., September 21, 1977.

Hon. JOSHUA EILBERG,
U.S. Congressman, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: This is in response to your request for the position of the United States Parole Commission with respect to legislation regarding the transfer of offenders from foreign countries, H.R. 7148, which is presently pending before the House Subcommittee on Immigration, Citizenship and International Law which you chair. Your specific concern was how the Commission would implement this legislation, if enacted, to determine whether a transferred prisoner should be released on parole.

The Commission intends to consider the case of a transferred United States National Under the same criteria, 19 U.S.C. § 4206(a), employed to determine whether an individual serving a federal sentence in the United States should be paroled. This consequently includes utilization of our guidelines set out at 28 C.F.R. § 2.20. The Commission's guidelines are a national paroling policy designed to promote a more consistent exercise of discretion and more equitable decision-making without removing individual case consideration. An illustration of the application of these guidelines may prove informative.

An individual convicted of possession with intent to distribute or sell a "hard drug" such as heroin or cocaine and who obeys the rules of the institution in which he is incarcerated can customarily expect to serve from twenty-six up to seventy-two months of incarceration before his release depending upon his background. The Commission's guidelines are flexible and provide that decisions above or below them can be made if mitigating or aggravating factors of an individual's offense, background or service of sentence are found to exist. At present decisions within the guidelines are made in 79 percent of the cases

while decisions above and below them are made in 15 percent and 6 percent of the cases respectively.

Regarding the situation of United States Nationals serving sentences in Mexico, if many of these individuals have already served long portions of their sentences, they may be entitled to immediate release under our guidelines. No estimate can be given as to how many prisoners might be released after their transfer to the United States inasmuch as information about the nature of these individuals' offenses and the length of their incarceration is not presently available. Moreover, any decision must be based upon the circumstances of each individual case.

The Commission intends to follow the procedures set out in 18 U.S.C. § 4208 which are employed for a federal offender in conducting parole proceedings for a transferred prisoner. Information which would be considered in arriving at a parole decision will be received from the prisoner, from the translated criminal proceedings and institutional records of the foreign country, from a Post Sentence background report prepared by a United States Probation Officer and from criminal justice agencies which may have information about a particular transferred prisoner.

I understand that some concern was expressed in hearings before your subcommittee regarding a proposal to modify Section 4106(c) of the legislation to permit the Commission to determine when a transferred prisoner would be eligible for release on parole. As you are aware this sentencing alternative may be imposed in the case of a federal offender by a federal district court pursuant to 18 U.S.C. § 4205(b)(2). The Commission endorses such a provision for several reasons. Statistics suggest that most drug offenders sentenced in the United States receive this type of sentence which entrusts the question of eligibility to the Commission. Inasmuch as most United States Nationals in foreign prisons are convicted of drug offenses, this proposal would provide similar treatment of offenders. More importantly in our view is the fact that a term of ineligibility can be counter productive to the goals of treating transferred prisoners in an equitable manner. If long prison sentences are imposed by a foreign court for an offense such as possession of a small amount of marijuana, which is considered to be a less serious crime in the United States, a transferred prisoner who on the merits of his case deserves parole in such an instance would remain incarcerated until he has reached his eligibility date. Providing for parole eligibility in the Commission's discretion has not in our experience resulted in wholesale grants of parole for all offenders at the earliest opportunity but has given the Commission the ability to determine the central question, when a prisoner should be released into the community, independent of any arbitrarily imposed term of ineligibility.

For your information I have enclosed a copy of the Commission's regulations under which we are presently operating. I trust this information will be of assistance to you.

Sincerely,

CURTIS C. CRAWFORD,
Acting Chairman, U.S. Parole Commission.

Mr. EILBERG. Our next witness is Hon. Warren Christopher, Deputy Secretary of State, Department of State.

Mr. Christopher.

TESTIMONY OF WARREN CHRISTOPHER, DEPUTY SECRETARY OF STATE, DEPARTMENT OF STATE, ACCOMPANIED BY HERBERT J. HANSELL, LEGAL ADVISER, AND ROBERT HENNEMEYER, ACTING DEPUTY ASSISTANT SECRETARY, CONSULAR AFFAIRS

Mr. CHRISTOPHER. Mr. Chairman, members of the committee, I am pleased to have this opportunity to be here today to discuss H.R. 7148, which is described as the bill to implement the Mexican and Canadian prisoner transfer treaties.

As you know, the administration strongly supports the treaty and the legislation both as humanitarian measures to relieve the hardship

of prisoners and as steps to improve our relations with our two neighboring countries.

Only a few evenings ago I had a telephone call from our Ambassador to Mexico, Patrick Lucey, former Governor of Wisconsin, and he stressed to me the great importance that Mexico attaches to the implementation of a treaty on transfers. Santiago Roel, the Foreign Secretary of Mexico, made the same point in his conversation with Secretary Vance and me here in the United States recently. We assured both of them that we share their hope that Congress would shortly enact legislation to implement the treaty.

In my statement today, Mr. Chairman, I would like to set forth briefly the context of the treaties and our concept of the need for the legislation. We have reviewed the legislation to make certain that it is consistent with the treaties and its operation would enhance, and not adversely affect, our foreign relations.

If I may, Mr. Chairman, I would like to take just a moment to ask you to consider with me the context of the treaties and this legislation. Most Americans probably have not had much reason to consider how exceedingly fortunate we are to have excellent relations with our two neighbors, Mexico and Canada. It's different elsewhere; the borders of many countries are fortified and the people on either side look across with suspicion and hostility. Happily this is not the case as we look both north and south across our very long land borders.

However, the presence of U.S. citizens in the jails of Mexico and of Canada have cast a shadow on our otherwise good relations, and the treaties were negotiated to attempt to remove that impediment. And the legislation that is before you is necessary to complete the task.

As a general matter, the welfare of American prisoners in foreign jails has greatly concerned the State Department. As you indicated in your statement, Mr. Chairman, approximately 2,200 Americans are in foreign jails, nearly 600 of them in Mexico, and about 275 in Canada. The situation in the Mexican jails is well known to this committee. Congressional hearings have highlighted the problems of the prisoners there. They've shown in general the inadequacy of prison conditions with respect to food medical treatment, security against violence, and other matters. In spite of the efforts of Mexican authorities and some recent improvements, there is still much that is unsatisfactory.

In any case, there are special hardships involved in being in prison abroad. It is difficult or almost impossible to maintain contact with one's family or friends. Language problems make it exceedingly difficult to be in prison abroad, and, I would add, that the isolation which is inherent in being imprisoned abroad can aggravate the always difficult problems of readjustment after release. Comparable hardships exist for foreigners in the U.S. prisons even though there is considerably less publicity about it.

The problems of American prisoners abroad and the publicity which they have generated have been a burden on our diplomatic relations. The treaties and the implementing legislation will help lift that burden. As you've indicated in your statement, following the signature of the treaties, the President transmitted them to the Senate for advice and consent. The Senate, by an overwhelming margin, gave that advice and consent, specifying only that the formal ratification should be

withheld until enactment of the implementing legislation. Parallel procedures were followed in Mexico, which completed all the necessary steps by January of this year with the entry of the treaty into force. Although Canada has not yet enacted the necessary legislation, we have been told very recently that such legislation will be introduced there very promptly, before the end of the year.

Now, we've already done a good deal of the necessary spade work to implement the treaty with Mexico. State Department personnel accompanied representatives of the Justice Department to Mexico to discuss matters with their Mexican counterparts. While transfer of the prisoners is the responsibility of the Justice Department, and magistrates will be assigned to the task, the State Department will have the function of helping to make sure that there are smooth relations between the Mexican and American penal authorities.

The important steps of identification of American prisoners, adjudication of citizenship of those who have never had passports, and the issuance of certificates of identity have already begun. In addition, the State Department is working closely with the Immigration and Naturalization Service to insure that the preclearance program will proceed on schedule.

Mr. Chairman, failure to act promptly to implement the treaties could increase the chances of diplomatic misunderstanding and add to the problems in our bilateral relations. As I noted, the Mexican Government gave final approval to the treaty in January of this year, and since then they have told us on several occasions of their eagerness for the transfer to begin promptly. We fully share their view that prompt repatriation is the most desirable and humane solution for the problems of American prisoners in Mexico, particularly the younger ones.

We do not wish to give the Mexicans, by our failure to act, the impression that we no longer share their sense of urgency. The American prisoners and their families have followed closely the course of this legislation. They are aware that the Mexican Government has taken final action, and that this repatriation awaits only final action by the Congress. For us to delay further would increase the understandable anxiety and frustration that the prisoners have so frequently expressed to their families and to the U.S. officials.

In conclusion, Mr. Chairman, I want to emphasize that the Department of State without reservation, joins with the Department of Justice in urging the speedy enactment of this legislation which is necessary to implement the treaties with Canada and Mexico.

Mr. Chairman, I stand ready now to answer those questions on which I might, possibly, be of help to your committee.

Mr. EILBERG. Thank you very much, Mr. Secretary, and we have several questions of immediate concern and attention to the members of the subcommittee on the negotiations and discussions that led up to the two treaties and then to this bill.

Would you please describe for us in detail what conversations you had with Members of Congress about these treaties and this bill prior to the signing and Senate consideration of the treaty and the submission of the implementing legislation?

Mr. CHRISTOPHER. Mr. Chairman, I'm not going to be able to be as helpful on that as I would like to be.

The treaties were negotiated in the prior administration before I came here to Washington, and I do not know of any contact between

your committee and members of the Department of State at that time. The Department of Justice had the responsibility in connection with the implementing legislation. I believe their answer will have to stand with respect to contacts during the course of the development of the legislation itself.

Mr. EILBERG. Can you undertake to find out from your predecessor or from your department whether there were any pertinent prior conversations? The point we are trying to make here is that such discussions, we think, are very desirable in order to have smoother legislation; and I think it's fairly obvious from the questioning of Mr. Flaherty and his associates that without this input problems arise, many of which could have been avoided.

Mr. CHRISTOPHER. I think your point is a good one, Mr. Chairman. I'll be pleased to make inquiries in the Department and see if I can furnish to you any information about prior contacts. If the answer is no, I will also furnish that.

Mr. EILBERG. Thank you.

[Information as furnished follows Mr. Christopher's testimony.]

Our subcommittee has oversight jurisdiction with regard to the activities of U.S. consular offices abroad. One of the complaints heard repeatedly, which led to the Mexican treaty, was the failure of our Government to provide adequate services to the Americans jailed in Mexico. Parents, friends, and even Members of Congress complained that consular personnel did not provide information, advice, or guidance. Many individuals complained that these persons lacked sufficient training to deal with these problems and knew nothing about Mexican criminal procedure.

What efforts are being undertaken, Mr. Christopher, to properly train and educate consular offices throughout the world to provide proper services to Americans in prison in foreign jails?

Mr. CHRISTOPHER. Mr. Chairman, I am pleased to have a chance to respond to that question, because the quality of our consular services has been a matter of very great concern to me as I travel around the world and visit our embassies and posts.

To put the matter in some kind of context, I would like to give you some numbers first. We have approximately 650 consular officers abroad, and approximately 1,700 additional local employees assisting in consular activities. Roughly speaking, we have about 3,000 Foreign Service employees abroad who engage from time to time in consular activities.

Those are substantial numbers, but they are relatively small in relation to the tremendous number of Americans who travel abroad. It is a striking figure that about 13 million Americans travel abroad every year. Last year we issued over 3 million passports. The burden on the consular officers from this travel abroad of Americans is a very great one.

To throw out just another number, around 4,000 Americans are reported missing abroad every year, and it is the duty of the consular officers to try to track them down. Each time someone is reported missing, of course, it's a matter of grave concern to the family and loved ones of that person. Now, these people frequently turn up within 2 or 3 weeks, and some of them are lost because they want to be lost, but that doesn't make the concern of their family any less.

Now, I mention these numbers to you and the disparities not in any defensive way, but because I think it's important to try to understand the burdens on our consular officers abroad.

Mr. EILBERG. Mr. Secretary, if I may interrupt, we, as you know, are not very new on this job, and we have traveled considerably and seen the operation of our embassies around the world. Although we may not be the foremost experts on the subject we do know something of the responsibility of consular officers.

However, the question that I'm asking is, What good are the treaties and this legislation if our consular officers are not adequately trained? That's what we're really talking about.

Mr. CHRISTOPHER. Well, I apologize for my beginning if it was a diversion, and I would like to address directly the question that you have asked.

As the chairman knows, Barbara Watson has recently been made Assistant Secretary of State for Consular Affairs. With her taking over that enhanced role we have begun what I think is an unprecedented reevaluation of the consular function. We have a team of 14 senior officers examining the consular function to see how we can perform it better. We are not satisfied with the way we are performing it, and we'll be coming out of that evaluation with a number of recommendations.

But, already, we have in training a number of things that we hope will improve the consular function. We are trying to mechanize the program so that the handling of cases can be speeded up and improved at our posts.

Mr. EILBERG. Mr. Secretary, I would like to save time. Again, I would like to hear some assurance, or reassurance, or suggestion, that our consular officers are being trained in terms of guiding our U.S. citizens who get into trouble with the law in the country in which they are operating.

Mr. CHRISTOPHER. Well, at our Foreign Service Institute, Mr. Chairman, we have inaugurated what we think to be a new and really quite effective program of training. We are training all consular officers to work in a real life environment, to actually know how to engage in consular work at the post where they serve.

A number of these employees in our consular service will be brought back to Washington for special training at our Foreign Service Institute. We are going to have a number of workshops so that when people are assigned to consular activities they know how to be effective and responsive in dealing with consular problems at the post where they are.

We are also expanding the training of our midcareer people so that they have courses which will enable them to be effective as consular officers.

Mr. EILBERG. Mr. Secretary, I think we will have to recess.

Mr. Fish, did you want to ask a quick question?

Mr. FISH. Yes.

Well, just on this one question. I'll have some questions on the legislation, but this one subject—glad to meet you, Mr. Christopher—and are you the person that we go to when we hear a complaint about a mission abroad from a constituent?

Mr. CHRISTOPHER. I wish you would feel completely free to come to me, Congressman Fish, I'd be delighted to hear from you.

Mr. FISH. Thank you, sir.

Mr. EILBERG. The subcommittee will take a brief recess while we go over and answer this rollcall. Please excuse us.

Mr. CHRISTOPHER. I'll be glad to wait.

[Short recess.]

Mr. EILBERG. The subcommittee will come to order.

I would like to address a statement to you, Mr. Secretary.

Mr. CHRISTOPHER. Excuse me, Mr. Chairman. Pardon me for interrupting.

Mr. EILBERG. Yes, sir.

Mr. CHRISTOPHER. I wonder if you might allow me to complete or extend the answer that I was giving when the quorum call came.

Mr. EILBERG. Oh, indeed.

Mr. CHRISTOPHER. I think there are some specific things that have been done recently in order to help better prepare our consular officers for dealing with the prisoner situation. In the first place, we have drawn together all of our prior guidance to consular officers in what is called the prisoner handbook. This guidance was scattered through a number of different cables, and manuals and has been drawn together in a handbook which will, hopefully, assist all of our consular officers in dealing with these difficult problems.

Second, at the Foreign Service Institute we are inaugurating a series of lectures on comparative law so that those who take consular training are able to understand the rudiments of the laws of the countries in which they will be serving.

Parallel to that and as a third step, Mr. Chairman: at posts abroad we are planning a program of retaining local attorneys who will conduct seminars for our consular officers in connection with the laws of the host country. So, once again, the consular officers have an idea of the rudiments of the law of that country.

A fourth step, Mr. Chairman, is that our posts abroad are developing information books on local laws and judicial systems to give to American prisoners who are in prison abroad. The main purpose of this is to enable the American prisoners to better understand the advice they might be getting from the local lawyers retained to assist them.

And, finally, Mr. Chairman, I want to emphasize that in Mexico we have retained a full-time attorney to assist the local prisoners there and we have assigned five additional consular positions to Mexico within the last 18 months.

I appreciate the opportunity to give those more specific responses to your question.

Mr. EILBERG. Mr. Secretary, this subcommittee over the years has been exercising its oversight responsibilities in an effort to determine whether the provisions of the Immigration and Nationality Act are being properly and efficiently administered by the Department of State, and, more precisely, by the Bureau of Consular Affairs.

I'm sad to report that despite urgings, recommendations, and even exhortations by me and other members of this subcommittee, the powers that be in the Department of State have done very little, in

our opinion, to improve consular operations and consular services to Americans abroad to upgrade their professional stature. In addition they have not recognized the handicaps, the strains, under which consular personnel are forced to work. And, above all, nothing has been done to enhance the image of the consular service within the Department and Foreign Service.

In our hearings in 1973 we made our misgivings known to Dr. Curtis Tarr, Acting Deputy Under Secretary for Management, when he appeared before this subcommittee.

In 1975, when no improvements were forthcoming, we again made our concerns known to Mr. Lawrence Eagleburger, Deputy Under Secretary for Management in further hearings before this subcommittee, covering the same subject matter.

Some improvements did result from these last oversight hearings, but based upon our personal review of the consular functions performed in many foreign countries, I believe a great deal remains to be done.

Mr. Secretary, my colleagues and I would, therefore, be grateful if you would present your views and plans in writing with regard to the following issues:

One, the effectiveness of the organizational structure within the State Department in responding to consular problems that arise or in directing the consular program.

Two, the grade structure of consular personnel in relation to officers in other areas such as political, economic and commercial, and administrative affairs.

In this respect, in spite of our calling constant attention to this particular failing, I noted that in the 1977 promotion lists, the consular people fared no better than previous years. They were still low men on the totem pole.

Three, the need, if any, to revise the "consular package" process to more adequately reflect the needs of each consular post.

Four, the adequacy of screening procedures for nonimmigrant and immigrant visas.

Five, the need for improvement in the training of consular personnel.

Six, the need for a genuine esprit de corps in the consular service so that officers would be fighting to get in instead of fighting to get out.

We would ask you to give a written response to those inquiries if you would, Mr. Secretary.

Mr. CHRISOPHER. Mr. Chairman, I will be glad to respond to those questions promptly.

[Written responses follow Mr. Christopher's testimony.]

Mr. EILBERG. And can you assure the subcommittee that there will be no reduction in the number of consular positions? Can you tell us whether the Department means, in the future, to increase the personnel in the consular areas recommended by the President in his proposal to the Congress on undocumented aliens in which it was stated:

> The State Department will increase its issues of resources to insure that foreign citizens attempting to enter this country will be doing so within the requirements of the immigration laws.

That was a statement made on August 4, 1977. What would you say to that, Mr. Secretary?

Mr. CHRISTOPHER. Well, Mr. Chairman, I would say that we'll respond to that in connection with our written responses, but our general attitude is to recognize the need to enhance our consular resources, and certainly not to cut back on them. [Written response follows Mr. Christopher's testimony.]

Barbara Watson has been very emphatic in her conversation with Mr. Vance and me about the need to increase those resources. Of course, we exist in a time in which we are trying to cut back on our expenses abroad and we'll have to balance those scales, but the consular area is one where we recognize the need for enhanced resources.

Mr. EILBERG. And I might add that the recommendation by the Domestic Counsel Committee on Illegal Aliens, for December 1976, read: "The President should issue instructions to ambassadors to major sending countries to accord the highest priority to these issuance functions."

I'm sure that you agree with that in view of the statement that you just made.

Mr. CHRISTOPHER. Yes, I think it not only needs a high priority, but, as I mentioned earlier, I think that we need to find ways to mechanize that function to see if we can't speed it up.

Mr. EILBERG. I expect, Mr. Secretary, that within the next few months, although not in this session, but, hopefully, very soon thereafter, we will have an oversight hearing, and we would like to invite you at that time to come and talk to us so that we may examine together the progress that we have made. I hope that that would be agreeable to you.

Mr. CHRISTOPHER. Mr. Chairman, I'm very much concerned about the consular function, and I can assure you that the Department will work with you on those problems.

Mr. EILBERG. Going back to the subject at hand more directly, these treaties with Mexico and Canada and the implementing legislation do not address the issue of the treatment of arrested Americans prior to trial and sentencing. Many of the complaints have to do with pretrial detention, forced confessions, illegal searches and seizures, and other police improprieties.

What efforts are being made, if any, to deal with these problems?

Mr. CHRISTOPHER. Well, I first would say, Mr. Chairman, that the treaties themselves are negotiated instruments of an experimental character. If the treaties are successful, they may pave the way to additional reforms.

On the precise question that you ask, I would say that there have been recent improvements in Mexico in their judicial procedures, and we are regularly making representations to the Mexican Government and its Justice Department with respect to their procedures.

There are difficult problems involved in any exchange that would take place before there is a conviction, for many people in that situation hope to establish their innocence.

Mr. EILBERG. Are we making representations to Mexico or other countries about these various complaints regarding the administration of their criminal justice system at the pretrial or predetention level?

Mr. CHRISTOPHER. Yes, Mr. Chairman, I've been personally involved in sending messages to our embassies urging, for example, that people be brought to trial at an early time, that individuals be permitted the right to counsel, and that the treatment of the individuals be of a humane character. We deal with a number of different judicial systems around the world, but we are deeply concerned about the conditions in which Americans are incarcerated in the pre-sentence period as well as after they are convicted and sentenced.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. I'm just curious; do we have many Mexican nationals who are prisoners here that we're going to send back to Mexico under this treaty?

Mr. CHRISTOPHER. I don't have that number in mind, but I think my colleague knows.

Mr. ABBELL. Mr. Sawyer, the figure that we have from our preliminary inquiry in the U.S. Federal prison system is 69 Mexicans indicating an interest in returning. However, we note that the vast majority of the Mexicans indicating an interest in returning are narcotics offenders. In Mexico there is no parole for narcotic offenses; therefore, it can be assumed that many of these individuals are not aware of it, and when they become aware of the fact that they can't be paroled in Mexico will decide to remain in the United States.

Mr. SAWYER. So, you don't consider, then, we have any significant number that we would be sending back to Mexico?

Mr. ABBELL. Not from the Federal prison system. Although a lot have indicated interest, I believe when they find out the ramifications of transfer, the fact that they can't get parole in Mexico, many of them will decide to remain in the United States, be paroled to deportation status, be deported back to Mexico without a sentence hanging over their head.

Mr. SAWYER. Well, those that are in our State penitentiaries, are those affected, too, by the treaty?

Mr. ABBELL. Yes, each State has the ability to participate under the treaty if it's passed the requisite enabling legislation. Thus far only Texas has done so. The preliminary indication is that of the 75 adult offenders in Texas, about half of them are interested in possibly returning to Mexico.

Mr. SAWYER. I'm not really well acquainted at all with the penal system of Mexico, but I know they have Federal areas, states, and so forth. Do they have state penitentiaries, as well as Federal penitentiaries?

Mr. ABBELL. My understanding is that other than the district—Federal District—all of the penitentiaries are state penitentiaries. However, there are Federal and state prisoners within the same prison. In other words, they may be run by the same state but there's a complicated division of authority between their Department of Interior, which has certain responsibilities, and the State governments, and it's a very mixed up and confused situation as far as I can understand.

Mr. SAWYER. Well, with respect to getting our citizens back who are incarcerated there, are all of their states participating in this so that we can get all of ours back, whether they are in a State or Federal penitentiary?

Mr. ABBELL. That is my understanding. The Mexicans are assuring us that there will be no problem with regard to approximately the 10 percent who are in state prisons for state offenses, essentially common-law-type offenses.

The vast majority of those offenses are Mexican drug convictions—are Federal convictions—and 80 percent of our people are drug offenders. And, also, offenders in the Federal District in Mexico City are Federal offenders.

Only about 10 percent of our people were convicted of violating Mexican state laws, and we have been assured by the Mexican attorney general that there should be no problem in those states with prisoners violating Mexican state laws being returned under the treaty.

Mr. SAWYER. Thank you.

That's all, Mr. Chairman.

Mr. EILBERG. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Christopher, just two questions.

I wonder if you are familiar with whether there are any provisions in the recently signed treaty with Panama relating to the exchange of prisoners?

I understand there is a provision there that within 3 years Panamanians would take over jurisdiction over offenses in the zone, and I wonder what the situation would be with people presently incarcerated under American jurisdiction: would they later be convicted of crime by a Panamanian court, and would they require jurisdiction?

Mr. CHRISTOPHER. Mr. Fish, my understanding is that there is no comparable provision affecting an exchange of prisoners such as that which is involved in these treaties. As I stated before, my colleague, Mr. Hansell, the Department's Legal Adviser, is here and I would like to have him confirm that.

Mr. HANSELL. There is none now.

Mr. FISH. And my second. Mr. Secretary: I understand some children have been born in Mexico to American prisoners there. First of all, what would the nationality of that child be?

Mr. CHRISTOPHER. I think I'd like to turn to Mr. Hennemeyer on that.

Mr. HENNEMEYER. American: if he's born of an American parent, the child would be an American.

Mr. FISH. And has this taken into consideration the arrangements that would be provided for the welfare of infants when they return to the United States?

Mr. HENNEMEYER. Mr. Abbell assures me that it has been.

Mr. ABBELL. It is being done.

Mr. FISH. I assume that the infants to which we refer would be incarcerated with the mother. What happens when they get back to this country?

Mr. ABBELL. I believe there are, apparently, approximately three infants, children under 3 years of age, who are in prison with their mothers in Mexico. We plan to work out arrangements either for their parents, or the grandparents of the child, to come down and pick up the child, or to provide to have the child brought with the mother to the United States and then give it to the grandparents until the child's mother is released.

Mr. FISH. Thank you very much.

Mr. SAWYER. Mr. Chairman.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. With respect to the question Mr. Fish asked, as I read the treaty, the proposed treaties as executed, after 30 months, either a Panamanian national or an American national, after being sentenced by either court during the time or after the 30 months, has the option of going to the country of their own nationality to serve whatever sentence was imposed on them; am I correct?

Mr. CHRISTOPHER. I'd like to ask Mr. Hansell to comment.

Mr. HANSELL. I can't speak precisely to that, but it is not——

Mr. EILBERG. Might we have your name, sir, your name and position?

Mr. HANSELL. Herbert Hansell, Mr. Chairman, Legal Adviser, Department of State.

I can't speak precisely to that question, Mr. Sawyer; I'll get the answer very quickly. I think your recollection may be related to a provision for later agreement on an exchange of prisoners of the kind that we are discussing here. There is such a provision, very similar to the one that you describe, in the treaty.

Mr. SAWYER. It is identical to the one I described, but I just wanted to clarify, because I thought the answer was partly correct and not completely correct. It doesn't involve the exchange of prisoners who are serving sentences at the time of the treaty; but during the interim period or thereafter it does give the prisoner the option after being sentenced by Panamanian authorities to serve their time in the United States if they choose to do so, and the same with Panamanians.

Mr. HANSELL. Yes, sir, it could.

Mr. SAWYER. That's all.

Mr. EILBERG. Mr. Secretary, with regard to eligibility for transfer, the Mexican treaty includes persons who are "nationals" of the receiving state while the Canadian treaty includes "citizens." What is the reason for this difference?

Mr. CHRISTOPHER. Mr. Hennemeyer assures me that my reaction is correct; there is no difference in that it's simply the reflection of the different terminology used in the country involved.

Mr. EILBERG. What would happen in the case of a binational marriage where both spouses are incarcerated in that particular country? For example, a U.S. citizen may be incarcerated in Mexico along with his permanent resident spouse.

In your judgment, does the treaty preclude the transfer of the permanent resident spouse to the United States?

I might add, in view of this problem, should the treaties have included those persons who are also permanent residents even though they wind up in a receiving state?

Mr. CHRISTOPHER. Well, as you've stated the question, Mr. Chairman, I think the treaty would permit the transfer only of the American citizen.

Mr. EILBERG. Is that the result we want to accomplish, and does it not create a very, potentially, difficult problem in view of the accent in our policy of uniting and keeping families united?

Mr. CHRISTOPHER. Well, I'm sure there will be cases of that kind, Mr. Chairman. I want to bring to your attention the fact that the American citizen would not be compelled to make the transfer in that

situation; he would have the option of applying for a transfer or not. I would go on to indicate, as I did earlier, that I think it well to remember that these treaties are of an experimental and precedential nature, and as we get further experience under them we may find that they should be broadened to include such cases as you mentioned. But we began with a relatively narrow situation involving American citizens who had been convicted and who had more than 6 months to serve.

Mr. EILBERG. I assume, however, that in a real case rather than a hypothetical one, as presented, you'd do everything in your power to allow the permanent resident spouse to be transferred along with the citizen husband.

Mr. CHRISTOPHER. We would certainly take that humanitarian consideration into account and see if we couldn't find some way to ease that which would be, obviously, a very unsatisfactory family situation.

Mr. EILBERG. You heard the testimony of the Justice Department indicating, to my surprise, that it contemplates the return of all American citizens who are prisoners in Mexico or Canada as the case may be. I'm surprised to hear that.

One of my concerns about these treaties and the implementing legislation is the possibility that dangerous individuals might be returned to our country, some which we simply wouldn't want back. It doesn't require much imagination to contemplate the kinds of persons, dangerous persons, that we're talking about.

As the United States must consent to a transfer under this bill, what procedures do you expect to undertake together with the Department of Justice to provide for screening?

Mr. CHRISTOPHER. Well, Mr. Chairman, I think that individuals of the character that you mention would probably in most cases be serving substantial sentences in Mexico. When they return here, if they are of the character that you describe and are serving substantial sentences, I think they would continue to serve such sentences in American jails.

There is a presumption that the parole boards would act with good sense and discretion in connection with release, but I don't think any assurance can be given in that situation that the people would be permanently incarcerated any more than the assurance that in the United States people who have committed crimes will never again be back on the streets.

Mr. EILBERG. Well, again, you answer in a style which is reminiscent of the answers of the Justice Department in this area.

What I am trying to get at is, will you take the position in a given case that we simply do not want this person back? And if that is the case, shouldn't there be a set of criteria, or regulations, or some policy statements, to guide your people accordingly?

Mr. CHRISTOPHER. Well, Mr. Chairman, the program—as far as examining the prisoners and making certain that they make an intelligent waiver in deciding whether to come back—would be administered and implemented by the Justice Department. As they told you, they will be considering the need to develop regulations, and I think I would have to defer to them in connection with this matter which would be essentially, a law enforcement requirement.

Mr. EILBERG. Mr. Secretary, let me be more specific. Imagine a horrible case where one American citizen in a Mexican jail has com-

mitted six murders and somehow has avoided their method of execution, but has multiple life sentences hanging on him. Now, are you saying that we would welcome such a person back, or that he would have the right to come back under this proposed legislation?

Mr. CHRISTOPHER. Well, I understood the Justice Department to say they expected to receive all the prisoners back who desired to come. If a prisoner were serving multiple life sentences in Mexico, presumably he would continue to be faced by a similar sentence here.

It is one of those situations in which, in order to accomplish the goal of enabling Americans who had relatively minor offenses and were serving sentences in adverse conditions to come back, we are faced with the other side of that problem, and that is that probably we'll be receiving some who have very unattractive backgrounds and very unattractive prospects.

Mr. EILBERG. What is your opinion of the proposals providing for the immediate eligibility of parole of all transferred Americans? Will this proposal have any effect on bilateral relations between the treaty countries?

Mr. CHRISTOPHER. If I can answer the two different questions, I do not believe that all will be immediately eligible for parole. I think the parole board will consider the length of the sentences, the amount of time served, and whether or not it is desirable to grant parole. If someone had a 20-year sentence in Mexico and served 1 year, I would not expect him or her to be immediately paroled.

Second, I have a strong conviction, Mr. Chairman, that the overall effect of the treaties are very favorable for our bilateral relations. I know that from having been told several times by leading officials in the Mexican foreign affairs field.

So, I think the early implementation of these treaties, and ratification, will be a desirable thing from the standpoint of our foreign relations.

Mr. EILBERG. You heard the testimony, of course, where under our system, depending upon the order of the court, a defendant may have to serve one-third of his sentence, yet under the incorporation of 4205(B), as adopted in the Senate committee, upon transfer to the United States, the U.S. citizen coming from the Mexican jail would be immediately eligible for parole.

Was the application of 4205(B), regarding immediate eligibility for parole, discussed between the signatory countries prior to entrance into the treaties?

Mr. CHRISTOPHER. I do not know the answer to that, Mr. Chairman. I will furnish the answer to you.

Mr. EILBERG. All right, we would like to know that.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Also, I'm concerned that our colleagues from Justice are most emphatic in their testimony as to what their positions are, and of course, they're all entitled to their own opinions.

I would like to ask you and them: It's entirely conceivable to me that an American prisoner transferred from Mexico pursuant to the treaty who has received a very severe sentence is granted immediate parole by the parole commission, and that he then walks out on the street and commits another dastardly crime. Should we provide some

insurance or mechanism to prevent such an occurrence? How do you react to that situation?

Mr. CHRISTOPHER. Well, I react to it, hypothetically, with great concern, Mr. Chairman.

I would expect that if someone were serving a life sentence, he would not be on the streets in the United States, but I think we have to be concerned about that situation arising. On the other hand, if someone is released on parole, you have to have respect for his civil rights and not prevent him from having an opportunity to reform and carry on a normal life.

Mr. EILBERG. I asked this of Justice, and I ask this question of you: Specifically excluded from these treaties and the implementing legislation are individuals imprisoned for immigration offenses. Why?

And I would add, how many Mexicans are imprisoned in the United States for such offenses?

Mr. CHRISTOPHER. My understanding of the negotiations is that the Mexicans are unwilling to recognize that the people who had violated our immigration laws were the proper subjects for consideration for transfer under treaties, and as a result, immigration laws were excluded in connection with the treaties from the standpoint of both countries.

Mr. Hennemeyer is indicating to me that there are about 400 Mexicans in the United States who are incarcerated for violations of our immigration laws.

Mr. EILBERG. Mr. Secretary, you may not feel the need for it, but I would feel better if you would be kind enough to explore further why immigration offenses were excluded from those treaties. I just don't understand the reasoning entirely. There are so many different kinds of immigration offenses that are possible. If you could provide us with a further explanation to this, I would be grateful.

Mr. CHRISTOPHER. I would be glad to look at the negotiating record on that and supply that for you.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. The bill provides for appointment and payment of counsel to represent offenders at consent verification hearings by the Department of State. Can the Department of State be sufficiently disinterested so as to insure adequate representation at these proceedings?

Mr. CHRISTOPHER. Well, the responsibility for the representation of the individual would be on the lawyer who represents the individual. The interest or disinterest of the Department of State, I think, would not be controlling. The lawyer for the individual would have to represent the individual involved, and it would be on his shoulders to give them full and fair representation.

Mr. EILBERG. And may I ask or suggest that your Department make clear in whatever way you can, that such lawyers are, indeed, independent and not subject to policies of the State Department or our Government at all.

Mr. CHRISTOPHER. Yes, sir, Mr. Chairman, I'm glad to have that caution. I think that it is important the lawyers be independent and able to explain the serious choice that is being made by the offender.

Mr. EILBERG. Specifically, what are the time limitations for appeal from criminal convictions in Mexico and Canada, and which parties under each system have the right to appeal?

Mr. CHRISTOPHER. Mr. Chairman, I would not want to hold myself out as that much of an expert either on Mexican law or Canadian law. I think that in both countries the defendants have the right to appeal, but as far as the time for appeal, I would want to have an opportunity to consult our embassies in those countries and furnish that information. I imagine it might vary from State to State and province to province as it does here in the United States.

Mr. EILBERG. Can we try to get those answers for the record then?

Mr. CHRISTOPHER. I'll be glad to furnish them in as much detail as we can get, Mr. Chairman.

Mr. EILBERG. Again, as I've told Deputy Attorney General Flaherty, we are anxious to move on the legislation as soon as we can, and I would, therefore, hope that you would make a priority of getting the answers to whatever questions you can as quickly as you can.

Mr. CHRISTOPHER. Your priority is exactly the same as ours, and we will respond just as rapidly as we can get the information. It may be available here in the United States. It simply isn't available in my head, unfortunately.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Could you tell us, for the record, exactly how many Americans are imprisoned in foreign jails?

Mr. CHRISTOPHER. The statements that I made in connection with my opening remarks are as close as we could come, Mr. Chairman. About 2,200 Americans are imprisoned abroad.

I have here a list indicating the number which are imprisoned in various countries around the world. Naturally it changes from day to day, or from week to week, but I would be glad to make this list, which is our best current estimate, available.

Mr. EILBERG. Can we have that? And do you have available here, or in the Department anywhere, not only where they are jailed but for what offenses and what their terms of imprisonment are?

Mr. CHRISTOPHER. I don't have it here, but we'll try to supply that as well as we can. I think that we will at least be able to give you a fairly solid indication of the nature of the events and the nature of the term, although I would emphasize the difference in the judicial systems and the difference in the nature of the sentences. You'll find it won't exactly parallel our own experience as far as specifically on the length of sentences.

Mr. EILBERG. But you will try to supply that information?

Mr. CHRISTOPHER. Yes, sir.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Are there particular countries where we are not receiving proper notification when Americans are arrested or where consular access is a problem?

Mr. CHRISTOPHER. If I could ask Mr. Hennemeyer, who is Deputy Assistant Secretary of Consular Affairs, to join me, he can, perhaps, tell you the countries where we are having difficulties along those lines.

Mr. EILBERG. May we have his full name and title?

Mr. HENNEMEYER. Robert Hennemeyer, Acting Assistant Secretary, Consular Affairs.

Yes, there are a number of countries where the problem still exists. Some of that is due to local laws in which the definition of when a person is arrested is different than ours. Under their laws they may have 72 hours in some cases in which a person may be detained before being

officially arrested. In those countries where it is 72 hours before they must formally arrest a person, we have taken the position that an arrest takes place the moment an American citizen is detained. Some of these authorities have taken the position that the arrest is 72 hours later.

Our experience has been that when something untoward happens to an American citizen such as forced confession, it frequently happens in that brief initial detention period. It very rarely happens when consular notification has already taken place.

Our hope is—as you know, the Congress has expressed this quite often with regard to consular conventions—that we negotiate consular conventions with as many countries as possible so that this difference in definition is removed. We are engaged in a program of negotiating consular conventions. But, unfortunately, there are many countries where we do not have satisfactory agreements.

Mr. EILBERG. Can you identify the countries with which we're having these problems?

Mr. HENNEMEYER. Well, the definitional problem that I've just explained exists with Mexico, for example. It has been a major problem. I think we should say, for the record, that the new Mexican attorney general has been very, very accommodating and has done his best to meet our desires with regard to prompt notification, and to make it clear to all Mexican authorities that we cannot tolerate brutality, or forced confessions, or whatever, affecting our citizens. He's been very cooperative, and the situation has improved considerably, but I have to say there is still a definitional problem.

Mr. EILBERG. Can you identify for the record—if not now, subsequently—what countries we're having problems with as far as notification and consular access is concerned?

Mr. HENNEMEYER. Yes, sir, I can provide that for the record.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Would you supply us with a brief breakdown and analysis of consular agreement or conventions that have been reached?

Mr. CHRISTOPHER. Yes, sir, we would be glad to do that.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Recent press reports and letters have indicated that the problem of poor prison conditions, unfair sentences, and mistreatment are not limited to Mexico alone. Other Latin American countries, and other countries in the Mideast, for example, retain Americans for long periods of time without trial, impose disproportionate sentences, and provide for improper treatment after sentencing. This is especially true in drug cases involving young, naive travelers.

What efforts are you undertaking to negotiate treaties with other countries to provide for the exchange of prisoners?

Mr. CHRISTOPHER. Well, Mr. Chairman, we look to these treaties and the implementing legislation as providing an opportunity to see how well they will work and whether they can be effective. If they do go into effect, and if our early experience with them is good, then we will consider the desirability of negotiating them elsewhere. It is a rather novel approach to this problem. Although I feel confident of the constitutionality of the treaties and of the implementing legislation. You yourself indicated a question about that, and I feel we ought to try to have some experience under these treaties, and if they do seem to be effective, then move forward at that time.

On the earlier part of your question, there are, indeed, other countries where we are having serious problems in connection with Americans who are incarcerated, and we are in frequent contact with them in an attempt to improve the lot of American prisoners in their jails.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. Yes, Mr. Secretary, I read some time ago about these two young ladies who were under life sentence in Turkey, but they said it really wasn't all that bad, they'd be eligible for parole in 22 or 23 years, as I recall it, for smuggling hashish allegedly. Is there anything that can be done about that kind of situation?

Mr. CHRISTOPHER. Well, I don't know the particular situation to which you refer, but we are in contact with a number of governments about people who are in prison for carrying relatively small amounts of marihuana or other types of drugs. And, in many instances, we are able to improve the conditions of incarceration or even obtain release of those individuals.

On the other hand, people who are involved in narcotics offenses in foreign countries can expect, in many instances, to receive rather severe sentences.

Mr. SAWYER. Do you envision, assuming these treaties are implemented, a followup with countries such as Turkey or other countries to work out something similar?

Mr. CHRISTOPHER. I would reserve judgment about that, Mr. Sawyer. It's one thing to have treaties with our neighbors Canada and Mexico where we have a substantial amount of population crossing back and forth, but I think it involves a different set of issues and some rather high-policy questions as to whether we want to extend such treaties on a worldwide basis. And I would have to say to you for myself I would prefer to see these treaties in operation for some time before reaching judgment as to the desirability of worldwide expansion of them as implied by your reference to Turkey.

Mr. SAWYER. Well, what would be the arguments against it? They're not apparent to me.

Mr. CHRISTOPHER. Well, I think one of the problems that you would find is the vastly different judicial system, and whether or not we would be prepared to release an individual in this country to the foreign nation if they had committed crimes in this country, and if we might fear that releasing them to foreign nations would be a way for them to completely avoid punishment for severe sentences in this country. I can see that there might be quite serious opposition in the United States if we turned individuals who had been guilty of rather heinous crimes over to another country. And I think before we move down this road we need some experience with these treaties and implementing legislation under these treaties.

I'd be glad to hear a comment from either of my colleagues in the Justice Department as to their views about an expansion of this treaty.

Mr. KENNEY. My name is William S. Kenney, Criminal Division.

Since the very essence of these treaties and the legislation require the consent of both countries to every transfer, I can envision no legal difficulty or problem in extending such treaties to any country where an American is in prison. Because in any given situation, we could say no with regard to any prisoner that we as Americans did not want to turn over, we could exercise our option and say, "We do not offer that prisoner."

You asked about Turkey, I might point out that Turkey has domestic legislation which authorizes the transfer of foreign prisoners on the basis of reciprocity, and that's another approach to the problem.

Mr. SAWYER. I suppose Turkish prisoners are kind of hard to come by here, I would assume.

Mr. KENNEY. I have no information on any Turkish prisoners.

Mr. SAWYER. Thank you.

Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Secretary, two other areas that we would like to have your opinion on: Does your Department have information relative to procedures used in foreign countries, specifically Mexico and Canada, to declare individuals who have been charged with a criminal offense mentally ill? I might add, if so, how are these procedures different from those utilized in the United States? Specifically what standards are applied in determining mental illness or incompetence in such a situation?

Mr. CHRISTOPHER. Once again, Mr. Chairman, if you will permit me, I would like to be able to contact our embassies and give you a coherent summary of the laws of those countries with respect to mental illness as it applies.

Mr. EILBERG. And to what extent they differ from those in the United States as well.

Mr. CHRISTOPHER. Yes.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Also, does your Department have information relative to the treatment and disposition of juvenile offenders in foreign countries, specifically Mexico and Canada? How do they compare with our procedures?

Mr. CHRISTOPHER. Well, I've known that they do have procedures for juveniles in both countries, but rather than try to do that on an impromptu or extemporaneous basis, I'd be glad to furnish that also.

[Written response follows Mr. Christopher's testimony.]

Mr. EILBERG. Does Mr. Sawyer have any other questions?

Mr. SAWYER. I have nothing further.

Mr. EILBERG. Mr. Secretary, as in the case of the Justice Department, we would like to have the opportunity to submit additional questions to you.

And, once again, as we have expressed, we are anxious to get together as quickly as we can. I'm sure we'll do that, at least at our staff level, so that we can move this legislation as promptly as possible.

Mr. CHRISTOPHER. Mr. Chairman, there is one question that you asked, I believe, of the Justice Department representative on which we can provide some information and might do it at this point for the record.

Mr. EILBERG. Please.

Mr. CHRISTOPHER. You asked about the age of those incarcerated in Mexico. Our Embassy in Mexico developed a profile of the American prisoner population based upon a random sample, so this would not be exact, but it is a fair approximation. That random sample indicated approximately 60 percent of the American citizens who are imprisoned there are under 30 years of age, and 79 percent are under 35.

Mr. EILBERG. Thank you for that, Mr. Secretary.

Also, we neglected to ask, and I think it is important for us to know the breakdown of the U.S. prisoners in Mexico, particularly with re-

gard to offenses that they've been convicted of. There's been testimony that drugs have been the primary and the main crime, and I'm not quarreling with that, but I think the subcommittee and the House should know, possibly, what all of them are charged with.

Mr. CHRISTOPHER. Yes, this same profile shows, Mr. Chairman, that 84 percent of them are charged with narcotics violations. This was, as I say, a random sample based upon about 40 percent of the prisoners who were in Mexico.

Mr. EILBERG. Can we do better? Can we get the precise numbers? There are 600 involved, and I assume that you have information somewhere in your department as to those particular cases.

Mr. CHRISTOPHER. Mr. Hennemeyer indicates that we can provide a relatively accurate indication as to the indication of all their major offenses.

Mr. EILBERG. Fine.

And, Mr. Secretary, I express our deep gratitude for your appearance here. You've been most helpful, and your attitude is most cooperative. We're on the same track and it's just a matter of getting together with the information that we need as soon as possible so that we can bring to the floor a bill that is at least likely to satisfy the scrutiny of some of our colleagues who will analyze the fine points with great particularity. And it is our habit and practice in subcommittee and full committee to bring a bill to the floor that is going to survive and pass the House.

Mr. CHRISTOPHER. Well, I appreciate the patience and the cooperation of the committee.

Mr. EILBERG. Thank you, sir.

Thank you, gentlemen.

The subcommittee is adjourned.

[Whereupon, at 11:15 a.m., the hearing was adjourned.]

DEPARTMENT OF STATE,
Washington, D.C., October 6, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives.

DEAR MR. CHAIRMAN: When Deputy Secretary of State Warren Christopher testified before your Subcommittee on Immigration, Citizenship, and International Law on September 16, 1977, in support of H.R. 7148, the bill to implement the Mexican and Canadian prisoner transfer treaties, the Subcommittee asked that replies to sixteen specific questions be provided in writing. Transmitted herewith are the Department's responses to those questions.

If you should require any additional information, please do not hesitate to let me know.

Sincerely,

DOUGLAS J. BENNET, Jr.,
Assistant Secretary for Congressional Relations.

Enclosures.

ADDENDUM OF QUESTIONS PREPARED FOR SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

1. Would you please describe for us in detail what conversations you had with members of Congress about these treaties and the bill prior to the signing and ratification of the treaty and the submission of the implementing legislation?

Your views in and plans in writing with regard to the following issues:

2. The effectiveness of the organizational structure within the State Department in responding to consular problems that arise or in directing the consular program.

3. The grade structure of consular personnel in relation to the officers in other areas such as Political, Economic and Commercial, and Administrative Affairs. In this respect, in spite of our calling attention to this particular failing, I noted that in the 1977 promotion lists, the Consular people fared no better than previous years. They were still low men on the totem pole.

4. The need, if any, to revise the "Consular Package" process to more adequately reflect the needs of each consular post.

5. The adequacy of the screening of applicants for immigrant and nonimmigrant visas.

6. The need for improvement in the training of consular personnel.

7. The need for a genuine "esprit-de-corps" in the consular service so that officers would be fighting to get "in" instead of "out".

8. Can you assure the Subcommittee that there will be no reduction in the number of consular positions? Can you tell us whether the Department means, in the future, to increase the personnel in the consular areas as recommended by the President on August 4, 1977, in his proposal to the Congress on undocumented aliens.

9. Was the application of 4205(B), regarding immediate eligibility for parole discussed between the signatory countries prior to conclusion of the treaty?

10. Mr. Secretary, I wonder—you may not feel the need for it, but I would feel better if you would be kind enough to explore further why immigrations offenses were excluded from those treaties.

11. Specifically, what are the time limitations for appeal from criminal convictions in Mexico and Canada, and which parties under each system have the right to appeal?

12. And do you have available, or in the Department, not only where they are jailed but for what offenses and what their terms of imprisonment are? [Profiles of Americans Imprisoned in Mexico and Machine Print-Out.]

13. Are there countries where we do not have prompt notification? Can you identify those countries for the record?

14. Would you supply us with a brief breakdown and analysis of consular agreement or conventions that have been reached?

15. Does your Department have information relative to procedures used in foreign countries, specifically Mexico and Canada, to declare individuals who have been charged with a criminal offense mentally ill? If so, how are these procedures different from those utilized in the United States? Specifically, what standards are applied in determining mental illness or incompetence in such a situation.

16. Also, does your Department have information relative to the treatment and disposition of juvenile offenders in foreign countries, specifically Mexico and Canada? How do they compare with our procedures?

Question 1. Would you please describe for us in detail what conversations you had with members of Congress about these treaties and the bill prior to the signing and ratification of the treaty and the submission of the implementing legislation?

Answer. The Legal Adviser, Monroe Leigh, the Counsellor on International Law, Professor Detlev Vagts, and the Deputy Assistant Secretary for Inter-American Affairs William Luers met at various times with members of Congress about the treaty prior to its signing.

Professor Vagts met with Senator Sparkman and some members of the Senate Foreign Relations Committee staff in Senator McGee's office on September 23, 1976. On September 29, he accompanied the Legal Adviser to a meeting on the subject with Chairman Fascell and Congressman Wiggins.

Our records reflect that staff persons from the offices of the following members of Congress were invited to a November 15, 1976, briefing: Rep. Stark (Cal.), Rep. Edwards (Cal.), Rep. Koch (New York), Rep. Wiggins (Cal.), Rep. Burgener (Cal.), Rep. Goldwater (Cal.), Rep. Lagomarsino (Cal.), and Rep. Rangel (New York). Additional invitees were three staff members of the House International Relations Committee and one staff member of the Immigration, Citizenship and International Law Subcommittee of the House Judiciary Committee. Our records do not indicate who attended, but Professor Vagts recalls that seven or eight persons did. They were briefed by Messrs. Leigh, Vagts and Luers.

In addition to the meetings mentioned, the Department provided substantive information during the negotiations to a number of Congressmen. Among those

to whom letters were written during the negotiating stage were Chairman Sparkman, and Congressmen Stark and Wiggins.

As the Deputy Secretary indicated the Department of Justice had responsibility for the implementing legislation. Accordingly, that Department will respond to the question as to conversations with the Congress during the preparation of the legislation.

Question 2. The effectiveness of the organizational structure within the State Department in responding to consular problems that arise or in directing the consular program.

Answer. The Department shares the Subcommittee's concern that the organization of the Department should be responsive to and supportive of an effective consular program. To this end, and with the strong encouragement of the Congress, we have initiated a full-scale review of the adequacy of our mandate to provide consular services and the appropriateness of the present organization and resources to effectively meet that mandate. At this time, fourteen (14) senior Foreign Service Inspectors are actively engaged in the review and we expect to have the results of it beginning in December. At that time we will be in a better position to respond more fully to this question and we would, of course, anticipate sharing the results of the evaluation with this Subcommittee.

The elevation of the Administrator of the Bureau of Security and Consular Affairs to the Assistant Secretary for Consular Affairs, as provided for in the Department's fiscal year 1978 authorization, has corrected one possible long-standing organizational flaw. The Bureau of Consular Affairs now has a direct-line relationship to the Secretary and the Deputy Secretary just as do other functional and geographic bureaus. This elevation in status should be helpful in focusing needed attention on the critical importance of consular work in the Department and in gaining for it the required priority for appropriate resource allocations.

Question 3.—The grade structure of consular personnel in relation to officers in other areas such as Political, Economic and Commercial, and Administrative Affairs. In this respect, in spite of our calling attention to this particular failing, I noted that in the 1977 promotion lists, the Consular people fared no better than previous years. They were still low men on the totem pole.

Answer. Promotions in the Foreign Service are based on merit and the needs of the Service.

At Class 2, FSO and non-FSO generalists compete classwide and promotions are awarded without functional consideration. At Class 3 these officers compete both classwide and functionally. The bulk of the promotions at Class 3 are awarded classwide, while a minimum number are allocated functionally to assure that our essential needs at Class 2 are met. Consular vacancies at the senior levels are few; thus Consular Officers competing functionally at Class 3 have minimal promotional opportunities to vie for at Class 2. However in both Classes 2 and 3, Consular Officers have equal opportunity to compete for whatever promotions are available at the next higher level on a classwide basis, where productions are geared to total rather than functional vacancies.

In the intermediate grades (Classes 4 and 5) non-FSO generalists compete functionally, and promotions are awarded based on vacancies within each function at the next higher level. For FSO's we introduced a new system of promotion competition last year which assures that all officers who are competed by function have the same percentage opportunity for promotion regardless of their particular function once they have acquired a specified period of experience in class. Approximately 80 percent of the total opportunities available at these class levels are given to this group of officers. Since we also have to assure that functional needs are met the remaining 20 percent of the opportunities are distributed according to functional needs and are awarded to those officers judged to merit promotion with less than the specified period of experience in class. As a result although the initial distribution of opportunities are equal (proportinate to the number of officers within each function with the specified years of experience in class) the final percentage may be larger in certain functions if those functions have a shortfall at the next higher level. Below Class 5 all FSO's are promoted by classwide competition without regard to their field of functional emphasis and again Consular Officers have equal opportunity for promotion. Non-FSO's continue to compete functionally below Class 5.

The following chart shows the number of Foreign Service personnel at the officer level by functional specialty.

NUMBER OF FOREIGN SERVICE OFFICER-LEVEL PERSONNEL BY CLASS LEVEL AND FUNCTIONAL CODE AS OF MAR. 31, 1977

	Consular	Administration	Political	Economic/commercial	Executive/program direction	Total
FSO/R-1	10	34	90	45	255	434
FSO/R-2	17	109	152	112	59	449
FSO/R-3	68	233	324	217	11	853
FSS-1	8	48	0	1	0	57
FSO/R-4	125	260	334	268	1	988
FSS-2	11	74	1	1		87
FSO/R-5	183	288	245	114		830
FSS-3	18	111	0	0		129
FSO/R-6	128	382	128	85		723
FSS-4	41	119	0	0		160
FSO/R-7	128	391	80	81		680
FSS-5	8	83	1	0		92
FSO/R-8	33	233	20	20		306
FSS 6 and 7	0	178	0	0		178
FSS 8	0	99	1	0		100
Total	778	2,642	1,376	944	326	6,066

Question 4. The need, if any, to revise the "Consular Package" process to more adequately reflect the needs of each consular post.

Answer. The "Consular Package" is a system for projecting consular workloads and assessing the staffing and other resources needed to perform these workloads at 250 Foreign Service posts. The Bureau of Consular Affairs plays the lead role in developing, maintaining and operating the system, working directly with consular sections at the posts and coordinating closely with the regional bureaus, the Foreign Service Institute and with other organizational elements of the Department whose functions may relate to the delivery of consular services.

Since its inception in 1972 with the strong encouragement of the Office of Management and Budget, the "Consular Package" system has facilitated the central analysis and presentation of consolidated worldwide consular workloads and requirements by the Presidential appointee primarily responsible for developing and executing the Department's consular program. While originally designed to predict only permanent position requirements for consular sections, the system has been perfected and extended to encompass broader functional requirements. It now also addresses at length consular training requirements, ranging from the development of more extensive training programs for Foreign Service local employees to the presentation of mid-level management training programs for Foreign Service officers, specialized equipment procurements, needed expansion of the automated lookout system, etc. We contemplate the further development of the technique in the future to include an analysis of additional important items such as space in order to make the "Consular Package" an even more useful tool in promoting the most effective and efficient management of the consular function.

Quantified "Consular Package" data is now computerized and we have developed workload/manpower profiles on each of the 250 Foreign Service posts performing consular services. While this type of data display is invaluable in assessing requirements both on an incremental basis and in the aggregate, it must be related to and correlated with voluminous other information available from the narrative portions of annual post "Consular Package" submissions, from recent reviews by Foreign Service Inspectors, from the subject and post files of the office of the Bureau of Consular Affairs, and from regional bureau management files. It is also adjusted to reflect known current and anticipated policy and legislative initiatives as much matters might affect resource requirements.

The "Consular Package" has been an invaluable management tool for the Department and we would plan to continue refining it to be even more responsive to Congressional and Departmental management needs for improved consular program planning and execution in the future. Although consular workloads and staffing are subject to a large number of uncontrollable variable, we are confident that, with further sustained effort, we should be able to quantify and better predict the affect of these variables on staffing and other resource needs. We are fully committed to such an effort.

Question 5. The adequacy of the screening of applicants for immigrant and nonimmigrant visas.

Answer. The Department is giving higher priority to the improvement of our visa screening process through more refined management techniques, such as modernized procedures, direction, guidance, training and evaluation of the visa function. Additionally, the Department has been increasing the number of positions to cope with a steadily increasing number of visa applications. Given our present human and material resources, we believe that our consular officers are on the whole performing in a highly professional manner. We, of course, are well aware that there is always room for improvement, and we are constantly seeking ways to do a better job. In this connection, as you are undoubtedly aware, the President's program for dealing with the undocumented alien problem includes provision for increased allocation of resources, both human and material, to the visa screening function and we have begun the process of implementing this aspect of the President's program.

Question 6. The need for improvement in the training of consular personnel.

Answer. *Improving the quality of existing consular training programs and developing new training programs responsive to current and future requirements are priority concerns of the Department and we are allocating increased resources to achieve a more balanced, responsive training package for consular personnel.*

As noted elsewhere in material provided as inserts for this hearing, we are developing post-level training in the operations of local judicial and law enforcement systems to assist consular officers in performing their protection and welfare responsibilities for Americans arrested or detained abroad. We also anticipate the use of outside experts in evaluating and, as necessary, improving our guidance to consular officers in respect to Americans reported missing abroad.

The Consular Operations Training Program operated by the Foreign Service Institute has been reorganized and reestablished as a mock-Consulate General. Students are now trained in a "real life" environment to deal with actual situations drawn from post case files. This new approach is now being modified to provide for the use of experts in comparative law to prepare the students to deal more effectively within the varying judicial and law enforcement systems and customs they will encounter in providing protection services to Americans. The mid-career consular officer management training program is being expanded to accommodate a wider range of officers assigned at foreign service posts in lieu of past practices of selecting primarily those officers otherwise available in Washington.

For fiscal year 1978, we are developing several new training programs targeted primarily on our consular work force of 2,300 foreign service locals. Some twenty to thirty senior foreign service local employees will be selected for participation in a three week training program at the Foreign Service Institute designed to enhance their overall effectiveness in dealing with the consular challange of today. Similarly, a number of key foreign service locals assigned in visa operations in the South/Central American areas will be selected to participate in a series of visa workshops along with their American colleagues. This latter program is targeted on improving the quality and efficiency of our visa screening functions and it should become the model for a much more extensive visa training program in connection with the President's Undocumented Alien Program.

In summary, the Department not only recognizes the need to upgrade consular training, it has embarked on a long-range effort to accomplish the needed changes.

Question 7. The need for a genuine "esprit-de-corps" in the consular service so that officers would be fighting to get "in" instead of "out".

Answer. We believe that there is a genuine "esprit-de-corps" in the Foreign Service and, as measured by the large number of applicants for the Junior Foreign Service Examination, there is a definite desire on the part of our citizens to become a part of the Foreign Service. We believe that this "esprit" characterizes the Foreign Service in general as well as that part of the Service assigned to consular work.

The Department's recruiting methods result in the selection of highly motivated officers who possess strong aspirations to reach the top levels of the Foreign Service. There is a relationship between the classification levels assigned to positions in the various career lines in the Department and perceived promotion opportunities and promotion rates. Unfortunately, proportionately more consular officer positions are classified in the lower grades than, for example, are positions in the political or economic/commercial fields. This fact may tend to detract somewhat from the morale of consular officers.

Consular workloads frequently are highly seasonal and peak workload demands at many posts coincide with the most favorable vacation times, particularly for officers with younger families. (Peaks typically occur at Christmas, Easter and during the late spring and summer months.) Further, the spring-summer peak also coincides with the period of maximum lost time due to post transfers and home leaves for officer personnel. Therefore, this phenomenon also tends to cause consular sections to experience substantial workload pressures during the summer months. These pressures could cause a consular officer to be attracted by another career speciality not as subject to seasonal pressures. We attempt to relieve this type of pressure by the flexible short-term assignment of personnel from other parts of the mission into the consular sections. We also authorize the employment of large numbers of temporary employees during peak season operations.

The Department is aware that a number of consular officers do not have as high a morale as should be expected in work as inherently interesting as in consular work. We are taking a number of steps to improve morale, including expanded training opportunities, a better chance at getting choice assignments as principal officer, more positions to meet rising workloads, more appropriate workspace and a full integration into the total work of our embassies and posts. Consular work is important and we are making a sustained effort to make sure this perspective is apparent at all levels of management in the Department.

Question 8. Can you assure the Subcommittee that there will be no reduction in the number of consular positions? Can you tell us whether the Department means, in the future, to increase the personnel in the consular areas as recommended by the President on August 4, 1977, in his proposal to the Congress on undocumented aliens?

Answer. All the trends indicate a continued increase in the consular workloads and in the total number of consular positions available to perform those workloads. Consular work is performed at some 250 Foreign Service posts and at 12 locations in the United States. Workload trends at each facility are largely governed by highly variable local factors and conditions. This leads unavoidably to the occasional shifting of resources. Reprogramming of this kind takes place constantly within the Department and is a function of good management.

The net number of consular positions, however, has been increasing and will undoubtedly continue to do so in the foreseeable future. In preparing the annual budget for the Department there are special budget guidelines which allow for mandatory consular increases based on workload requirements. Our fiscal year 1979 budget request submitted to OMB in fact makes provision for workload increases which are expected by then.

With respect to the resource implications of the President's proposal on undocumented aliens, we are in the process of determining what our needs will be and by what means we should seek them. At present, we would contemplate a strong possibility that the Department may be required to seek supplemental appropriations and additional positions to meet the demands of the President's program and to issue up to an additional 140,000 immigrant visas formerly utilized for processing Cuban refugees.

Question 9. Was the application of 4205(B), regarding immediate eligibility for parole discussed between the signatory countries prior to conclusion of the treaty?

Answer. No.

Question 10. Mr. Secretary, I wonder—you may not feel the need for it, but I would feel better if you would be kind enough to explore further why immigration offenses were excluded from these treaties.

Answer. The exclusion of immigration offenses from the scope of the Convention was not included in the draft treaty tabled by the United States. It was added at the request of the Government of Mexico. That request appears to have been premised on Mexico's unwillingness to receive as an "offender" one of its citizens who emigrated to the United States in search of economic betterment notwithstanding that such act might violate the immigration laws of the United States. The Mexican view is that a worker who immigrates to a foreign country for such a purpose should not be considered a criminal.

Question 11. Specifically, what are the time limitations for appeal from criminal convictions in Mexico and Canada, and which parties under each system have the right to appeal?

Answer. In Mexico, either the prisoner or the prosecutor may file an appeal in a criminal case within five days. A direct amparo (very similar to an appeal to

a higher court) must be filed within thirty days. An indirect amparo, usually based on new evidence may be filed at any time.

In Canada, appeals may be filed by either the prosecution or defense within thirty days from the date of conviction.

Question 12. And do you have available, or in the Department, not only where they are jailed but for what offenses and what their terms of imprisonment are?

Answer. *Profile of Americans Imprisoned in America.*—The Department is developing a computerized data base which, when completed, will enable us to provide more prompt current and complete responses to requests for information on United States citizens incarcerated around the world. The attached print-out [see appendix] of March 1, 1977 is the most current available comprehensive list of Americans in Mexican jails. Keys to the print-out are furnished. The names of the arrestees have not been deleted since this document is being provided under Section 3(b)(9) of the Privacy Act. This document contains personal information which should not be disclosed to unauthorized persons to protect the privacy of the individuals. Also attached is a profile sampling prepared by the United States Embassy in Mexico.

Question 13. Are there countries where we do not have prompt notification? Can you identify those countries for the record?

Answer. *United States Prisoners: Notification*—Prompt notification of the arrest of an American citizen continues to be a problem in most countries of Africa and South and Central America. This is particularly true in regard to those countries which operate on the Napoleanic code and whose laws require various periods of incommunicado immediately following arrest or initial detention. Unfortunately, the United States Government is now on fairly weak ground with respect to most of these countries inasmuch as we have no bilateral consular conventions with them, or if we do, the convention is out-dated and does not clearly spell out a specific time frame within which notification must be made. Even the Vienna Convention, to which most countries are signatories, only requires notification with consent of the arrestee "without delay."

The Department has embarked on a campaign to negotiate new consular treaties with various countries and has discussed the issue with various foreign governments, most recently by Assistant Secretary Watson during her recent trip to a number of South American countries including Peru and Bolivia.

Question 14. Would you supply us with a brief breakdown and analysis of consular agreement or conventions that have been reached?

Answer. *Consular Conventions.*—Attached is a copy of the Department's arrest Handbook. [See appendix.] On pages 22–25 is a list of countries indicating which have ratified and acceded to the Vienna Consular Convention and/or bilateral consular convention with the United States or other treaty with consular provisions. The Department recognizes the importance of negotiating new or updating old consular conventions. However, in this endeavor progress is limited by the sometimes slow pace of negotiations. Nevertheless, during the past five years, five conventions were negotiated (four have been ratified). All five were negotiated with Eastern European countries under difficult practical and political circumstances. During the same time substantial progress has been made on the negotiation of four additional consular treaties and the groundwork has been laid for initiation of negotiations on several others.

Attachment.

Question 15. Does your Department have information relative to procedures used in foreign countries, specifically Mexico and Canada, to declare individuals who have been charged with a criminal offense mentally ill? If so, how are these procedures different from those utilized in the United States? Specifically what standards are applied in determining mental illness or incompetence in such a situation?

Answer. Procedures in Mexico for declaring mentally ill persons who have been charged with a criminal offense are as follows:

(a) All persons arrested in Mexico are examined by a doctor after arrest and prior to consignment. If it is determined that the arrestee was mentally ill at time of commission of the offense, the person is not consigned but sent to a hospital. When cured, he would be set free. Such persons are legally not considered to have the capacity to commit an offense.

(b) If, after consignment, a judge determines that a person may have a mental illness, a specialist is called in. If the specialist determines that the person is mentally ill, the legal process is suspended and the person sent to a hospital.

When found to be cured, he is returned to custody for completion of legal process.

In Canada, the prosecution may request psychiatric examination of a defendant before trial, and if the exam establishes mental incapacity or insanity, the defendant may be institutionalized rather than stand trial. The defense may raise question of insanity during trial, which also would lead to examination and commitment to psychiatric care if indicated.

Question 16. Also, does your Department have information relative to the treatment and disposition of juvenile offenders in foreign countries, specifically Mexico and Canada? How do they compare with our procedures?

Answer. Under Federal law in Mexico juveniles are persons under 18 years of age. They are considered to lack the legal capacity to commit an offense and are therefore not imprisoned. A juvenile arrested for commission of an offense is assigned to a special adviser in criminal juvenile matters who undertakes a study as to how best to rehabilitate the person; e.g., medical assistance or other rehabilitation. Normally the juvenile is returned to parent's supervision. However, if the parents are not considered capable of supervising the juvenile he is sent to a school for youthful offenders run by the authorities.

Federal procedures are generally applicable to state cases since the states follow the Federal rules of procedure.

In Canada, treatment of juvenile offenders is a provincial rather than a Federal matter. Provincial court systems normally include some justices who specialize in juvenile and family cases, but no special juvenile courts per se. Separate juvenile detention facilities exist in all provinces.

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

THURSDAY, OCTOBER 6, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
CITIZENSHIP, AND INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 2226 of the Rayburn House Office Building, Hon. Joshua Eilberg [chairman of the subcommittee] presiding.

Present: Representatives Eilberg, Hall, and Fish.

Also present: Garner J. Cline, Arthur P. Endres, Jr., Martin H. Belsky, counsel; Raymond P. D'Uva, assistant counsel; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

Today we continue our hearings on H.R. 7148, a bill to provide procedures for the transfer of prisoners and other convicted criminal offenders between the United States and other countries.

Two treaties, with Canada and Mexico, have already been ratified, providing for such an exchange. This legislation would implement those treaties and also provide the statutory basis for future treaties.

At our first hearing on September 16, 1977, witnesses from the Departments of State and Justice described the history, purpose, and legal theory supporting H.R. 7148 and suggested certain modifications to the bill. They urged prompt action. I share the administration's desire for expeditious action—so that Americans jailed, often under intolerable conditions, can be returned here, and so that foreign prisoners incarcerated here can be returned to their countries.

Such an exchange is not only humanitarian—by easing the lot of these individuals—but also beneficial to society—by increasing the likelihood of rehabilitation and thus decreasing the possibility of repeat offenses.

However, the hearings also raised serious questions about H.R. 7148 as originally introduced. Particularly troubling were the provisions limiting attacks on foreign convictions and sentences, and the nature of the waiver and consent by prisoners to the procedures established by the treaties and the implementing legislation.

Finally, I and other members of the subcommittee were concerned with the procedures for release on parole, and the possible screening out of dangerous offenders. To resolve these issues, we are convening these hearings.

Our witnesses today include distinguished legal scholars who will discuss the constitutionality of H.R. 7148 and possible amendments.

Other scholars and professors who could not be here today will submit statements for consideration by the subcommittee and the House.

Also testifying today is the Honorable Fortney H. "Pete" Stark, one of the primary leaders in the movement to aid Americans in foreign, and especially Mexican, jails.

Finally, we will hear from Attorney General John Hill of Texas. Many of the Americans in Mexican jails are from Texas, and I understand there are some Mexicans in Texas jails. Attorney General Hill has done extensive research on the foreign prisoner problem and the legal validity of the treaties and implementing legislation.

The Senate has already enacted its version of the prisoner exchange implementing legislation, and we intend to act expeditiously so that the House will have an opportunity for early consideration of this historic piece of legislation. It is our hope that after today's hearings, we can proceed in subcommittee to prepare appropriate modifications of the bill and report it to the full Judiciary Committee.

Mr. Hall?

Mr. HALL. Mr. Chairman, I ask unanimous consent that live broadcast or still photography be permitted in accordance with the applicable committee rules.

Mr. EILBERG. Without objection, that will be permitted.

Once again, it's a pleasure to have you, Congressman Stark, before our committee, and we look forward to your testimony.

TESTIMONY OF HON. FORTNEY H. STARK, JR., REPRESENTATIVE IN CONGRESS OF THE UNITED STATES FROM THE NINTH DISTRICT OF THE STATE OF CALIFORNIA

Mr. STARK. Thank you, Mr. Chairman. And thank you again for inviting me to testify before your commiteee, and we seem to get together often on some very important issues.

And I also start out with a request, if I may, to make my prepared remarks part of the record and allow me to skip over that part which tells you what great work I and my staff have done on this. But I'm sure you have already adequately covered that, and I will get to the meat of the testimony.

Mr. EILBERG. Without objection, your statement will be made part of the record.

[The prepared statement of Hon. Fortney H. Stark, Jr., follows:]

STATEMENT OF HON. FORTNEY H. STARK, JR.

Mr. Chairman and members of the committee, over three years ago—in March of 1974—I first learned of the plight of some 500 U.S. citizens incarcerated in Mexico. This matter was brought to my attention by a constituent who was then—and still is—in jail in Mexico City's federal penitentiary. He, and hundreds of his fellow prisoners alleged that, when arrested in Mexico, U.S. citizens were treated without regard for human or legal rights. The alleged mistreatment, in violation of Mexican law as well as numerous multilateral convention agreements, included torture, forced confessions made in Spanish without the benefit of a competent translator, incommunicado detention, extortion to the tune of $40,000, and general prison abuse. I also received many complaints about the U.S. Consular Service's lack of concern and mishandling of the cases of those U.S. citizens in their jurisdiction.

The serious charges levelled against the Mexican government and the United States Consular Service prompted me to write to then Secretary of State Kissinger in 1974, requesting information about, and an investigation into, the matter. When three such inquiries failed to produce a substantive response from the State Department, I introduced a Resolution of Inquiry, H. Res. 313, mandating

the Executive Branch to disclose information on the cases of more than 150 U.S. prisoners in Mexico.

In April of 1975, as a result of hearings on H. Res. 313 before Chairman Fascell's Subcommittee on International Political and Military Affairs, the State Department agreed to conduct the case by case review which I requested six months earlier. In cooperation with my staff, State undertook the enormous task of investigating the matter, eventually concluding that 84 percent of the alleged instances of denied rights had substantial merit.

I know that the Committee is now all too familiar with the circumstances which make life in a Mexican prison cruel and unusual punishment for U.S. citizens and their families at home, so I won't dwell on them. We are here today, because Mexico has proposed a partial solution to the problems—a bilateral treaty through which prisoners may be transferred to their home country to serve out sentences. Although I'm not convinced that this Treaty will put an end to all the abuses of human rights Americans experience when arrested in Mexico, it does provide a long overdue option to our citizens incarcerated in Mexico. I commend Mexico for this initiative.

Today, I would like to address myself to two specific issues; first, the way in which the implementing legislation now before us, H.R. 7148, can be substantially improved and, second, the need for swift action on the legislation necessary to implement the exchange of prisoners Treaty with Mexico.

When I first read the text of the exchange of prisoners Treaty with Mexico, I had a number of misgivings about it—based on questions of constitutionality. I testified on many of these problems before the Senate Foreign Relations Committee. I am now convinced that the Senate-passed bill enables the U.S. to carry out the Treaty in a constitutional manner.

I should preface my remarks on this by saying that I am not a lawyer, but as I understand it, the constitutionality hinges rather precariously on the "voluntariness" of a prisoner's consent to be transferred under the terms of the Treaty.

The legislation passed by the Senate assured the voluntariness of a prisoner's consent by—

Ensuring that every prisoner eligible for transfer receives adequate and competent legal counsel prior to consenting to the transfer.

Setting out, in greater detail, the consequences of which a prisoner must be informed before consenting to the transfer.

Requiring that an appropriate authority receives the prisoner's informed and voluntary consent, and that these proceedings are duly recorded or taken down.

The Senate modifications commend themselves for another important reason. S. 1682, as amended, provides that a transferred prisoner, regardless of age, may be released on parole at such time as the Parole Commission may determine, rather than requiring that those over 22 serve one-third of their sentences before they are eligible for parole. This change makes implementation of the exchange of Prisoners' Treaty far more equitable than it would be otherwise. Some of our prisoners in Mexico are now serving terms of several years for crimes considered misdemeanors in their own country. Since our government's determined efforts to control drug traffic are, at least partially, responsible for these arrests in Mexico, it seems unfair to impose sentences which are extremely harsh by American standards on some, but not all, of our drug offenders. It should be pointed out, moreover, that most of these arrests do not reflect our highest priority for drug traffic control. Of the hundreds of U.S. citizens arrested in Mexico on narcotics charges, those arrested for possession or trafficking of heroin could be counted on one hand. The overwhelming majority—some 95 percent—of U.S. prisoners in Mexico are young, first-time offenders charged with possession of marijuana and, in fewer numbers, cocaine. I believe that, under these circumstances, parole provisions which bring Mexican sentences in line with U.S. sentences are in order.

For these reasons, I urge the Subcommittee to accept the Senate amendments.

The second point I wish to emphasize today is the need for speedy action to ensure enactment prior to the Congressional recess

The Treaty was signed by the United States and Mexico nearly a year ago, and the Mexican legislature took positive action on it in less than three months. The Senate ratified the Treaty unanimously this summer, and two weeks ago passed the implementing legislation. The Deputy Attorney General, Peter Flaherty, testified before this Subcommittee that the first prisoner transfers could take place within a few days of enactment of this legislation. The House of

Representatives can act now, or it can wait until January, to bring about full implementation of this Treaty.

The difference between a month and four months may not be much in the normal course of legislation making its way through Congress. In this case, however, the difference is enormous.

It means, for instance, that we will allow a source of considerable bi-lateral tension to exist for four months longer than necessary. Mexico was convinced by the hard work of State Department officials and Congressional attention that the situation was unacceptable to the United States. Mexico, moreover, took the initiative on this Treaty and acted quickly to clear the way for its implementation. The United States and Mexico have important matters of mutual concern, which await implementation of this Treaty before they receive consideration.

Implementation of this Treaty will also bring relief to those prisoners who, for one reason or another, must remain in Mexico. Ambassador Lucey has indicated, in correspondence with me, that transfer of some prisoners will increase Embassy resources available to the remaining prisoners considerably. Our consular officers in Mexico have a big job, and prisoners are dependent upon them for important assistance.

Finally, and most important, in human terms—four months means a great deal for prisoners who elect to transfer, and their families at home. Since they first heard of the Treaty, prisoners and families have been anxiously awaiting its implementation—expecting and hoping that their ordeal would soon be over. We have the opportunity to reunite many of these families for the December holiday, or to disappoint them once again.

Despite a two-year campaign to persuade the Mexican government to abide by its own laws and to secure early consular access to new detainees, the abuses which necessitate this Treaty with Mexico continue to this day. Our lack of progress in this matter, our inability to do more than "report" on the situation two years after I first raised this issue in Congress is distressing to me, to the 600 prisoners in Mexican jails and their families in the United States, to the Department of State, and to the consular officers in Mexico who are compelled to explain the enormously slow workings of the U.S. Congress to the Mexican Government and U.S. prisoners alike.

If, in fact, our rhetoric about securing human and legal rights for our citizens imprisoned abroad, is to mean anything, we cannot fail to implement this modest relief without delay.

Mr. STARK. Thank you very much.

By way of background as to why this treaty came into being, about 3 years ago we received some complaints from constituents about mistreatment of young people being arrested in Mexico. At first, we were inclined to disregard it as the "sour grapes" of somebody who was in jail. It's never a very nice place to be in any country.

But actually one of my staff people felt very sympathetic about a woman in my district and listened to the story, and we found the stories hard to believe—stories of getting calls in the middle of the night from Mexico if they didn't have $10,000 down there that the next day her son would be dead. And it was almost beyond belief.

And also, there were accusations that they were getting no cooperation from the State Department.

Finally, we were introduced to a woman of a group in Los Angeles who represented kind of a "friends of prisoners in Mexico" group, relatives and parents, mostly. And with their cooperation we put together a questionnaire and sent it to some 150 or 200 people in Mexican jails, and they were returned. And as we began to collate them, too many of these stories were the same, from different jails, and almost too similar for us to suspect that these were trumped-up stories to get out of jail.

So, we began to dig into it, and certain of our State Department officials' names showed up repeatedly, certain lawyers' names, Mexican lawyers' names showed up repeatedly. A pattern of how the arrest,

the detainment, torture, all of these things showed up all too often to be just happenstance.

So, the State Department was not very anxious to investigate it, but as a matter of fact, two or three letters that I had sent to the Secretary of State went unanswered, and finally we issued a resolution of inquiry and through the very kind cooperation and excellent cooperation of Chairman Fascell on the Committee on International Relations, we began to hold hearings on our resolution of inquiry. And subsequently he sent some staff, along with a couple of members of my staff, to Mexico to interview people in jail.

And we found out—then, finally, I guess, we got the State Department to suspect that there was something worth looking into, and, in effect, I think 80 or 90 percent of the cases the allegations were found—and again, I'm not a lawyer—but were found to have sufficient enough indication that these people were telling the truth—for the State Department to finally get concerned.

There was an awful lot of time spent making sure that nobody was at fault, which really never was my concern in this whole matter. I really did not care why this came about. I was more interested in seeing it corrected.

The principle cause of concern actually was not necessarily those people already in jail, but the repeated violations by international standards and by the standards of Mexican law of human rights, torture, people being held incommunicado longer than Mexican law allows, people being forced to sign confessions in Spanish without an interpreter there, a whole series of things that have no relation to our law but were in violation of Mexican law, and they were routinely being violated.

There was some indifference, I think, on the part of State Department officials in Mexico. That is understandable. You get to be an ambassador by going to cocktail parties with dignitaries, not by finding scruffy-looking types and going to jail and holding their hands.

And the jails are a real problem, particularly with regard to medical care, relative to our standards. That is really the most serious problem. As I said, no jail is very nice, but the Mexican jails, while they serve a different society than ours in a different way, one problem for Americans there is the absolute lack of any health, sanitary conditions, or any adequate medical care.

Finally, after a lot of pressure and a lot of hearings and a lot of recriminations, the suggestion was made—and where it came from, we don't know—we had an amendment added to an international relations authorization which directed the Secretary of State—no, which requested the President to talk directly to the highest Mexican official and bring this to their attention and directed the Secretary of State to report back to the Committee on International Relations every 90 days on the progress being made to see that human rights were insured for Americans traveling in Mexico.

Out of that, came this treaty, which is the subject of the hearings this morning. And I gather it has some precedents. It is my understanding that a similar treaty is in existence between Denmark and Spain. This is not the first time in the history of international law that a treaty of this nature has been signed.

I have a couple of concerns. I was, from the very beginning, concerned about the constitutionality of it. Things that I just vaguely remember from civics and not from law. But certainly the question of the bill of attainder, and I gather that has been resolved, and I gather now it hinges or it hangs by that fine thread of the voluntariness, of how the prisoner decides or determines to return.

I think the Senate's bill, from a layman's standpoint, seems to be preferable in insuring that the prisoner has counsel and has the assurance that he is voluntarily being returned.

I think that the change in S. 1682, the Senate bill, which allows those over 22 to be paroled before serving one-third of their term, is a preferable provision. I know that laws are passed and that justice is blind and laws are passed without regard to who is involved. But I think it is important, because we have gotten to know, either through the mail or in person, so many of these people in Mexico. Their average age is probably in the early twenties.

To put your fears at rest, I don't think that the number—and coming back a moment, the district I represent has one of the highest incidences of heroin addiction of any in the country. And, as you probably know, I serve also on the Select Committee on Narcotics, and heroin is really our principal drug problem in this country. Less than half a dozen people have ever been arrested in Mexico and are serving time for heroin and what we would consider the hard narcotics.

Admittedly, many of the people are there because of the push. It was almost a numbers game, to show some results of stopping narcotics traffic, but I think it is safe to say that two-thirds of the people are in there on narcotics-related offenses; one-third are just in there for traffic, smuggling, a variety of crimes. But two-thirds are there on narcotics.

Of the two-thirds, I would guess that 60 or 70 percent are there for small amounts of marijuana possession, which in many States like my home State of California, would be a misdemeanor and a maximum fine of $100 under current law. And I think the trend in this country is to treat that crime very lightly.

On the other hand, in Mexico, the terms may run 7 and 8 years for a crime which in this country now would be ranked along with speeding or reckless driving.

There are perhaps 20 percent who are related with cocaine smuggling. In almost every case it was the first arrest or first criminal involvement for any of them. Generally, these were people who weren't admittedly those who were trafficking in cocaine to make the $1,000 or $2,000 that was the normal fee for bringing back—I don't know how much—but about a shoebox full, I guess, is the amount that was brought back, and I think have learned their lesson, certainly insofar as any kind of jail sentence is a deterrent to further involvement in crime.

So, we are not dealing with—we saw no indication of anybody who is any kind of organized crime situation or hardened criminals or, indeed, people with long criminal involvement.

We are dealing with people who either, for the most part, were involved, I guess, in what you would say a "social use" of marihuana, and some admittedly were involved with cocaine. And almost none of these people were involved in the serious crime of dealing with the

hard narcotics, so that the requirement for many of them that they serve a third of their term before parole might mean they would still end up serving 3 and 4 years in this country for a crime which in this country might be 90 days to a year. And it would seem that the Senate version would make it more flexible.

I have to then get on, of course, to the plea that I'm sure all of us in Congress hear too often from our constituents and from our colleagues, and that is the need for rapid action; and as the term or as the session draws to a close, we all hear that all the time. And I don't want to belabor it because your subcommittee has been so cooperative in other matters, and I feel I will wear out my welcome coming in at the 11th month of the term and asking for speedy action, and you might be wondering why I could not have been here 6 months ago.

There is some necessity, I think, for the U.S. Congress to perform rapidly at this point to maintain our credibility. It was through our efforts, beginning 3 years ago, that we put tremendous pressure on the Mexican Government and on our State Department and, at times, that pressure was full of emotion, and we charged people with being indifferent to human rights.

And now the Mexican Government has put forth a treaty, has ratified it, we ratified it, and for us at this time to act any slower than is necessary might be viewed as confusing by our neighbors to the south.

And also, there is, unfortunately— hopes have been raised by some— I think it's approximately 250 prisoners who would be eligible under this treaty for transfer, and it goes without saying, I'm sure, that once they get that feeling that they are on their way home, 3 and 4 months which would be necessitated if we have to put this over until January, seems a lot longer to them than it might otherwise.

I want to assure the chairman that in response to any questions, I have always urged people not to think of anybody coming home until 1978, secretly hoping that we could do it more quickly, but feeling that the cruelest thing you can do for somebody who has already suffered a good deal is to hold out a promise that you cannot perform on.

So, I don't want to imply in any way that I'm trying to put the committee in a position that would be embarrassing because I recognize the thoroughness that the chairman wishes to—and the reason for his thoroughness and caution in proceeding with something where the constitutionality is involved and where it will be a law for many years to come.

That concludes my testimony. Insofar as I am able, I would be glad to answer any questions.

Mr. EILBERG. Thank you very much, Congressman Stark.

I would like to assure you that we are giving expeditious treatment to this legislation. There is, however, a bottleneck at the level of the full committee which has various bills of great importance also to consider. And I cannot assure you—in fact, I would say that the chances are not particularly good for the full committee to be able to consider this legislation before the end of the session, although we will make every effort.

Mr. STARK. I appreciate that.

Mr. EILBERG. At the Senate hearings on the treaty, the Mexican-United States Treaty, you stressed that this treaty and thus the implementing legislation "falls short of addressing the most serious abuses

of human rights that the American experiences, when arrested in Mexico."

Do you believe we should seek further treaties or other arrangements on exchange of prisoners prior to conviction and sentencing?

Mr. STARK. I don't know if an exchange prior to conviction and sentence—I don't know what you would do with people in this country. The military, as a practical matter, does that. It was interesting to us in that out of the 600 prisoners, I think there were next to none—no members of the armed services. And if any of you have ever served in the services or ever been to Tijuana, it's almost inconceivable that the Navy could ship that many sailors into Tijuana, back and forth, and never have any of them appear in jail.

So, we were interested in how the military worked it, and, quite frankly, the military seemed to have ad hoc arrangements with the police, and when one of their own is arrested, they get them out of there and back home. I thought that seemed like a good system, and there is no sense my upsetting it by finding out how that worked. But I'm not sure you could design a treaty that would work that way.

I think the major concern is that the routines that we heard of were about torture, the signing of confessions, trumping up charges, being held incommunicado, and I'm afraid that that would be done anyway. I mean, that is the part I'm trying to change, is, how do you treat another human being in what we begin to think of as humane conditions throughout the world. And I'm afraid that more treaties won't do it.

Mr. EILBERG. So, you think we should not attempt to seek other treaties at this time?

Mr. STARK. Not that I can see.

Mr. EILBERG. As chairman of the Subcommittee on Immigration with oversight responsibility as to American consular officers, I am particularly concerned—and you mentioned this in your opening remarks—with the effect of the incompetence of these individuals.

In seeking to act on behalf of your constituents, could you give us your impression as to the ability and cooperativeness and assistance of our consular offices in Mexico?

Mr. STARK. Yes. I found in Mexico and every other country in the world that I've had occasion to visit, that consular officers, as a general group, are dedicated, probably the most overworked and understaffed part of our embassies and consulates.

In Mexico, the caseload is terrific. There are two-thirds of the Americans in jail outside of our country are in Mexico. There's about 1,500 Americans in jail worldwide, and I guess there are about 900 of them that are in Mexico. So, the Mexican embassy and the consular offices throughout Mexico have a unique load.

I think it is fair to say that Ambassador Hoba, or former Ambassador Hoba, had made statements indicating that he thought torture might be a good example for other Americans coming down. And with an attitude like that, it is easy to understand why the consular officers might not have been directing their efforts toward the people in jail as much as we would like. But that has changed. Ambassador Lucey is aware of the problem and is committed to working at following the President's standard of seeking human rights for people throughout the world.

I think it is an attitudinal change rather than a question of competence, and I have noticed that change in the past several years.

Mr. EILBERG. I might observe that Ambassador Lucey has personally called me from Mexico, urging quick action on this legislation.

Mr. STARK. As I say, it is an amazing difference.

Mr. EILBERG. But you say there is a different atmosphere, as far as the consular officers. I would like a little more than that, if you know.

Mr. STARK. Well, they are making an effort now to see that the prisoners are visited periodically and not just when they hear a complaint. And they are making—also, they are making it a point to complain loudly and follow up when they hear about torture.

I think the attitude previously was that they thought that the prisoners were trumping up stories about torture just to get more attention and more sympathy. So, they are trying to bring about help.

Also, one of the results of this treaty will be that if we bring 250 prisoners back to the United States, we will cut their caseload in half, and that will allow much more time for the limited consular staff to conduct periodic visits to the prisons.

But I would say within the limits of travel and consular staff, they are doing a much better job, and I think once this treaty has put some extra workload on them to get around to the prisoners and explain it, I think they are doing an excellent job and I think it will improve when we get the 250 home because their caseload will then be of a more manageable size.

Mr. EILBERG. Recent press reports have indicated that the Justice Department interviews with Americans in Mexican jails show that a substantial percentage do not wish to return. As you have had direct contacts with many individuals incarcerated in Mexico, would you accept this conclusion; and, if so, how do you explain it?

Mr. STARK. Yes, I can understand that some might not wish to return. Mexican jails are different from ours. In Mexico, as I'm sure the chairman is aware, the concept is that the society supports its own prisoners, or the family supports prisoners, or friends or relatives, and not the taxpayers. Consequently, in Mexican jails people are allowed sometimes, within the confines of the courtyard, to build their own home, to live with a girl friend or spouse, to work, to work off part of the sentence, to earn money. It is a different style, certainly, than our penal system.

Mr. EILBERG. So, you agree many do not wish to return?

Mr. STARK. I can conceive that there are some who, for one reason or another, either they have a parole or the term is ending, that they would want to stay there. Or some with more serious crimes might find they would get a harsher sentence if they came back. So, it is conceivable to me that some would not want to return.

Mr. EILBERG. Our next question would be that apparently everyone in Mexican jails would be eligible to return and, in fact, would be given the opportunity to be transferred to the United States and therefore eligible for immediate parole. There may be individuals transferred who are dangerous and violent and who therefore would be released immediately upon parole. Do you believe that application of the parole provision be limited to drug offenses, where most of the problems have arisen, and we should provide in our legislation a mechanism for screening out undesirable potential transferees? In other words, there may be some that it may not be in the national interest that we would have back.

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Mr. STARK. Two things, Mr. Chairman. First, I think not every person in Mexican jails is eligible. They have to have been sentenced and their appeal time, I think, has to have run. Now, in Mexico, that is generally a year that they spend in jail between the time they are detained and the time they are sentenced, and sometimes longer. The time frames and the appeal time can also be a year or two.

So, as a practical matter, a lot of people are going to have to serve a good bit of time before they are eligible under this treaty.

Second, it would occur to me that while they may be eligible for parole in this country, I would think—and certainly in the State of California—that the parole board would look pretty carefully at what type of crime this person had been convicted of in Mexico and what their prior record had been. And I would not like to think that parole boards would just be turning dangerous criminals out into the street.

Mr. EILBERG. But you have no objection to the return of everyone from Mexican jails?

Mr. STARK. Absolutely not.

Mr. EILBERG. Regardless of the seriousness of the offense?

Mr. STARK. Sure, because I think when they get out of a Mexican jail, some time or another and would be free to return anyway, and I would rather rely on our own penal system and our own judicial system than one of another country.

Mr. EILBERG. Before recessing, I would just like to announce to the members that I have a very important appointment in the White House which I will be going to and then returning to the meetings as soon thereafter as possible, and Mr. Hall will relieve me as chairman. And perhaps they have questions, and I don't know that we have time now. We are some 3 or 4 minutes into the bells, and I would just like to emphasize again and for the benefit of Mr. Fish, who has spoken to me personally, that we will expedite this legislation just as rapidly as we can, and I hope you can come back for possible questions.

Mr. STARK. I will be glad to return.

Mr. EILBERG. The subcommittee will take a brief recess.

[Brief recess is taken.]

Mr. HALL [presiding]. Continuing, Mr. Stark, we will go ahead and pick up at this point. I think that the chairman had asked you some questions prior to our break a few moments ago, and I would like to ask you a series of questions concerning the people who are now incarcerated in Mexico.

I believe you indicated earlier there are about 900 people who are in jail in Mexico.

Mr. STARK. If I could correct that, I am informed that, as of the first of the year, it was 579, and that varies. So, it is between 600 and 650.

Mr. HALL. Of that number, does that account for all convictions of every type and character?

Mr. STARK. Yes. About 400 of those 600—approximately 600—are narcotic or drug related. The others, as I indicated, are either charges of smuggling or traffic offenses or robbery or a variety of other crimes.

Mr. HALL. Well, do we have any people in jails in Mexico who have been convicted of what I would refer to as a "capital felony" or a murder or a robbery or something of that nature?

Mr. STARK. I'm sure we do. I would guess one or two.

Mr. HALL. Now, this treaty that we're speaking of in this bill would allow those individuals, if they exercised their rights under this bill, to also come back and serve the remainder of their sentence in American jails.

Mr. STARK. That is correct. That is my understanding.

Mr. HALL. I don't believe there is anyone else here but me, and I have no further questions of the witness.

Mr. STARK. I thank the distinguished gentlemen for allowing me to testify this morning, and I know that you are working very hard on this with all the other matters that we have, and I appreciate your taking the time to hear this matter this morning. Thank you.

Mr. HALL. Would you identify yourself for the record, please.

TESTIMONY OF M. CHERIF BASSIOUNI, PROFESSOR OF LAW, DE PAUL UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Mr. BASSIOUNI. I would like to extend my appreciation to the committee for inviting me. I was notified about being present here today on Thursday and therefore have not been able to have my written prepared statement along with me today and ask permission to have it follow up and included in the record later.

Mr. HALL. That will be granted.

[The prepared statement of Prof. Bassiouni follows his testimony.]

Mr. BASSIOUNI. Mr. Chairman, may I submit a historical note as a foreword to the discussion of House bill H.R. 7148, and that is how this scheme of prisoner transfer evolved. And it is because I noticed that witnesses before this committee and before the Senate committees before which I testified had some perplexity as to how it came about.

Originally, this matter came about when a foreign country in the early 1970's notified the United States of its interest in engaging in a system of a transfer of prisoners as that foreign country had done with another country abroad. At that time the United States was not interested in a system of transfer of prisoners.

Subsequent to that, in 1973 my book, a treatise on International Criminal Law described the recognition of foreign penal judgments and transfers of prisoners. Then, in 1975, at the Fifth United Nations Congress on Crime Prevention. Deputy Attorney General Tyler had discussions with representatives of Canada for the supervision of the condition of released persons of U.S. citizenship in Canada who would then be returned to the United States.

Subsequently there was a great hue and cry by the press about young U.S. offenders in Mexico who were ill-treated, and that brought about some interest on the part of the White House and the State Department.

I think that the record should clearly indicate that the first major work on that subject was done by Professor Baldwin of the University of Wisconsin when he was counselor in international law at the Department of State, followed by Professor Vagts, who did a great deal in the preparation for the treaties and implementing legislation.

I would also like to point out and hope that this committee and others recognize the work of Mr. William Kenney of the Department of Justice in connection with this the implementing legislation—which was no small task.

The scheme of transfer of prisoner proposed, is certainly not a new one in terms of international precedents. One international precedent is of the European Convention on International Validity of Criminal Judgments. The Council of Europe, which includes 15 countries, plus Turkey.

There are two additional European conventions among the 15 European countries, plus Turkey, dealing with the supervision of the conditionally released. The combination of these conventions accomplish what the treaties with Mexico and Canada and this proposed legislation aim at.

Similarly, among the Benelux countries, for over 25 years, there have been treaties for the recognition of penal judgments. The Scandinavian Act of Enforcement of 1963 parallels that and the Scandinavian countries engage in the exchange and transfer of offenders.

A fourth different type of arrangement exists between France and certain of its African countries, done by bilateral treaties.

So, what we have is a situation that is not novel. However, I might add that the approach and the speed with which the United States is moving on implementing this approach is probably going to be the one that will really be a first in the field of international cooperation.

I think it is important for us to bear in mind, Mr. Chairman, that the purposes of the treaty are multiple, and that various facets of the legislation implement these multiple objectives.

One of those, of course, is that a state—in this case, the United States in particular—has an interest in the treatment of its citizens abroad. That is essentially a humanitarian concern. However, the humanitarian concern must not overshadow other considerations that we have, namely, that a state also has an interest in the future behavior of its citizens. To establish an environment for the resocialization of individuals in their own state provides a more propitious environment for future rehabilitation; And that is essentially a criminological consideration.

In addition, I think that there is another factor that we should never overlook, and that is the factor of mutual assistance and cooperation in penal matters. I think that this type of legislation might well be the precursor for other types of treaties and legislation on cooperation between countries in the enforcement of criminal laws and the reduction of criminality.

The scheme embodied in the treaties is predicated on the assumption that an individual, namely, U.S. citizen in a particular country, will be able to either apply for or benefit from the possibility of being transferred for the execution of a sentence in his or her own country.

The basic premise is that the individual will waive certain rights and will agree to accept what is essentially embodied in the treaties and in the legislation.

The question which will invariably arise is whether or not there is an element of unconstitutionality in providing for a scheme that essentially relies on the inarticulated premise that the United States is going to recognize, enforce, and execute a foreign penal judgment without inquiring as to the merits or validity of that judgment or without inquiring into the basis on which it was obtained.

The first issue is whether or not the United States will recognize a foreign penal judgment, apply its laws and the Constitution of the United States extraterritorially.

The United States has seldom seen fit to apply its law extraterritorially, although it is true that in many instances we have done so, both substantively and procedurally.

Whether the Constitution applies extraterritorially is very questionable, although we have precedents indicating that the United States might consider the extraterritorial application of constitutional provisions in the case in which a U.S. public agent is involved in a particular type of activity.

Barring the directing of the U.S. agent in securing a conviction which might be in violation of the Constitution, it would seem that the United States, by precedent, has always accepted the validity of a penal judgment of a foreign country.

In international affairs, every country being a separate sovereignty manifests its respect for the sovereignty of other countries, and consequently the U.S. will recognize the penal judgments of other countries, but may not see fit to enforce or execute these penal judgments if they run contrary to its minimum standards of criminal justice.

However may I point out that ever since 1791, in our first international extradition treaty with Great Britain, Jay's Treaty, we have recognized foreign penal judgments as the bases for using our criminal processes in order to arrest an individual and to transfer that individual to the custody of a foreign requesting country.

Thus, having done so for such a long period of time, it would seem to me that this as well as other precedents indicate that we recognize foreign penal judgments.

Nevertheless, the recognition of a foreign penal judgment does not imply that we will necessarily enforce it and execute it without any further inquiry, and in that respect, I have serious reservations about whether or not judicial inquiry into the provisions of the treaties and the proposed legislation will be held constitutional in that they attempt to prevent a judicial review of the conviction.

Mr. HALL. Professor, allow me to interrupt. We have a vote on, and we live by bells and buzzers, here. So, if we could interrupt your testimony for just a moment until I go over to the House floor.

[Brief recess is taken.]

Mr. HALL. Professor, if you will proceed, please.

Mr. BASSIOUNI. Thank you.

The implementing legislation requires that an individual in a foreign jail, having been appraised of his or her rights to a transfer, will then, through a waiver and consent procedure, agree to the provisions of the treaty and of the legislation and thus agree to be transferred to a U.S. prison on the basis, that such a person waives his or her rights to challenge the validity of the conviction and the sentence.

I think this is probably the most vulnerable point in the treaties and in the legislation.

There are essentially two conditions here: No. 1 is a question relating to the validity of the waiver and consent. If the waiver and consent is done in the manner prescribed by S. 1682 as amended, namely, that a U.S. magistrate, as a judicial officer, will verify the consent and waiver and inform the individual of his or her rights.

And No. 2, that an individual will have an appointed counsel in the case of indigency and that such appointed counsel not be a Government official. Thus, there is no question of conflict of interest. It would seem to me that the legislation would have done everything possible in order to insure that the waiver and consent are done in a valid way and without coercion.

However, it is possible, I assume, that a court may consider certain conditions of detention in a particular country as applied to a particular individual as being so coercive in nature that notwithstanding the guarantee of the presence of a judicial officer and an impartial appointed counsel that might say that the waiver was not valid.

Nevertheless, the other question remains, whether by legislation one can, in effect, attempt to suspend the applicability of a judicial remedy and the writ of habeas corpus.

I personally do not think that this is possible, and my guess is that it is very likely that while a court will uphold—and I'm sure the Supreme Court will uphold—the constitutionality of the treaties and the legislation, that it will nonetheless recognize the right of judicial review in two types of situations which will inquire nto the sentence and conviction.

The first of these situations will be where a U.S. public official may have been involved in the arrest or in the process of securing the conviction. On the authority of some cogent decisions it seems to me that the Supreme Court might recognize the right to inquire into the behavior of a U.S. public official abroad and whether he has violated certain U.S. constitutional standards abroad. In that case an attempt to preclude such a review would be ruled unconstitutional.

The second one will be probably where it would clearly appear on the face of the record that the conviction was obtained in clear and manifest derogation of minimum standards of criminal justice in the United States. That, I do not think, that U.S. courts will be able to ignore.

Here, allow me to draw an analogy with the question of recognition of foreign civil judgments. In the Uniform Foreign Money Judgment Recognition Act, we establish certain minimum standards of due process that we consider indispensable before our courts enforce the execute a foreign civil judgment.

It would seem to me the analogy would be very apt here, that if we are to recognize, enforce, and execute a foreign penal judgment, that certain minimal standard of criminal justice will be required. Thus, it would seem contrary to U.S. public policy to enforce and execute a judgment which would appear on its face, predicated, on a coerced confession which is the product of torture.

The question then will be: What is the threshold line? Will U.S. courts inquire into every case or only in those cases in which a violation appears on the face of the word. I believe, the latter will be the case.

Thus, U.S. courts will overturn any absolute prohibition on judicial inquiry into the validity of the conviction.

Amended Senate bill, 1682, cures most of the constitutional problems that existed in the original version of 1682 and what is the present version of the House bill 7148 now before the subcommittee.

Thus, H.R. 7148 should be amended in order to conform to S. 1682. By way of emphasis the waiver should be verified by a judicial officer,

appointed counsel should not be a government attorney but should be a public defender or a private attorney who would not be in a position of conflict of interest with any Government agency.

This has nothing to do with whether or not a Government agency pays for the services of that attorney; that transferred offenders should be immediately eligible for parole; and that offenders who are awaiting appeal should be given the right to be transferred, pending their appeal, if their presence is not needed at the appellate review stage, or if they elect to waive their appeal.

Here, I would like to be very cautious about that, because I don't think that the legislation ought to be an inducement for people to waive their right to appeal, only to benefit from the privileges of transfer.

On the other hand, as with most appeals, if they are on questions of law, the presence and participation of the offender in these proceedings is not necessary. As a matter of fact, in most cases, it is barred. If the offender does not appear at the appellate or Supreme Court level, the transfer can take place while the sentence is still being considered by a review court. And I don't think that offenders should be barred from that.

I think that a decision by the attorney general to discretionarily accept or not accept a transfer is something that we should avoid. U.S. citizens ought to be treated in a manner which provides equal protection of laws to all, and that such discretion should not be exercised by the Attorney General.

H.R. 7148 should be amended in order to show that all U.S. citizens eligible for such transfers, subject to the other provisions of the legislation.

I have a particular problem with amended S. 1682, and H.R. 7148, in that they exclude permanent residents of the United States for the benefit of transfer. The problem arises from the fact that permanent residents of the United States, particularly those who have already indicated their intention of becoming U.S. citizens, have been considered by the Supreme Court as having substantially the same due process rights as U.S. citizens. One can envision the situation where a permanent resident, having applied for naturalization, awaiting to be sworn, having complied with all other requirements of naturalization, is on a vacation trip in Mexico and falls subject to a violation of the law and is imprisoned there and can no longer return to the United States because this legislation does not apply to him.

It would seem to me that this is an unwarranted denial of equal protection of the laws as applied to a permanent resident. It would also create a great deal of hardship with respect to U.S. citizens whose spouses may not yet have acquired U.S citizenship and who are permanent residents of the United States, and I think that this is one aspect which should be reviewed, both in the House bill as well as in the Senate bill. The amendments brought to S. 1682 should be incorporated in the House bill, as I think they are amendments predicated on thorough study.

In addition, may I suggest that the House consider also provisions dealing with expungement of records of a foreign conviction. As the legislation now stands the foreign conviction will become a matter of record. There is no way an individual can expunge that record, and it would seem to me that it would put this individual in a position of disadvantage with respect to an individual who has not elected to be transferred to the United States.

With that, Mr. Chairman, let me conclude that I fully support the scheme of transfer of prisoners as envisaged. I would strongly urge that H.R. 7148 be amended to conform to the amendments brought to S. 1682, but that in addition the House consider extending U.S. legislation to permanent residents of the United States and to make appropriate provision for the expungement of records which are two amendments which are not in S. 1682.

I particularly urge the House to look at the return procedures which have been carefully embodied in amended S. 1682. They have been the object of very careful and long study by Mr. Kenney, and they have taken into account many of the difficulties we have with extradition.

Section 4114 creates a new modality of rendition which is an alternative process to extradition and I think the legislation ought to be very clear that we are not calling it extradition by another name, and that we are setting up a completely new and different procedure with different rules. S. 1682 as amended does that and H.R. 7148 should be amended accordingly.

Thank you.

Mr. HALL. Thank you very much sir. I do have a résumé which has been sent to the committee which is most impressive, and which we'll make a part of the record.

[The résumé follows:]

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., LLB, the University of Cairo; J.D. Indiana University; LLM, 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 seven 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. HALL. There are a few questions I would like to direct to you, sir.

H.R. 7148 provides that a prisoner is to consent to a transfer and that such consent must be voluntary and with full knowledge of the consequences thereof. Some question has been raised at our hearings as to whether this consent is really a waiver.

Specifically, it has been suggested that there be an affirmative requirement that the offender waive his rights to challenge his foreign conviction or his sentence in the receiving State so as to avoid the constitutional problems.

Do you agree that such a waiver provision should be required?

Mr. BASSIOUNI. I'm afraid that the problem here derives from the treaties which clearly state that the receiving country shall not allow a challenge of the sentence and conviction, but shall accept the sentence and conviction of the sending country. Consequently, the implementing legislation is bound by that language of the treaty.

It would be incongruous for the legislation to say that we're not going to require such a waiver for the transfer of offenders, and then find ourselves in violation of our treaty agreements with a foreign country.

I would have hoped that the treaties did not contain that, but the dilemma would be if the legislation does not require it, we would then find ourselves in the position of implementing by legislation something which would be contrary to our treaty obligations.

Mr. HALL. I believe in your Senate testimony you discussed the possibility of transferring persons awaiting trial in Mexico to the United States with the idea that they would be tried in this country by courts which would apply the substantial law of Mexico and the procedural law of the United States.

Could you comment upon that, please, if you would, on that particular subject?

Mr. BASSIOUNI. This is a novel device which has not really been tested in the field of international criminal law except in very few instances. The concept could be called the concept of transfer of criminal proceedings. It is now presently being developed by the Council of Europe within the European countries.

We have experienced and experimented with that type of procedure in the civil area where in matters of conflicts of law a case may be tried in one particular court which applies the laws of another State. I think we can use that analogy in criminal proceedings by having the criminal proceedings transferred as if it were a matter of venue, for example, to a U.S. district court which would apply U.S. procedure and the substantive law of the country where the violation occurred.

This is much the same situation as, let's say, in automobile accidents involving parties from multiple States. A court may decide that it will apply the substantive law of one State which has the most significant contacts with the transaction, but it will apply the procedures of the state where the court fits.

So that by using this analogy, I think that we could avoid many of these problems in the future, when a U.S. citizen is arrested and charged with a violation in Mexico, after what would be the equivalent of the indictment; namely, the instruction of the trial has reached its end, that we have a transfer of the criminal proceedings to the United States and that would avoid most of the problems of recognition and execution of a foreign penal judgment.

Mr. HALL. Would such an approach require additional treaties and further implementing legislation, in your opinion?

Mr. BASSIOUNI. Based on the existing practice of the United States, I would say definitely that it would require implementing legislation. I'm not really sure whether it necessarily would require a treaty.

Mr. HALL. In your Senate testimony you indicate that a U.S. court would still be able to collaterally review a foreign conviction and sentence as a necessary premise for considering the validity of U.S. detention, custody, and control.

Now, in our hearings here in the House, representatives of the Justice Department indicated that they believe that the consent provision in the bill would effectively preclude any challenge to a conviction and sentence in the receiving State's court and that such a conclusion is constitutional.

You disagree with that conclusion, as I understand it? Why?

Mr. BASSIOUNI. I disagree with that conclusion simply because when we're dealing with any problem of consent and waiver in the criminal area, for example, a confession that is presented in court and the confession's admission into evidence is predicated on a waiver of all of the rights of the individual who has confessed, that this will not preclude the court from examining the ways and means in which this waiver was secured and to test the voluntariness of that waiver and of the confession.

If the waiver is found to be voluntary, and satisfies certain minimum standards of constitutional requirements, then I think that the consequences of the waiver may be valid. If, on the other hand, the essential premise of the consent is challengeable, then I think that the courts will be free to go beyond that.

[The prepared statement of Professor Bassiouni follows:]

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PREFACE

This writer strongly supports the scheme of transfer of prisoners and particularly S. 1682 as reported to the Senate Committee on the Judiciary and urges this subcommittee of the House to act promptly and expeditiously to amend H.R. 7148 in conformity with S. 1682, to report it to the House Judiciary Committee or to the floor of the House of Representatives for enactment. The legal analysis provided herein is not intended to detract from the scheme or the proposed implementing legislation but to strengthen it.

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 two treaties in force as of this point in time are:

(*a*) 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

(*b*) 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.

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"

[1] See Hearings Before the Committee on Foreign Relations, 95th Cong. 1st Sess. June 15–16, 1977, statement of M. C. Bassiouni and others.

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 a humanitarian interest in the treatment of its citizens abroad;[2]

2. That a state has a criminological and social interest in the future behavior of its citizens;[3] and

3. That all states, particularly neighboring ones, 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 custodial and detentional control is fully warranted and justified.

(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 matter of legitimate interest and concern thereto.

(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.

Thus, a sound humanitarian and criminological policy supports the scheme of transfer of prisoners to their country of nationality. It is therefore in the context of this rationale that the proposed legislation must be viewed and that it is most likely to be judicially and administratively interpreted and applied.

II. International precedents for the execution of foreign penal sentences

The policy represented by the two present "Treaties" in force is both desirable and Constitutionally valid. Other States have found comparable arrangements desirable and feasible and have put into operation international agreements (Multilateral and Bilateral) for such purposes. Of particular interest are the

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[2] Nationality of individuals has formed the basis of two theories of jurisdiction under international law; *See*, Bassiouni, *International Extradition and World Public Order*, pp. 251–59 (1974). *See also*, Article 5 of the Universal Declaration of Human Rights, General Assembly Resolution 217, UN 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 American Convention on Human Rights, signed 22 November 1969, O.A.S. Treaty Series No. 36 at 1–21. Concern 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*, 278 F.2d. 77 (2nd Cir. 1960) discussed in *Bassiouni*, pp. 530–31:

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 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 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 come 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 reexamination of the principle set out above."

See also, *Peroff* v. *Hylton* 542 F.2d 1247 (4th cir. 1976), wherein 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.

[3] Rehabilitation is the principal of modern theories of criminal sanctions, recognized by all states in the U.S. and most countries of the world. 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, p. 5; for a historical basis, *see*, J. Bentham, *Principles of Penal Law*, pt. 11, Bk. J, Chapter 6 (Browning ed., 1943). 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 also* P. J. Fitzgerald, "The Territorial Principles in Penal Law: An Attempted Justification," *Ga. J. Int'l. and Comp. L.* 28 (1970).

[4] H. Grutzner, "International Judicial Assistance and Cooperation in Criminal Matters," in M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law*, Vol. 2 (1973) p. 189; and Oehler, "Recognition of Foreign Penal Judgments and their Enforcement," p. 261.

arrangements of the Conucil of Europe, the Benelux countries, the Nordic States, and French Community States.

The European Convention on the International Validity of Criminal Judgments[5] 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.[6]

The Scandinavian Act of Enforcement of May 22, 1963, a parallel legislation in the five Scandinavian countries,[7] provided for recognition and enforcement of a wide range of criminal judgments.

Another form of arrangement, which represents cooperation among States of substantially different systems of justice is that maintained by France and certain African states: An example of this is the bilateral Judicial Convention signed by France and Cameroun in 1960,[8] 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. It should therefore be the policy of the U.S. to encourage this type of practice and extend it by treaty to other countries where U.S. citizens are detained.

III. The processes of transferring offenders under the proposed legislation

The basic purpose of the two "Treaties" in force and the proposed implementing legislation is to permit persons who are under a final conviction (all reviews having been exhausted) and sentenced by the 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. That decision is a matter of unreviewable 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

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[5] For the European Convention on "Recognition of Foreign Penal Judgments" *See*, European T. S. No. 70, May 28, 1929. *See*, M. S. Harari, R. J. McLean, F. R. Silverwood. "Reciprocal Enforcements of Criminal Judgments," 45 *Rev. Int. de Droit Penal* 585 (1974). For a proposed convention on reciprocal enforcement, European Committee on Crime Problems of the Council of Europe, "Aspects of the International Validity of Criminal Judgments." (1968) and "Explanatory Report of the European Convention on the International Validity of Criminal Judgments" (1970).

[6] 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. *See also*, B. DeSchutter, "International Criminal Cooperation—The Benelux Example" in M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law*, Vol. II, p. 249 (1973).

[7] The Scandinavian countries' arrangement for recognition and enforcement of penal judgments reproduced in H. Grutzner, *Internationaler Rechtshilfeverkehr in Strafsachen*, pt. IV (1967).

[8] The Arrangement between France and certain African states are reproduced in 52 *Rev. Critique de Droit International Prive* 863 (1963) : *See also*, Shearer, "Recognition and Enforcement of Foreign Criminal Judgments," 47 *Australian L. J.* 585 (1973).

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 of 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 and 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.

While the two "Treaties" in force have somewhat different eligibility requirements and some procedural variances, they are nonetheless similar in substance. The proposed implementing legislation whether it be S. 1682 or H.R. 7148, provides an element of uniformity in the applicable procedures which are desirable.

IV. The recognition and enforcement of penal judgments: Within the United States and as between the United States and foreign States

A confusion exists 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.[9] 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

[9] 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 United States-Mexico and United States-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 eligibility 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, editor.

state penal judgments and have used their power processes to give such judgments some form of enforcement. The most illustrative practice has been that of "extradition" which has existed as between sister states and as between the U.S. and foreign states since Jay's Treaty of 1791.[10] 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 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, however, 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. Thus, since the process of Extradition has been considered Constitutional,[11] 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:[12]

1. The existence of a treaty, whether bilateral or multilateral;
2. The existence of implementing federal legislation;
3. The existence of state legislation allowing the transfer of foreign detainees in state Institutions to be transferred to Federal authorities for transfer abroad;
4. The offender has been convicted of a violation of the criminal laws of the requesting state and has been found guilty in accordance to a legal process not inherently offensive to minimum standards of criminal justice policy in the U.S.;
5. The crime in question is listed in the treaty of constitutes a crime in the laws and jurisprudence of the United States; and
6. The transfer process is voluntary and certain guarantees of the voluntariness of the offender's transfer must be established.

The Treaties establish the same essential conditions as does S. 1682 and H.R. 7148 should included them.

V. Precedents in the United States for the execution of foreign penal judgments

The "Full Faith and Credit" clause of Article III of the U.S. Constitution does not apply to the judgments of foreign states.[13] In civil matters foreign judgments have been recognized and enforced on the basis of reciprocity or comity.[14] The Uniform Foreign Money Judgment Recognition Act [15] 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 extradi-

[10] Discussed in S. F. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (2d ed. 1965); *See also,* M. C. Bassiouni, *International Extradition and World Public Order* (1974).

[11] *See, U.S. v. Rauscher,* 119 U.S. 407, 7 S. Ct. 234 (1886).

[12] *See,* Bassiouni, *supra* note 10 at 24–44; and I. A. Shearer, *Extradition in International Law* (1971).

[13] Homburger, "Recognition and Enforcement of Foreign Judgments," 18 *A.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 16 S. Ct. 281, (1895). *Johnston v. Compagnie Generale Transatlantic,* 242 N.Y. 381, 152 N.E. 121 (1926); for an excellent discussion see, *Cheran v. Frishman,* 236 F. Supp. 292 (D.C. 1964).

[14] Except on grounds of Public policy, *see Huntington v. Attrill,* 146 U.S. 657, 13 S. Ct. 244 (1892); *Intercontinental Hotels Corp. (Puerto Rico) v. Golden,* 15 N.Y. 2d 9, 254 NYS 2d 527, 203 N. 2d 210; Paulsen and Sovern, "Public Policy in the Conflict of Laws" 56 Colum. L. Rev. 969 (1956); Stimson, *Conflict of Criminal Laws,* p. 20 et. seq. (1936) and H. F. Goodrich and E. F. Scholz, *Conflict of Laws* (9th ed. 1964) p. 14–15.

[15] 93 *Uniform Laws Annotated* (1957).

tion by using its power processes to seize and deliver the requested person located in the United States.

Sister state penal judgments have not been construed as falling within the purview of the "Full Faith and Credit" Clause,[16] 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 Inter-State Rendition Company;[17] and,

2. By giving credit in some states to the penalty received and executed in sister states or in federal sentences[18] 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.

Another example is 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) which 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. There has never been any question about its constitutionality.

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,[19]

2. The Agreement between the United States and the Republic of Korea on the status of U.S. Armed Forces in Korea,[20]

3. The specific recognition by the court of appeals of the tenth federal judicial circuit in 1975 of a foreign penal judgment.[21]

These three specific instances constitute valid precedents supporting the constitutionality of the "Treaties" and its implementing legislations S. 1682 and H.R. 7148, 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. It must be emphasized however, that nothing precludes the U.S. Judiciary from refusing to recognize, enforce or execute a foreign penal judgment or sentence if the prosecution, conviction or sentence is in manifest derogation to minimum standards of criminal justice as perceived by the U.S.

1. Where U.S. public agents have acted in a particularly violative manner of U.S. Constitutional standards and that behavior is related to the conviction; and,

2. Where it appears on the face of the record of the foreign conviction that it is contrary to minimum standards of justice.

VI. Extra-territorial application of the Constitution and laws of the United States

It is a commonly held belief that neither the Consittution nor the laws of the United States apply extra-territorially.[22] This view is only partially correct because certain provisions of the Constitution and several U.S. laws apply extra-

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[16] *See, supra* notes 9 and 14.

[17] Uniform Extradition Act., 9B *Uniform Laws Annotated* (1957), e.g., Ill. Rev. Stat. Ch. 60, § 18 (1977)

[18] 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).

[19] See, Gordon E 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 (1965).

[20] 17 U.S.T. 1677; T.I.A.S. 6127, signed at Seoul 9 July 1966, effective 9 February 1967.

[21] *Cooley* v. *Weinberger*, *supra* note 9.

[22] *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See also*, 6 M. Whiteman, *Digest of International Law*, 889 (1968).

territorially.[23] 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."[24] 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."[25]

As to the protections of the "Bill of Rights" as they have been embodied in the meaning of the Fifth and Fourteenth amendment "Due Process" clauses they have not been extended extra-territorially except in a very narrow way. The United States Supreme Court faced that issue with respect to two subject-matter areas. They are: (1) Status of Forces Agreements and (2) Unlawful seizure of persons abroad.

(1) The "Status of Forces Agreements" between the United States and certain foreign countries wherein United States troops are stationed, provided for prosecution of U.S. military persons who have committed a crime in the host country.[26] 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.[27] 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 1883[28] the position has been that the constitutional protections of the fourth, fifth, and 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.[29] 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.[30]

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.

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[23] 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* note 4 at p. 5.

[24] *See*, Bassiouni, *supra* note 10, page 40–43.

[25] *See*, Bassiouni, *supra* note 10 at 47–50.

[26] See, Coker. "The Status of Visiting Military Forces in Europe" in Bassiouni and Nanda, *supra* note 4 at 1–15.

[27] *Wilson* v. *Girard*, 354 U.S. 524 (1937). *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).

[28] *Kerr* v. *Illinois*, 119 U.S. 436 (1886); *Frisbie* v. *Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952).

[29] 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.

[30] *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),

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

In this context, 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.

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.[31] This principle has been applied in the United States with respect to the recognition and enforcement of foreign civil judgments.[32] It is also applicable as between sister states notwithstanding the "Full Faith and Credit" Clause of the Constitution.[33]

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 extradition[34] and on the constitutionality of Status of Forces Agreements[35] has been to respect other criminal justice systems even though they may be very different from that of the United States.

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.

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.[36] 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.

With respect to Mexico, that State's criminal justice system represents a greater variation from that of the United States than Canada's. Nowithstanding

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[31] A. A. Ehrenzweig, *Private International Law* (1973).

[32] A. A. Ehrenzweig, *Conflict of Laws* (1962), at 204 and *Huntington* v. *Attrill*, 146 U.S. 657, 13 S. Ct. 244 (1892).

[33] *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. Scoles, *Conflict of Laws* (9th ed. 1964) pp. 14–15.

[34] *See, supra* note 10.

[35] *Wilson* v. *Girard*, 354 U.S. 524, 77 S. Ct. 1409 (1957).

[36] 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).

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.[37] Thus, on its face the criminal justice system of Mexico is not violative of the public policy of the United States.

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" and the implementing legislation 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. Nevertheless, it must be underscored that no treaty or legislation can deprive a U.S. citizen of basic constitutional rights and that the judiciary as a separate branch of government cannot be mandated to recognize, enforce, or execute a foreign penal judgment or sentence if in so doing the judiciary would derogate to minimum standards of criminal justice. While it is conceded that under Article III of the U.S. Constitution and its judicial interpretation, Congress can define the appellate jurisdiction of the higher federal courts, it is equally true that under the separation of powers doctrine, Congress cannot mandate the judiciary to precluded access to it by U.S. citizens for alleged violations of Constitutional rights. The relevance of these observations pertain to paragraph VIII, 3–4–5 discussed below.

VIII. Specific observations of H.R. 7148 and proposed amendments

1. *Applicability to "offenders."*—Section 4109(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 provided they are not domiciliaries of the Sending 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 results in that U.S. nationals who are domiciliaries in Mexico are ineligible to being transferred and vice versa (Mexican nationals who are domiciliaries of the U.S. are ineligible.) This might be construed as a denial of "equal protec-

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[37] 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—Procecution 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 (II)—A person may not be compelled to testify against himself nor held incommunicado in order to coerce him.

Article 20 (III)—A prisoner shall be told in a public hearing within 48 hours of formal detention the name of his accuser and the nature of the charges.

Article 20 (IV)—The prisoner has a right to confront and cross examine witnesses against him.

Article 20 (V)—An accused may call his own witnesses and is entitled to court assistance in procuring them.

Article 20 (VI)—An accused is entitled to a public trial by a judge or a jury of his peers if the sentence faced is more than one year in prison.

Article 20 (IX)—An accused has the right to be represented by counsel of his choice or by a public defender.

Article 20 (X)—Time served prior to sentencing is subtracted 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].

tion" to U.S. nationals abroad.[38] Unfortunately the legislation cannot cure that problem created by the treaty in question, but hopefully other treaties will, as in the case with the Canadian treaty, not contain such a restriction. (See also, VIII–6)

Only offenders who have exhausted their opportunities for review or appeal and who have been sentenced are eligible for transfer. § 4100 makes no provision for transfer pending appeal. In fact, § 4100 denies transfers during pending of review or appellate procedures even if the presence of the offender is not needed at the review or appeal hearing. The legislation should provide the offender the right to waive review or appeal in order to benefit from this process, and to allow transfers pending review or appeal if the offender's presence is not needed to complete or carry out such a procedure. S. 1682 provides for transfer in case of waiver but not pending review if the offender's presence is not required for the proceedings. H.R. 7148 could add to S. 1682 this additional possibility of eligibility.

H.R. 7148 and S. 1682 exclude mentally ill and it is advanced that special measures shall be developed by the Attorney General to supplement Title 24 U.S.C. Section 321 et seq. It would have been preferable to have this legislation cover this class of offenders as well but its absence is not crucial to the validity of the process or of its constitutionality.

The problem of "Youthful Offenders" is also one which merits consideration. Canadian Treaty (Article IV) includes a provision whereby the receiving state may apply its laws to youthful offenders but the Mexican treaty has no similar provision. There is no clear understanding as to the meaning of "youthful offender" in either treaty. It is assumed that the Departments of State and Justice have a clear understanding based on the legislative history of S. 1682 and H.R. 7148 that "Youthful Offenders" are those defined in U.S. Laws (see, Chapter 402, Title 18 U.S.C. Federal Youth Correction Act) to whom the same legal provisions applicable to offenders in the U.S. shall apply and that the treaty provisions and its implementing legislation shall be applicable in the same manner as for adults save for the special considerations concerning waiver and consent.

2. *Applicability of "offenses."*—The offense for which an offender can be transferred must be one which constitutes a crime in both states. This is known in extradition law and practice as "double criminality." The proposed legislation does not define this requirement and it is assumed that it means that the foreign offense is a crime under the laws of the United States (including state laws). A statutory definition as provided in S. 1682, would be helpful.

Section 4111 states that a transferred offender shall not be subject to double jeopardy, however the language of that section refers only to offenses for which the offender was convicted and not for offenses for which he or she was acquitted. While it may reasonably be assumed that this was the intent of the legislation, it would be better to amend that section to specifically include "acquittals" in the meaning of offenses to which "double jeopardy" applies.

H.R. 7148 should also be amended in accordance with § 4101(h) to cover all contingencies and possibilities or retrial or of violations to the constitutional and treaty requirements against double jeopardy (specifically § 4111). S. 1682 has adequately dealt with this problem and H.R. 7148 should be amended accordingly.

3. *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. 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

[38] On denial of equal protection for an unjustified discriminatory reason, *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). The compelling state interest standard is characterized in *Printing Industries of Gulf Coast* v. *Hill*, 382 F. Supp. 801, 808 (D.S. Tex 1974); *Coleman* v. *Coleman*, 291 N.E. 2d. 539, 534; 32 Ohio St. 2d. 155 (1972).

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, Section 3 amends Chapter 153 Title 28 U.S.C. § 2256 (1) and (2). This is in keeping with 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:

"(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 Section 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 the validity of conviction and sentence in the Sending Stat leaves the status of challenges relating to eligibility of offenders for parole or probation in some doubt in that such determinations may 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(3).

Thus, § 4103, rather than resolving the problem of jurisdictio.. ' overlap, compounds it. Moreover, it creates a whole new issue: whether U.S. laws remain applicable to "prisoners, probationers, parolees, and juvenile offenders" should they be convened 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 processes 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 has been discussed above in paragraphs VII & VIII–3 nothing in the proposed legislation can be viewed as effectively precluding a U.S. Court from considering and ruling on the constitutionality of the treaties in question, the foreign convention and sentence had this implementing legislation. In fact, it is the belief of this witness that the U.S. Supreme Court while upholding the constitutionality of the treaties will nonetheless find that U.S. Courts have the right to make *ad hoc* inquiries into the validity of a foreign conviction. In such cases a court may find that even though the foreign criminal justice in question meets on its face the minimum standards of criminal justice due process of the U.S., its application in the case at bar did not, and thus order the release of the transferred offender.

A U.S. court may and is indeed likely to inquire into a foreign conviction by way of a collateral attack in the form of a *habeas corpus* petition to determine whether it was obtained in violation of certain U.S. constitutional rights by or with the participation of a U.S. public official. To the extent that the Treaties and implementing legislation seek to foreclose judicial review or to eliminate the right to petition for a *habeas corpus* they are likely to be held unconstitutional. The problem facing Congress however, is that since the existing treaties preclude judicial review by the receiving state of the conviction or sentence, the implementing legislation cannot derogate to those treaty obligations.

4. Consent to transfer and the problems of waiver and right to counsel.—In keeping with the "Treaties" 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 by predicating the transfer process on the prior "consent" and "waiver" of the transferred offender. Whether such "consent" and "waiver" are valid and effectively foreclose judicial review of the foreign convictions and sentence depends on several factors:

1. Whether the consent and waiver were given knowingly, intelligently, voluntarily and free of coercion;

2. Whether they have been verified a judicial officer who has informed the prospective transferee of his or her rights under the applicable treaty, the implementing legislation, the U.S. Constitution and relevant federal laws; and,

3. Whether the consenting transferee has had the benefit of counsel of his or her choice, or of a court appointed counsel who does not also represent conflicting interests.

§ 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. S. 1682 has cured this problem and H.R. 7148 should be amended accordingly.

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).[39]

That provision states that "ccunsel for proceedings conducted under section 4108 shall be provided by the Secretary of States. . . ." 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. It is therefore recommended that counsel be made available by the Administrative office of the judicial conference from among federal defenders and volunteer agencies or private practitioners. S. 1682 has not entirely cured this problem and H.R. 7148 should be amended accordingly.

The waiver of rights provided for in § 4108 faces several other difficulties which are discussed below. Since S. 1682 has cured most of these problems, J.R.

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[39] *Gideon* v. *Wainright*, 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. Ct. 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).

7148 should be amended accordingly, but the following should also be taken into account:

(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. The specific consequences of the consent should be stated more clearly in the legislation in a "Miranda Warnings" fashion. 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.[40]

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. Where as 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. It is therefore suggested that this limitation be removed and the decision to accept or reject the transfer be made reviewable.

(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.[41] 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.[42]

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 justify a U.S. Court in such extreme circumstances to hold that the waiver was involuntarily given.

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 they are a legislative requirement which is indispensable to the constitutional validity of the transfer process.

It must be noted however, that H.R. 7148 does not, as it should, provide for making a record of the consent, waiver and notification of the effects of the consent (see also VII–9).

5. 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

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[40] 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.*, pp. 376 *et. seq.*

[41] *Tallett* v. *Henderson* 411 U.S. 258, 93 S. Ct. 1602 (1973).

[42] See *Hoffa* v. *Saxbe*, 378 F. Supp. 1221 (D.C.D.C. 1974); *Stoner* v. *California*, 376 U.S. 483, 845 Ct. 889 (1964). *Bumper* v. *North Carolina*, 390 U.S. 986, 885 Ct. 788 (1968); and also *Schilk* v. *Reed* 419 U.S. 256, 95 S. Ct. 778 (1974).

upon the character of the offender as shown in part by past behavior.[43] 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.

A collateral attack by way of a petition for a writ of *habeas corpus* will exploit the jurisdictional overlap created by the Treaties and the proposed legislation 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.[44]

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 subject matter jurisdiction would not foreclose a U.S. court from collaterally reviewing the foreign conviction and sentence as the nescessary premise for considering the validity of U.S. detention, custody and control of the transferred offender. This was also the position implicitly taken by the Department of Justice in Deputy General Flaherty's memorandum of Q. and A. of October 3, 1977 addressed to the Chairman of this subcommittee, the Honorable Joshua Eilburg (p. 2). It must also be noted that S. 1682 contemplating this eventuality provides for venue in such cases. Clearly as these procedures are pursued in the U.S. by transferred offenders and their release a possible likelihood, its impact on the treaty obligations and relations between the respective states could be jeopardized.

6. Nonapplicability of the proposed legislation and the treaties to permanent residents (see also VIII–1).—The treaties and § 4100(b) and § 4102(7) of the proposed legislation, 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,[45] 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 contravention to the underlying criminological purposes and rationale of the treaty and implementing legislation as discussed in paragraph one. It is assumed that the exclusion is based on the fact that diplomatic protection abroad is extended only to nationals. However, a challenge to the legislation would be internal and the nationality doctrine as applied in the duty of diplomatic protection abroad, is not likely to prevail. It is suggested that even though the present treaties do not apply to permanent residents for future treaties. S. 1682 does not contain such a provision.

7. 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, presumably a record is to be made in the U.S. of the foreign criminal conviction and under § 4105 and 4106 dealing with revocation of parole, a transferred offender would acquire a police record by virtue of any unfavorable action on his or her parole

[43] 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).

[44] *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. The problems relating to rendering *habeas corpus* relief unavailable by jurisdictional allocation or otherwise are discussed in authorities collected in "Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty," 90 *Harv. L. Rev.* 7 (May, 1977), notes 53–90.

[45] 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).

requests or status and thus create a record of that foreign conviction. This would operate as a disability for the offender and nothing in the legislation deals with the expungement of such records.

A remedy to this problem would be to amend 18 U.S.C. to add to the list of records which may be expunged under that section any record deriving from proceedings relating to transferred offenders. The problem would however, remain for those persons who have violated their probation or parole conditions and who are sentenced accordingly. S. 1682 does not contain such a provision.

8. Eligibility for parole and revocation of probation.—(1) § 4106 is silent as to when a transferred offender is eligible for parole. This could be interpreted as being under U.S. law, which means that the offender would have to spend time in the U.S. before being eligible and thus could be prejudicial to an offender who would have been eligible had all the time served been counted. To avoid disparity of treatment, it is suggested that all transferred offenders be eligible for parole upon their arrival in the U.S. even though they might be treated differently from U.S. offenders convicted of the same offenses because a rational basis for distinction does exist. S. 1682 has so provided and H.R. 7148 should be amended accordingly.

(2) There is some questions as to whether § 4106 and § 4104(g) which does not refer to a right of appeal of revocation of parole or probation is intended to deny that right. § 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.

9. *Procedure for the "return" of offenders.*—Section 4114 of the proposed legislation provides 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 Treaties in force do not however require it.

The diplomatic considerations underlying these provisions are clear: such a release, if not followed by the return of such an offender, would be embarassing to the Receiving State and would be viewed as an abuse of the Treaty by under 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 fullfill its duties to execute the foreign penal sentence as provided by the Treaty.[46]

What Section 4114 intends to accomplish is to:

(1) create a statute—based process comparable in certain respects to extradition; (but different from extradition)

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

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

(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; and,

(5) make the return dependent only upon proof of the foreign conviction.

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, et seq.

[46] Article 70 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 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 United States from holding them.

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, et seq. with respect to this class of offenders or (2) that this process is intended 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 et. seq.

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 requiring "probable cause" a "certified copy of the sentence" would not necessarily and by itself be sufficient.

Upon careful consideration of § 4114, it appears that the "return" procedure proposed is intended to apply to a special class of persons, with modified extradition procedures but as an alternative modality of rendition to extradition.

The controlling language for deciding which of these models is sought to be followed pears in paragraph (4) whereby it is stated that a returned person "shall not be deemed to have been extradited." The interpretation of this language 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 any 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.[47] 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 treay 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 this writer that the courts may regard "return" as a form of extradition is the fact that the Mexican treaty refers expressly to the U.S.-Mexican extradition treaty,[48] 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 such 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

[47] 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.*

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

them. This process fits precisely the definitions of extradition that have been used by U.S. courts.[49]

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.[50] 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.[51] With a treaty, the Executive may perform extradition duties in accordance with the treaty's terms, because an extradition treaty is self-executing.[52] 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.[53] 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 could be approved by a simple majority in each House, so the distinction is not one without a difference.[54]

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 separate classification of persons to be "returned" as opposed to persons to be "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 and on a national basis.[55] 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.[56] On the other hand there is a valid rational basis for distinguishing between the two procedures in their application to a separate class of offenders. To make that return process more effective, H.R. 7148 should be amended to conform to S. 1682 and it is suggested that a special mention should be made of that procedure to the offender prior to transfer and to include it in the "consent" formula as a matter of record (see VIII–4).

CONCLUSIONS AND RECOMMENDATIONS

It is very unlikely that the United States Supreme Court would hold the "Treaties" to be unconstitutional because they, in effect, purport to recognize, enforce and execute the penal sentences of a foreign state.

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

[50] *Valentine* v. *U.S. ex rel Neidecker*, 299 U.S. 5, 57 S. Ct. 100 (1936); *U.S.* v. *Rauscher*, *id.*

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

[52] *Re Metzger*, 5 How. (U.S.) 176 (1857).

[53] *See, Roberts* v. *Reilly*, 116 U.S. 80, 6 S. Ct. 291 (1885) and *U.S.* v. *Rauscher*, *supra* note 17.

[54] 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).

[55] *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).

[56] 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).

The Supreme Court is however, likely to consider 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" and the implementing legislation 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.

The Court is 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) what 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.

(*f*) That "consent" is not a complete waiver that absolutely forecloses judicial review by a *habeas corpus* petition, (Particularly where a U.S. agent has been involved in the pre-trial processes, or where it appears on the face of the record or by competent and credible evidence that the conviction was secured in a manner patently offensive to our standards of justice, e.g. a confession obtained by torture.)

The outcome of such a decision would be to open the door to litigation to each and every relator who would in such proceedings 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 all proceedings leading to the conviction rendered by the foreign state. 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 some 600 known eligible transferees and some 300 in Canada. 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.

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. There should be no misconception about the fact that judicial inquiry is very likely to go into the basis for the conviction and sentence, and that a certain number of transferred offenders are likely to be released. Such releases without return to the Sending State are very likely to be disturbing to the Sending State and thus strain relations between the respective countries. Surely, no one should presume to underrate the possible reactions of any state or its general public to the release of transferred offenders without return by a Receiving State on the basis that the criminal justice standards of that Sending

State is below that of the Receiving State. This is a risk which, while worth taking, should not however be discounted. The proposed implementing legislation though drafted with care and concern for the constitutional hurdles which it is certain to face and needs to be amended to strengthen in the face of the obvious obstacles it will face. To that end, this statement which supports the purposes of the proposed legislation sought to highlight the areas in need of amendment before its passage into law.

To that end, S. 1682 should be followed in amending H.R. 7148 and in particular:

1. Appointed Counsel should not be a government attorney.
2. Verification of consent should be only by a judicial official.
3. All transferred offenders should be immediately eligible for parole.
4. No record of the foreign conviction should be kept after the discharge of the offender and provision for expungement of record should be made.
5. Offenders awaiting appeal should be transferred pending appeal if their presence at the appellate review is not necessary or if they waive their right to such review.
6. The offense for which the offender is transferred should be defined as one which constitutes a crime in any U.S. jurisdiction.
7. The Attorney General should accept all transfer requests.
8. Permanent residents of the U.S. who are not nationals of the Sending State should be covered by this process.
9. A record should be made of the verification of the consent.
10. Return procedures should be redrafted to reflect that they are intended to be an alternative modality of rendition to extradition.

Mr. HALL. We appreciate very much your forthrightness and candidness with us on this matter, and we will submit further questions to you. Thank you so much.

I'm going to ask that we change the procedure somewhat in order to take the Honorable John Hill, who is Attorney General of Texas, to come forward at this time. I know what his schedule is in Texas, and I would like to ask my very good friend if he would come join us.

TESTIMONY OF JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS

Mr. HILL. I want to thank you, Congressman Hall, for your courtesy in permitting me to testify at this time and helping me with a scheduling problem that I do have. And to express, not only as Attorney General of Texas, but as a person who has known you all of your adult life, a great pride in the service that you are performing here and the good record you are making.

I appear here today to urge the enactment of the implementing legislation for the prisoner exchange treaty with Mexico. I made a similar appearance before the Senate Committee on Foreign Relations and my testimony, I am sure, is a matter of record and is available to the committee.

I believe that the treaty itself is a carefully thought out and well-drafted document. A great deal of work went into its preparation. I think it is a great compliment to those who worked on what was admittedly a difficult problem that they did such a good job of touching all the bases and coming up with a very workable and, I believe, constitutional document.

The implementing legislation passed by the Senate I think is in very clear and concise, and again represents work that should be highly complimented.

I personally hope that the action of the House would be—and the action of this committee would be to join in the changes and amendments that were made by the Senate so that we could take this matter to the full House as early as possible.

Although I understand the need for considerable deliberation on the part of the subcommittee, and indeed on the part of every Senator and congressional Representative, I think that we have reached the point now in the consideration of this matter where it is time for action, and time is important. Indeed, I think it is of the essence.

I had the personal experience of visiting some of the prisoners from Texas many months ago in Mexico City. There were four women prisoners in whom I was particularly interested—because I knew some of their parents. Two of them were from Houston, one from Tyler and one from Longview.

To capsule the cases in a general way, they were mules for the delivery of cocaine from Colombia back to the United States for $2,000. The transaction was essentially the same in all four instances: Women without any background of criminal activity; two of them solely for the excitement of the trip, and two of them for the money involved. Each has now served over 4 years in prison in Mexico.

They committed a crime; they have paid a fair price, in my judgment, at least, for that crime. And I think it would be a just result for those women to be permitted the advantages of this treaty which would give them a chance to come home and to be released.

Indeed, they expressed a desire to tour high schools and junior high schools in Texas to not only tell their story, but to encourage other young people to beware of the tragedies that can befall young people when they become involved in the drug culture.

I tell that story only because I think one has to look at the personal elements here in trying to decide some of these questions that are being raised.

We have 137 prisoners in Mexico today that are Texas residents. I feel a responsibility, as I know you do, Congressman Hall, to do what I can fairly to see that they have at least an opportunity to come home. Each case, of course, must be judged on its own merit under this treaty, as we all know. There is no automatic application of the treaty.

The opportunity is afforded for the review of the case by the authorities in Mexico and by our U.S. Attorney General before the transfer back. After transfer it seems appropriate that further review takes place by the parole board. And even then there's no assurance of any immediate release. However, I think in the instances of the cases to which I was privy that release is probably going to take place fairly early. I for one hope that it does.

But you can't leave that prison as I did with your own freedoms without being conscious of the need for all of us now who take part in the decision making process and have the voice to speak for them, to speak up and say that in our opinion it is time for action and it is time for those individuals at least to have an opportunity to come back home under this treaty.

I'm not going to get into all the merits of the treaty and all the humanitarian reasons for it, such as the conditions of the jails in

Mexico—that wouldn't serve any useful purpose here today. We have a lot of testimony on the record about that.

What we are down to at this point is this? Will the subcommittee move this legislation and will it be satisfied sufficiently concerning the two constitutional issues that have been presented in this hearing, to move the legislation on to the floor? One hopes essentially the Senate version will be enacted. Let it be voted on before the possible adjournment of Congress in order that the humanitarian beneficial aspects of this treaty can be made available to these individuals prior to the end of the year.

That is why I am back. I frankly did not want to come. I have been up here twice on this matter and I told the gentlemen that I was in El Paso when I received a call from the committee about coming and you have my testimony, but they said we would appreciate you coming once more. Since you've probably been the most active State attorney general in the matter we want the benefit of your personal views again on this constitutional question.

In addition, Mr. Chairman, at that time, coincidentally, we were in conference in El Paso in what is known as the Southwestern States Conference on Crime and the Border. I had just completed hosting that conference, a 3-day conference in El Paso, Tex. We had over 200 high-ranking law enforcement persons, both from the Federal law enforcement establishment in this country and our State law enforcement people in Texas, Arizona, New Mexico, and California. Many local law enforcement people were there from all four of those States.

And in addition, we made it binational. This was the second conference, and it was suggested that we try to bring some of our Mexican counterparts, and we did so.

We had representation from the Federal prosecutor's office from alll eight of the States of Mexico that border the United States.

In addition, Mr. Flaherty came and participated. And the head of DEA was there. Leon Castillo was there, the head of our Immigration and Naturalization Service. We had Mr. Leva, who's the second man in the attorney general's department in Mexico, and out of that kind of an assemblage we discussed this treaty and implementing legislation in a workshop.

And I want to file with the committee a resolution which was unanimously passed just yesterday at that conference.

And just briefly, to give you—leaving out the whereases, and giving you the resolveds, it says: "Be it resolved that the Conference strongly urges that the House of Representatives approve the implementing legislation during the present session of Congress; and further

Be it resolved that the Conference urge that every State adopt enabling legislation to permit the transfer of foreign nationals in their prisons to prisons in the prisoners' native countries for service of the remainder of their sentences."

And in the Whereas section, it was said that we felt that the implementing legislation would be highly beneficial to cooperative law enforcement efforts between the United States and Mexico.

So I want to file that for additional persuasion for immediat action. This has been an irritant between our two countries, and it needs to be removed.

Mr. HALL. For the purpose of the record, General Hill, that will be received and made part of the record.

REPORT OF THE PANEL ON THE TREATY FOR THE TRANSFER OF PRISONERS

The Treaty between the United States and Mexico for the Execution of Penal Sentences has been signed by both governments and the Mexican Legislature has given its approval for the Treaty. The Treaty was submitted to the Senate on February 15, 1977. In the near future the implementing legislation will reach the United States Congress. Attorney General Griffin Bell has promised his support for the ratification effort. Over the past months the states, and particularly the Southwestern states, have communicated their concerns over the Treaty to the federal government. Authorities in Washington have responded in an effort to accommodate these concerns. Consequently, it is expected that implementation of the Treaty will have a minimal impact on state criminal justice administrations.

This is the expected result because those prisoners who are received from Mexico will be under the jurisdiction of the United States Attorney General, and therefore will be federal prisoners or parolees. If prisoners are to be housed in state facilities, separate agreements under existing law (e.g., 18 U.S.C. §§ 4002, 5003) between federal and state authorities must be executed. Further, it is not anticipated that dangerous criminals will be returned from Mexico and set at large in the United States since federal authorities must consent to any transfer.

The panel recommends that the Attorneys General of the border states make the following statement regarding the Treaty:

"We applaud the objectives of the Treaty between the United States and Mexico on the Execution of Penal Sentences and appreciate the diplomatic and humanitarian concerns which underlie its negotiation. As the chief legal officers of our respective states we recognize the Constitutional issue which Article VII of the Treaty presents when considered in the light of the due process and habeas corpus clauses of the United States Constitution. This issue can only be resolved by the United States Supreme Court. We have carefully reviewed the language of the Treaty and of the March 14 [illegible] draft of the federal implementing statute. We are satisfied that the language of each safeguards the interest of our states and see no reason why each should not receive approval by the Congress of the United States."

This report approved by the Southwestern States Conference on Crime and the Border April 23, 1977, for transmittal to border states Attorneys General.

JACK R. WINKLER,
Chief Assistant Attorney General, Panel Chairman.

RESOLUTION

Whereas, the Second Southwestern States Conference on Crime and the Border and the Attorneys General of Arizona, California, New Mexico and Texas have thoroughly examined and analyzed both the Treaty between the United States and Mexico on the execution of Penal Sentences and the legislation to implement that Treaty, as passed by the Senate; and

Whereas, We are satisfied that the Treaty and the implementing legislation are constitutional; and

Whereas, the passage, by the House of Representatives, of the implementing legislation passed by the Senate, would be highly beneficial to cooperative law enforcement efforts between the United States and Mexico. Now, therefore,

Be it resolved that the Conference strongly urge that the House of Representatives approve the implementing legislation during the present session of Congress; and, further be it

Resolved that the Conference urge that every state adopt enabling legislation to permit the transfer of foreign nationals in their prisons to prisons in the prisoners' native countries for service of the remainder of their sentences.

Adopted October 5, 1977, in El Paso, Tex.

JOHN L. HILL,
Attorney General of Texas,
Conference Chairman.

Mr. HILL. Thank you very much, Congressman Hall, and I think that any unnecessary delay—and again, I don't want to appear critical of what I know to be a deliberative process, but bearing in mind the long time that has passed since Mexico ratified this treaty, I think

further delay is going to be injurious to other areas of international cooperation with Mexico that we are undertaking at this time.

Our Nation is now addressing then, finally the two questions of constitutionality once more. I have stated before and want to state again that it is my considered judgment—and I understand that there are distinguished legal scholars who may not agree with this—but I hold this view as a lawyer who has kicked around the courtroom for 30 years and I think has some knowledge of constitutional principles, that in my view the writ of habeas corpus—and I make this statement in my remarks that I will file here, and I think it is a simple answer to most of these constitutional inquiries does not apply to a foreign conviction of a violation of foreign laws.

An individual who commits a crime in a foreign country and who is tried and convicted under the laws of that country, does not have, in my opinion, the right to challenge his conviction by writ of habeas corpus in the United States.

I cite *Neely* v. *Henkel*, an old and unchallenged Supreme Court authority that held that the constitutional provisions relating to the writ of habeas corpus and the bills of attainder and trial by jury for crimes and various guarantees of due process, and I quote: "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."

With all due respect, when scholars try to compare this treaty and the waiver provisions of it with traditional due process principles such as the voluntariness of a confession, it just leaves me a little cold.

I don't think it is a relevant comparison. I don't think it washes legally. I think it totally overlooks the fact that we're dealing here with a treaty situation. I cite *Wilson* v. *Girard*, where the Supreme Court of our country reasoned that a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its border unless it expressly or impliedly consents to surrender its jurisdiction.

Under the treaty, any offender transferred to the United States would, of course, have been convicted by the Mexican courts of a crime committed in Mexico in violation of Mexican law.

Under the reasoning of these cases, it seems to me that the Mexican courts would have exclusive jurisdiction over the offender unless Mexico consents to waive that jurisdiction—which they have not done. Mexico expressly retained jurisdiction in order to save the integrity of its judicial process and to negotiate this treaty.

Of course, we put in the provision 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.

So in effect, the Mexican jurisdiction system will surrender custody of the offender while retaining jurisdiction over the offense.

And I think also that you ought to keep in mind the role of habeas corpus as we know it under our current constitution. The traditional role of the writ of habeas corpus has been simply to direct the custodian to produce the body of the individual and to explain by what authority that individual is being held. That is the purpose of the writ.

And if an individual is transferred under this treaty and then brings, or someone brings on his behalf, a habeus corpus action, it

would require the Attorney General of the United States to explain by what authority the individual is being held.

The simple and obvious answer is the individual is being held by authority provided the United States in a duly enacted treaty.

So if the treaty is valid—and I don't know anyone that says it isn't and I certainly believe it is—the custody would be valid without regard, I submit, to the underlying sentence and conviction. This waiver provision is primarily, then, a mechanism for making it clear to an individual who wishes to be transferred that he or she is not being given an additional appellate procedure through which to challenge the underlying conviction. The waiver provision protects the integrity of the transferring nation's judicial process by insuring that the transfer defendant cannot collaterally attack the underlying conviction and sentence unless he or she returns to Mexico to do so and has the contest made in that jurisdiction. Without some guarantee that the integrity of the transferring nation's judicial process will be so respected, frankly, there could be no treaty. These American citizens would continue to be confined in places that are far from the emotional support of their family and friends.

Now, the second question deals with equal application of the laws, denial of equal protection under the Equal Protection Clause of the U.S. Constitution, because we may be treating prisoners transferred under this treaty differently than some other prisoners confined on similar charges in our prisons. I have heard so little about that that I am not going to dignify it here by referring to my response.

I have just been listening, and I haven't heard anyone make a strong argument. I have always been taught in the courtroom that if they have not laid a glove on you, that you ought not to have very much to say.

But I do have a response to that, if it becomes an issue, in my remarks.

Mr. Chairman, I think I will save you some time and not give you the rest of my testimony. It has been filed with the committee. I hope I have covered the essential points.

I want to implore you, personally, Congressman Hall, to do all in your power to try to move this implementing legislation to the floor and arrange for an early vote. I feel confident that it has broad support, and we are here now sort of debating how many angels are on the head of a pin. I can understand that the questions are being raised and openly debated, but I think the debate should be completed and the humanitarian aspects of this treaty be implemented. I respectfully request you and the other members of the committee and all with influence on the decisionmaking here to expedite that result.

Thank you.

Mr. HALL. Thank you very much. And your statement that you have presented will be filed and made a part of this record.

[The complete statement follows:]

U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW

STATEMENT ON H.R. 7148

My name is John L. Hill. I am the Attorney General for the State of Texas. I am here today to urge enactment of the implementing legislation for the Prisoner Exchange Treaty with Mexico. As I have said previously in my remarks before

the Senate Committee on Foreign Relations, I believe the prisoner exchange treaty to be a carefully thought out, well drafted document that provides a just and workable solution to a very difficult problem: Incarceration of one country's nationals for crimes committed in another country. Furthermore, I believe that the implementing legislation in clear, concise terms gives effect to all of the treaty's provisions and fully carries out the intent of the parties.

Rather than discuss generally the merits of the treaty and its humanitarian goals, I will address my remarks to the two issues that have been raised concerning the constitutionality of the implementing legislation. The first is whether an individual constitutionally can be required to waive his right to challenge the validity of his conviction by writ of habeas corpus as a precondition to transfer. Conceptually this is a difficult question. However, there is a simple answer. The answer is that an individual who commits a crime in a foreign country, who is tried and convicted under the laws of that country does not have the right to challenge his conviction by writ of habeas corpus in the United States.

In *Neely* v. *Henkel*, the Supreme Court held that the constitutional provisions relating to the writ of habeas corpus, bills of attainder, trial by jury for crimes and various other guarantees of due process "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U.S. 109, 122 (1901). In *Wilson* v. *Girard*, the Supreme Court reasoned that "(a) sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." 354 U.S. 524, 529 (1957). Under the treaty, any offender transferred to the United States would have to have been convicted by the Mexican courts of a crime committed in Mexico in violation of Mexican law. Under the Supreme Court reasoning in *Neely* v. *Henkel* and *Wilson* v. *Girard*, the Mexican courts would have exclusive jurisdiction over the offender unless Mexico consents to waive this jurisdiction. Clearly, Mexico has not waived its jurisdiction. Article Six of the treaty provides that "[t]he 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." In effect, the Mexican jurisdiction system will surrender custody of the offender while retaining jurisdiction over the offense. The United States, acting through the Attorney General, will have custody of the offender pursuant to the treaty.

It is important to keep clearly in mind the role of habeas corpus. The traditional role of the writ of habeas corpus has been to direct the custodian to "produce the body" of the individual and to explain by what authority the individual is being held. If an individual transferred pursuant to the treaty were to bring a habeas corpus action requiring the Attorney General to explain by what authority he is holding the individual, the answer would have to be by the authority provided in the treaty and the implementing legislation. If the treaty is valid, as I believe it is, the custody would be valid without regard to the underlying sentence and conviction.

The waiver provision is primarily a mechanism for making it clear to an individual who wishes to be transferred that he is not being given an additional appellate procedure through which to challenge his conviction. The waiver provision protects the integrity of the transferring nation's judicial process by insuring that the transferred defendant cannot collaterally attack his conviction and sentence in the courts of the receiving nation. Without some guarantee that the integrity of the transferring nation's judicial process will be respected, there could be no treaty and American citizens convicted of crimes in foreign lands would continue to be confined in places far from the emotional support of family and friends.

The second question is whether the fact that offenders transferred pursuant to the treaty and the act as passed by the Senate are immediately eligible for parole on arrival denies equal protection to individuals convicted of federal crimes in this country who may be eligible for parole only after they have served one-third of their sentences. Based upon a careful review and consideration of the problem, I believe that there is no denial of equal protection. The Equal Protection Clause of the U.S. Constitution does not require identity of treatment. It requires only that a classification rests on some real and not feigned difference, that the distinctions have some relevance to the purpose for which the classification is made and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. See, for example, *Arlington Heights* v. *Metro-*

politan Housing Development Corporation (97 S. Ct. 555 (1977)) and *Lehn Hausen v. Lake Shore Auto Papers Co.* (410 U.S. 356 (1973)). The parole provision fully satisfies this requirement. Individuals convicted of violations of the U.S. Government are subject to the control and supervision of the federal judiciary. It is quite reasonably to vest the power to determine the time of parole eligibility within reasonable limits in the judicial officers who heard the case and imposed the sentence.

The district court judge who heard the case has both a wealth of experience within the American criminal justice system and a great deal of detailed information regarding the defendant to draw on in making this determination. This experience and knowledge makes the Judge the person best qualified to determine whether the ends of justice and the best interests of the public are better served by making the defendant immediately eligible for parole or by requiring that defendant first serve some minimum portion of his sentence.

In sharp contrast, an offender transferred under the treaty cannot receive this individualized determination. There is no American official with the necessary experience and knowledge qualified to decide on an individual basis whether the ends of justice would best be served by making a special transferee immediately eligible for parole or requiring that he serve some minimum portion of his sentence. As a matter of administrative practicality, the decision of when transferees will be eligible for parole must be made legislatively on a generalized basis applicable to all transferees. In making this determination, the Legislature can reasonably consider that the foreign courts may impose harsher sentences for a given crime than do U.S. courts. It is also important to remember that each offender transferred under the treaty has been convicted of violating a foreign law in a foreign country under a foreign judiciary system that does not necessarily provide all of the due process safeguards that many U.S. citizens regard as their natural right. This experience must be a sobering one. Immediate parole eligibility does not mean that an individual will be released. It means only that he can be considered for parole.

Finally, it should be noted that pursuant to implementation of the provisions of a valid treaty, Congress can legislate more broadly than in the absence of a treaty. For example, in *Missouri v. Holland*, the Supreme Court upheld the constitutionality of the Migratory Bird Act against petitioner's contention that the act violated the Tenth Amendment and was similar to an act that the Court had earlier found constitutionally defective. In upholding the act, the Supreme Court stressed that the Migratory Bird Act was enacted pursuant to a treaty and "(i)f the treaty is valid there can be no dispute about the validity of the statute under Article 1 Section 8." *Missouri v. Holland* (252 U.S. 419, 432 (1920)).

Mr. HALL. I would like to ask you one or two questions.

Recent press reports have indicated that some prisoners in the Mexican jails do not wish to be returned to the United States.

Now, you indicated you have been there and talked to several. Have you found any that fit that category?

Mr. HILL. I have not, Congressman Hall.

I saw that same press report, and I was surprised by it. There may be some. I would not want to dispute the account, because I can't. I can only say that it is a surprising report. I don't know what it was based on.

My impressions, at least with the experience I had, was to the contrary. There may be some exceptional cases where perhaps the families of the inmates have moved to Mexico; they do have conjugal visits in Mexico. I'm not prepared to say that there is no case in which there might not be a desire to stay there. But I'm not impressed with that statement in the newspaper.

Mr. HALL. You mentioned in your testimony before the Senate that there are about 75 Mexican nationals in jails in Texas.

Do you have any idea as to the percentage of those offenders who are desirous of being returned to Mexico?

Mr. HILL. Yes. We have made an informal survey there of that, and there were only 21 who desired to avail themselves of the benefits of the treaty. The rest of them preferred to stay in jail in Texas.

Mr. HALL. I believe that H.R. 7148 provides that the Attorney General may designate certain State prisons to hold the transferred Americans.

Have any negotiations begun with the State and the Justice Department for the housing of any transferred offenders; and do you expect any arrangements to be undertaken along that line?

Mr. HILL. All I can tell you is that Mr. Flaherty and some of his assistants indicated to us in El Paso that in anticipation of early implementation of this legislation, some of the prisoners in Mexico that were housed in and around Mexico City have been transferred to border jail facilities, and that the Justice Department has instructed the magistrates now serving in and near the border to begin the preparation of the necessary paperwork, so that we will be ready to move as soon after the Congress acts as is possible.

They made no specific reference to the housing, but I don't anticipate any difficulty. Speaking for our own State, we have already provided legislation this last regular session that will permit the Governor to be the consenting authority for our State. We have both Federal and State facilities in Texas. Our attitude, I think, will be that we would like to have a prisoner transferred to the facility nearest to his or her home, be it State or Federal.

But we are pleased to note that the Federal Government under the arrangement is going to pay the bill.

I don't think we will have any problem in this regard, and I think I can speak for California because I spent a lot of time with Evelle Younger, the attorney general of California, with reference to this matter. He supports my testimony here today. I talked with his chief deputy of the criminal division yesterday, Jack Winkler. He authorized me to say that California was very interested in early action in this matter. And between the two States, California and Texas, we have over one-half of the prisoners. I would hope that Congress would then accord some extra weight to the fact that the elected officials of California and Texas are urging early action on the treaty, and we are prepared to say to you that we don't anticipate any difficulties. We believe we will be able to take care of the housing problem.

Mr. HALL. I note that you have prepared legislation from Texas to implement this exchange treaty.

What is the status of that legislation; and why do you believe such legislation is necessary—that is, when the implementing legislation would provide only for Federal decisionmaking?

Mr. HILL. Because of the question of housing the prisoners within State facilities and with regard to the question of Mexican nationals being transferred from our State back to Mexico, I think that it is necessary for some State official to consent to that transfer under our statutes relating to pardons and paroles. And this is why we enacted the amendment.

Mr. HALL. Do we have any people in Texas that you know of who are from Canada?

Mr. HILL. We have two in Huntsville from Canada, and they both asked to be transferred to Canada under the Canadian treaty.

Mr. HALL. Can you see from your experience as a trial lawyer and probably the best attorney general Texas has ever had—can you see in any way any problems in the implementing of this treaty with reference to getting these people back and forth across the borders into their respective countries?

Mr. HILL. I don't, Congressman Hall. Who's to say you're not going to hit some snags when you're dealing with this many people, but the Justice Department is very anxious to move. The State Department has done a very good job. Vernon McAgnish, who was our chief representative in the Embassy in Mexico, is one of the most decent fellows you would care to meet. He is really on the ball. And he's ready to move. He has a good staff of people. They could be at Santa Marta in a matter of about an hour. They have their Embassy people alerted in the various sections of Mexico, because our prisoners are in some 54 different Mexican facilities, I believe is the figure—don't hold me to that, but that is my recollection of the number of different facilities.

So there is a certain amount of contact work that has to be done and obviously, some transportation. But I don't think that it presents any real problem.

Mr. HALL. There may be additional questions that the subcommittee might wish to submit to you, John, and with your permission we would like to—if we submit those questions, you can respond, and we can make those inclusions a part of the record.

Mr. HILL. Thank you very much, Congressman Hall.

Mr. HALL. We appreciate you very much coming here today, and it's personally good to see you.

Mr. HILL. It's good to see you, Sam. Thank you.

Mr. HALL. Professor Abernathy, I believe, is next on the agenda.

TESTIMONY OF PROFESSOR CHARLES ABERNATHY, GEORGETOWN UNIVERSITY SCHOOL OF LAW, WASHINGTON, D.C.

Mr. ABERNATHY. Thank you.

I have also been unable, because of the promptness of the hearings, to have my remarks typed, and I ask for permission to submit those at a later date.

Mr. HALL. Without objection.

[The prepared statement of Professor Abernathy follows his testimony.]

Mr. ABERNATHY. I have been asked to speak to you today concerning certain provisions of the domestic legislation to implement the recently ratified prisoner exchange treaties with Mexico and Canada.

The implementing legislation, H.R. 7148, provides that no offender transferred to the custody of the United States may challenge in American courts the legality of this conviction under foreign law.

The bill contains a waiver provision to try to insure that each transferred offender will have knowingly relinquished whatever legal rights he may have possessed under American law.

Finally, the bill specifies indirectly that parole standards different from those ordinarily applied to domestic prisoners may be applied to some transferred prisoners.

I would like to speak today then to three questions.

First, does the prohibition against court challenges against the transferee's conviction violate any constitutional right of access to American courts?

Second, would the waiver provision cure any supposed constitutional violation?

And, third, do the different parole provisions violate constitutional notions of equal protection of laws?

The last of these issues may be disposed of summarily.

Section 4106(c) which the legislation would add to title 18 of the United States Code provides that transferred prisoners held in U.S. custody would be eligible for parole under the general provisions of the Federal parole statute 18 U.S.C., section 4205(a).

The subcommittee is apparently worried that since a number of offenders transferred from Mexican jails are drug offenders, that 4106 would effectively subject them to the general strict parole rules rather than to the special lenient parole provisions in 18 U.S.C., section 4205(b)(2), which usually are applied to domestic drug offenders.

In my opinion there is no equal protection violation in this provision.

In 1973 the Supreme Court in *McGinnis* v. *Royster* held that distinctions among prisoners on their minimum parole eligibility dates need only be justified under the lax rational basis test; that is, if the Government can show any rational reason for distinguishing between two sets of prisoners, equal protection principles would not be violated.

Specifically, the court held in that case that prisoners held in county jails during part of the total detention time could rationally be given later parole eligibility dates than prisoners in regular State prisons, and that was because the regular prisoners participate in rehabilitation programs and thus may be ready to return to society at an earlier date. In my opinion, the *Royster* decision applies here.

Testimony previously heard here and in the Senate shows that opportunities for rehabilitation in Mexican and Canadian prisons and indeed in all foreign prisons are very limited. Therefore, Congress could rationally conclude that offenders who have spent some time in foreign jails should not receive the same lenient parole provisions that are applied to American offenders.

There may also be other rational reasons to support the act, but I won't go into those now.

I would like to emphasize, however, that equal protection principles would not require that Congress treat transferred prisoners differently in granting parole. The rationale basis test, basically, defers to Congress' position on legislative factfinders. These are policy issues which you may decide any way you think best so long as you have some rational basis to support any different treatment you give.

Now, I would like for us to turn to the more troublesome issue involving denial of the right of access to U.S. courts.

Section 3 of H.R. 7148 would amend title 28 of the United States Code by adding a section 2256. Section 2256, subsection (1), declares that all challenges to an offender's conviction and sentence must be taken in the courts of the nation which convicted him. In other words, transferred offenders convicted in Mexico but held in U.S. prisons would have no right of access to U.S. courts to test the constitutionality of their confinement. Any claims of unconstitutional conduct would be unreviewable in American courts.

The question is, does Congress have the constitutional authority to cut off the citizen's right of access to the American courts for his constitutional claims?

Another side of this question is, does Congress have the power to cut off the court's power to hear such constitutional issues?

Both the Senate Foreign Relations Committee and this subcommittee have heard extensive testimony on these questions, and I'm sure that you are aware by now that no competent answer can be given the questions. We law professors use these questions, in fact, to confuse our students and to abuse them, and they provide a litmus test for whether one is a strict constructionist of the Constitution or whether one is a rule-of-law person who looks behind the words of the Constitution to see some grand design.

The positions of the persons arguing these positions may be fairly easily stated. The strict constructionists point out the words of article III. Constitutional law cases generally come within the Supreme Court's appellate jurisdiction, but that jurisdiction article III expressly provides, is the subject to "such exceptions as the Congress may make."

Having justified a restriction on Supreme Court power, the strict constructionist next points out that the lower Federal courts are entirely the creatures of Congress and, therefore, their jurisdiction is totally within Congress' control.

Having shut down all the Federal courts then, those of this persuasion next argue that separation of powers principles or federalism notions prevent States courts from ordering around Federal prison officials.

There is some precedent for each of these positions when taken individually. Ex parte McCardle, an 1869 case, supports the proposition that Congress may cut off the Supreme Court's appellate jurisdiction in situations where Congress deems proper.

Sheldon v. *Sill*, an 1850 case, upheld Congress power to limit the jurisdiction of lower Federal courts to something less than the full article III judicial power.

And *Tarble*'s case, an 1872 decision, holds that no State court judge may force a Federal official to give up a Federal prisoner.

There is no reason to believe that these old cases would be decided any differently today.

Although the rule-by-law people concede that each individual part of the strict constructionist argument is correct, they argue that the whole assembled argument proves too much. It effectively gives Congress the power to destroy the Supreme Court and the Constitution by cutting off all jurisdiction to hear constitutional cases. This, they say, violates the separation of powers doctrine, as well as, in practical terms, overturning *Marbury* v. *Madison*, and our whole constitutional commitment to the rule of law, especially constitutional law.

Although the Supreme Court has never ruled on this issue, it has said and done much to support the persons who champion the rule of law. The Court has gone out of its way on several occasions to deliver dicta concerning a party's right of access to Federal courts to litigate his constitutional claims.

In *Crowell* v. *Benson*, a 1932 decision, the Court dealt with the narrow issue of whether certain administrative factfinding which under-

lay constitutional claims could be made binding on the Court. The Court rejected such a result because, it said, that "would be to sap the judicial power as it exists under the Federal Constitution."

The Court reiterated that view in *St. Joseph's Stockyard Company* v. *United States*, and Mr. Justice Brandeis, in an opinion which echoed the view of every member of the Court, wrote that the supremacy of law "demands that there should be an opportunity to have some court to decide whether an erroneous rule of law was applied and whether the proceeding in which such facts were adjudicated was conducted regularly. To that extent," he said, "the person asserting a right, whatever its source, should be entitled to the independent judgment of the Court on the ultimate question of constitutionality."

The reason that the rule-of-law advocates can only rely on dicta is that the Supreme Court has scrupulously avoided deciding this very basic issue of whether Congress can completely cut off Court review of constitutional issues. Whenever pressed, it has construed statutes so as to avoid the issue, as it did in the substitute *Crowell* case, or as it did recently in *Johnson* v. *Robinson*, a 1974 decision.

In giving a less than literal interpretation to the no-review provision in the *Johnson* case, the Court specifically announced that it did so to avoid what it called serious questions of constitutional law.

The uncertainty and confusion on the issue of judicial reviewability is compounded by the interplay between these issues and the constitutional right to habeas corpus in article I, section 9. The exact scope of the constitutional as opposed to the statutory right of habeas corpus is presently in some confusion with several members of the Court extolling radically different views on the subject.

The distinguished attorney general of Texas has echoed the views of some of those members of the Court.

Congress should be aware, however, that if the Court sticks to its 1960's view that habeas corpus goes only to the issue of custody simpliciter, then H.R. 7148 effectively cancels the right to habeas corpus and thus is unconstitutional.

This, then, is your predicament, as I see it. If this legislation is passed and prisoner exchange treaty is implemented, you know that some prisoner will sue in Federal court to seek his release, and there is at least a substantial likelihood that the Supreme Court will find the prohibition on U.S. court review to be unconstitutional.

The legislation as presently drafted attempts to avoid this result in two ways. First, it requires the transferred offender to waive or consent to release his right of access to U.S. courts, but that in itself presents problems which I shall discuss later.

Second, the proposed section 4114 provides that any offender who challenges his confinement and ultimately wins in court will simply be sent back to Mexico or Canada. This second idea also presents grave problems. If the Court determines that it is unconstitutional for the Government to hold a person because he was unconstitutionally convicted, it will probably also——

Mr. EILBERG [presiding]. May I interrupt? We have just a few minutes left, and we are going to have to go to the floor, and I understand you are quite rushed, and I wondered if we could submit the rest of your statement for the record. And I would just like to ask you one or two questions and ask you to return the answers just as quickly as

you know how. We are anxious to move this bill quickly, and we need your help. And forgive me for being late, but I had a very important appointment at the White House.

May I ask you one or two questions now?

Mr. ABERNATHY. Please.

Mr. EILBERG. Do you feel that acceptance of offenders under the treaty and execution of the remainder of their sentence in U.S. prisons constitutes such U.S. involvement in the conviction and sentencing of an offender so as to require application of U.S. constitutional guarantees in criminal proceedings leading to incarceration?

Mr. ABERNATHY. I think so.

But as you have heard from the distinguished attorney general of Texas, he takes a different view.

What I would like to convince the subcommittee of is that no matter how many people you get here to testify, you cannot be assured of either result.

Mr. EILBERG. We want to be sure that we have as tight a bill as possible.

Mr. ABERNATHY. I would like to suggest some ways, and I had suggested them in my prepared testimony, which you can read later, in which the subcommittee can tighten up H.R. 7148 so that some of these constitutional issues are avoided.

Mr. EILBERG. Could you possibly come back later this afternoon or talk to one or more of our staff people as soon as you are available so that we have these?

Mr. ABERNATHY. Yes, I could.

Mr. EILBERG. All right, another question.

Some argue that in light of the alternatives available to a prospective transferee, any consent to transfer regardless of how well informed the individual may be as to consequences of his consent, is inherently coercive and not a valid waiver of rights.

What is your opinion?

Mr. ABERNATHY. Well, I think that is another issue on which the subcommittee cannot be certain.

I would doubt that the court would take that view.

The court has in domestic situations never taken the view that circumstances themselves raised the presumption that a waiver is, per se, invalid.

I would think, however, again, there are quite a few ways the act could be tightened up to induce the court psychologically to approve the waiver, and I think in this respect the Senate's version—putting the waiver in the hands of a Federal magistrate—is a better provision.

Mr. EILBERG. Once again, we welcome your early cooperation with our staff so we will have the benefit of all your thinking.

Mr. ABERNATHY. I would be happy to do that.

Mr. EILBERG. One more question.

Under the proposed implementing legislation as passed by the Senate, the transferred offenders would be immediately eligible for release upon parole, irregardless of what portion of their sentence has been already served in a foreign prison.

In light of the fact that many U.S. prisoners convicted under Federal law are required to serve at least one-third of their sentence before

they become eligible for parole, do you see any equal protection or other problems with this arrangement?

Do you believe foreign prisoners should be given this preferential treatment?

Mr. ABERNATHY. As I suggested earlier, I don't think there happens to be any equal protection violation. There happens to be a Supreme Court case on this. This is purely a question of policy which would be up to the subcommittee to decide, based upon the factors that the subcommittee finds important.

Mr. EILBERG. Do you have any other questions, Mr. Hall?

Mr. HALL. No, I do not.

Mr. EILBERG. Professor, we thank you very much and apologize for cutting you short. We hope you will be available to us.

Mr. ABERNATHY. That's quite all right. I will be happy to help.

Mr. EILBERG. Thank you very much.

And the subcommittee is adjourned.

[The prepared statement of Prof. Charles F. Abernathy follows:]

STATEMENT OF PROF. CHARLES F. ABERNATHY

SUMMARY OF RECOMMENDATIONS

Recommendation 1.—Amend Section 3, the proposed addition of a § 2256 to Title 28, U.S.C., as follows (changes italicized)—

"(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over any proceedings, regardless of their form, seeking to challenge, modify, or set aside, *under the law of such country*, convictions or sentences handed down by a court of such country;

* * * * * * *

"(5) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality *under United States law, of any other action by an officer of the United States or any state*, shall be brought in the United States district court in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents; the Attorney General shall defend against such proceedings." [Cf. H.R. 7148 text, pp. 19-21]

Recommendation 2.—Amend Section 1, the proposed addition inter alia, of a § 4100 to Title 18, U.S.C., by adding a further subsection—

"(f) The provisions of this chapter relating to the transfer of offenders shall be applicable only if the President, acting through the Secretary of State, shall find, at the time that a treaty of transfer becomes operational that the judicial system of the transferor state meets international minimum standard of due process of law, and his decision shall be unreviewable. [Cf. H.R. 7148 text, p. 3]

Recommendation 3.—Amend Section 1, the proposed addition, inter alia, of §§ 4107 and 4108 to conform with the corresponding provisions regarding waiver and consent as they appear in S. 1682. Note: It may be necessary to amend waiver specifications in §§ 4107 and 4108 to conform them to the amendment suggested in Recommendation No. 1. Alternatively the legislative history should make clear that the waiver provisions regarding access to federal court are to be construed in light of amended § 2256 of Title 28, U.S.C. set out in Recommendation No. 1.

REMARKS

Mr. Chairman and members of the subcommittee, I have been asked to speak with you today concerning certain provisions of domestic legislation to implement the recently ratified prisoner exchange treaties with Mexico and Canada. The implementing legislation, H.R. 7148, provides that no offender transferred to the custody of the United States may challenge in American courts the legality of his conviction under foreign law. The bill contains a waiver provision to try to insure that each transferred offender will have knowingly relinquished whatever rights he may have possessed under American law. Finally, the bill specifies

indirectly that parole standards different from those ordinarily applied to domestic prisoners may be applied to some transferred prisoners.

These are the three questions which I intend to discuss:

(1) Does the prohibition against court challenges against a transferee's conviction violate any constitutional right of access to American courts?

(2) Would the waiver provisions cure any supposed constitutional defect?

(3) Do the different parole provisions violate constitutional notions of equal protection of the laws?

I.

The last of these issues may be disposed of summarily. Section 4106(c), which the legislation would add to Title 18, U.S.C., provides that transferred offenders held in U.S. custody would be eligible for parole under the provisions of the general federal parole statute, 18 U.S.C. § 4205(a). The Sub-Committee is apparently worried that since a great number of offenders transferred from Mexican jails are drug offenders, § 4106 would effectively subject them to the general strict parole rules rather than to the special lenient parole provisions in 18 U.S.C. § 4205(b)(2) which usually are applied to domestic drug offenders.

In my opinion there is no equal protection violation in this provision. In 1973 in *McGinnis* v. *Royster*, 410 U.S. 263 (1973), the Supreme Court held that distinctions among prisoners on their minimum parole eligibility dates need only be justified under the lax rational basis test: that is, if government could show any rational reason for distinguishing between two sets of prisoners, equal protection principles would not be violated. Specifically, the Court held that prisoners held in *county jails* during part of their total detention time could rationally be given later parole eligibility dates than prisoners in *regular state prisons* because the regular prisoners participate in rehabilitation programs and thus may be ready to return to society at an earlier date.

In my opinion the *Royster* decision applies here. Testimony previously heard here and in the Senate shows that opportunities for rehabilitation are limited in foreign prisons. Therefore, Congress could rationally conclude that offenders who have spent some time in foreign jails should not receive the same lenient parole treatment that many domestic U.S. drug offenders receive. There may also be other rational reasons for the treatment provided in § 4106(c).

Let me emphasize here that equal protection principles would not require that Congress treat transferred prisoners differently in granting parole. The rational basis test basically defers to Congress' position as legislative fact-finders. These are policy issues which you may decide any way you think best, so long as you have a rational basis to support any differing treatment you give.

II.

Now let us turn to the more troublesome issue involving denial of access to U.S. courts.

Section 3 of H.R. 7148 would amend Title 28, U.S.C. by adding a § 2256. Section 2256(1) declares that all challenges to an offender's conviction and sentence must be taken to the courts of the nation which convicted him. In other words, transferred offenders convicted in Mexico but held in U.S. prisons would have no right of access to U.S. courts to test the constitutionality of their confinement: any claims of unconstitutional conduct would be unreviewable in American courts.

Does Congress have the constitutional authority to cut off a citizen's access to the courts to litigate his constitutional claims. Does Congress have the power to cut off the court's power to hear such constitutional issues?

Both the Senate Foreign Relations Committee and this Sub-Committee have heard extensive testimony on these questions, and I am sure that you are aware by now that no confident answer can be given to these questions. We law professors use these questions to confuse and abuse our students: they provide a litmus test for whether one is a strict constructionist of the Constitution or a "rule-of-law" person who looks behind the words to see a grand design in the Constitution.

The two positions may be fairly easily stated. The strict constructionists point out the plain words of Article III: constitutional law cases generally come within the Supreme Court's appellate jurisdiction, but that jurisdiction, Art. III expressly provides, is subject to "such Exceptions . . . as the Congress shall make." Having justified a restriction of Supreme Court power, the strict constructionists next point out that the lower federal courts are wholly creatures

of Congress' creation, and therefore their jurisdiction is totally within Congress' control. Having shut down all federal courts, those of this persuasion next argue that separation of powers or federalism notions prevent the state courts from ordering around federal prison officials.

There is some precedent for each of these positions when taken individually. *Ex Parte McCardle*, 7 Wall. 506 (U.S. 1869), supports the proposition that Congress may cut off the Supreme Court's appellate jurisdiction in situations where Congress deems it proper. *Sheldon* v. *Sill*, 8 How. 440 (U.S. 1850), upheld Congress' power to limit the jurisdiction of federal district courts to something less than the full scope of federal Art. III judicial power. And *Tarble's Case*, 13 Wall. 397 (U.S. 1872), holds that no State judge may force a federal official to give up a prisoner. There is no reason to believe that the holdings in any of these old cases would be different today.

Although the rule-of-law people concede each individual part of the strict constructionist's agrument, they argue that the whole assembled argument proves too much: it effectively gives Congress the power to destroy the Supreme Court and the Constitution by cutting off all jurisdiction to hear constitutional cases. This, they say, violates the separation of powers doctrine, as well as in practical terms overturning *Marbury* v. *Madison*, 1 Cranch 137 (U.S. 1803), and our whole national commitment to the rule of law, especially Constitutional law.

Although the Supreme Court has never ruled on the issue, it has said and done much to support those who champion the rule of law. The Court has gone out of its way on several occasions to deliver dicta concerning a party's right of access to federal courts to litigate his constitutional claims. In *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court dealt with a narrow issue on whether certain administrative fact-finding, which underlay constitutional claims, could be made binding on the court. The Court rejected such a result because, it said, that "would be to sap the judicial power as it exists under the Federal Constitution." The Court reiterated that view in *St. Joseph Stock Yards Company* v. *U.S.*, 298 U.S. 38 (1936), and Mr. Justice Brandeis, in an opinion which echoed the view of every member of the Court, wrote that: The Supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. [Id. at 84.]

The reason that the rule-of-law advocates can only rely on dicta is that the Supreme Court has scrupulously avoided deciding this very basic issue of whether Congress can cut off all court review of constitutional issues. Whenever pressed, it has construed statutes so as to avoid the issue, as in the *Crowell* case and as it did recently in *Johnson* v. *Robison*, 415 U.S. 361 (1974). In giving a less-than-literal interpretation to the no-review provision in *Johnson*, the Court specifically announced that it did so to avoid what is called "serious questions" of constitutional law.

The uncertainty and confusion in the issue of judicial reviewability is compounded by the interplay between these issues and the Constitutional right to habeas corpus (Art. I. § 9). The exact scope of the *Constitutional*, as opposed to statutory, right of habeas corpus is presently in some confusion, with several members of the Court extolling radically different views on the subject. Congress should be aware, however, that if the Court sticks to its 1960's-view that habeas corpus goes to the issue of custody simpliciter, then H.R. 7148 effectively cancels the right to habeas corpus and thus is unconstitutional.

This is your predicament, gentlemen: If this legislation is passed and the Prisoner Exchange treaties implemented, you know that some prisoner will sue in federal court to seek his release, and there is a substantial likelihood that the Supreme Court will find the act's prohibition on U.S. court review to be unconstitutional.

The legislation attempts to avoid this result in two ways. First, it requires the transferred offender to waive his right of access to U.S. courts, but that in itself presents problems which I shall discuss later. Second, proposed § 4114 provides that any offender who challenges his confinement, and ultimately wins in court, will simply be sent back to Mexico or Canada. This second idea also presents grave problems; the court determines that it is unconstitutional for the government to hold a person because he was unconstitutionally convicted, it will probably also hold that it is unconstitutional for government to send that person

elsewhere for confinement. This follows naturally from the several decisions in extradition cases where the courts have announced misgivings about sending a person off to suffer even a *potentially* unconstitutional trial. See *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901); *Gallina* v. *Frazer*, 278 F. 2d 77, 79 (2d Cir. 1960).

I assume that the subcommittee agrees by now that there is no way to insure completely that the no-review provision of H.R. 7148 will be upheld by the courts. But are there any ways to increase the odds of a favorable decision? I have some suggestions.

Let's get away from legal theory for a moment to think about the real factual situations which might arise. *First*, any right of access to the court is academic unless the offender can show that some constitutional right has been violated. Since the U.S. Constitution is not binding on the courts of other countries, court proceedings in Mexico, and Canada, or elsewhere normally—I emphasize normally—can present no question of American constitutional law. See *Neely* v. *Henkel*, *supra*; 90 Harv. L. Rev. 1500, 1503 & n.14. Of course, U.S. courts would, for similar reasons, be incompetent to enforce Mexican law on the Mexican courts.

Second, having ruled out that role for American courts, let us now think about the real problems which remain. I can think of three common situations.

(1) The offender attacks the role of United States agents in procuring his conviction, claiming that their acts violated the U.S. Constitution.

(2) The offender attacks the American and foreign joint acts of convicting and holding him as a violation of international law or minimum due process.

(3) The offender attacks his conditions of confinement or the U.S.' action in effecting his transfer.

Situation No. 3 should present no problem because review in these circumstances is implicit in proposed provision 28 U.S.C. § 2256(3). I am informed by the Justice Department that this is their view as well.

Situations Nos. 1 and 2 present the gravest problems. Consider Situation No. 1 in which U.S. drug enforcement agents have acted with foreign officials to procure an offender's conviction, perhaps by coercing a confession or entrapping the offender. In such cases American constitutional law does reach beyond our borders, not to control Mexican affairs but to control our own government employees. This is implicit in such cases as *Reid* v. *Covert*, 394 U.S. 1 (1957), and *Toth* v. *Quarles*, 350 U.S. 11 (1955). The *Reid* case stands equally for the proposition that no treaty, such as the Prisoner Exchange Treaty at issue before you, can relieve government officials of their constitutional duties.

If you stop for a moment to consider this situation, I am sure that members of this subcommittee would be horrified at the prospects of insulating any such acts from judicial review—allowing such acts to go unpunished by requiring the offender to waive his rights to seek U.S. court review. Drug Enforcement Agents unable to coerce a confession or entrap a person in the United States could entice him to Mexico or Canada, procure his conviction there, and—under the treaty—have the offender transferred to a U.S. jail! To insulate the acts from review in such a situation would not only be unwise and contravene this Sub-Committee's sense of decency, it would also present the strongest possible case, psychologically, for convincing the Supreme Court that § 2256's ban on judicial review is unconstitutional.

Accordingly, I recommend that the Sub-Committee amend § 2256 to permit American courts to review an offender's claim that U.S. agents violated American constitutional law in procuring his conviction. I think that such a provision would not be inconsistent with the treaties' language or intent. This would not be a challenge to the foreign court's "sentences" (Treaty with Mexico, Art. VI), but rather a challenge to our own government's illegalities. Similarly, the treaties' underlying goal of protecting foreign courts from embarrassing reviews by American courts would not be undermined. American judicial review would not question the foreign courts' proceedings, but only the actions of our own agents or officials.

That leaves us with one other situation, that which I labeled No. 2, involving an offender's attack on the basic fairness of the United States and Mexico (or Canada) in convicting and holding the offender. The chances of the Supreme Court recognizing a constitutional right of this nature are not great—there is no clear precedent—but fast-developing notions of International Human Rights and the Court's tendency in extradition cases to mumble veiled threats that it would refuse extradition if minimal due process rights were not available, suggest seeds for a constitutional right. Of course, American court review of such issues involves us directly in criticizing a foreign government's justice system—

a situation which the treaties' no-review provisions were specifically drafted to guard against.

I think that H.R. 7148 could be amended to insure that American courts are very unlikely to enter into such an inquiry. I recommend that your legislation be amended to include the following: a) a Congressional finding that the systems of law used in Mexico and Canada meet international minimum standards of due process, and b) a directive that the Secretary of State re-certify such finding at each interval at which a treaty becomes capable of termination (and in the case of additional treaties with other nations also make such a determination before signing the treaties).

The purpose of such a provision would be to signal the Supreme Court that as to narrow situations in this category international relations are at stake, and therefore separation of powers principles require the Supreme Court to defer to the Executive (and Legislative) Department(s). Such principles were the basis for the Supreme Court's decisions in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and *Chicago and Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948). The *Waterman* case specifically held that at least some foreign affairs decisions made by the Executive Department were incapable of judicial review.

III.

Finally, let me speak briefly to the waiver issue. Here again is a situation in which no one can speak confidently concerning whether the court will accept the waivers specified in H.R. 7148 or reject them as inherently involuntary given the offender's plight. I would think that the waivers would be accepted because the Supreme Court has never adopted such per se rule in domestic cases. If the sub-committee again seeks insurance on this issue, I recommend to you the provisions of the Senate version of this legislation, S. 1682.

S. 1682 would do two things: 1) it would require more detailed procedures to insure the voluntariness of the waiver, and 2) it would bring the entire waiver-securing process nearer to the judiciary by placing the process in the hands of federal magistrates. Both of these provisions would give the Supreme Court greater confidence in the waivers and thus make them psychologically easier to accept.

IV. Summary

To summarize, let me reiterate that I have no doubt about the constitutionality of the parole provisions in H.R. 7148. I have some concern about the waiver provisions and extremely grave reservations concerning the ban on judicial review.

In response to these concerns and reservations, I commend that you:

(1) amend H.R. 7148 to allow U.S. judicial review of offenders' claims that U.S. agents or officials have unconstitutionally procured their convictions;

(2) amend H.R. 7148 to place in the authority of the Secretary of State the power to determine whether treaty nations protect human rights, thus emphasizing that claims based on minimum due process or international law involve foreign relations problems beyond the Supreme Court's competence; and

(3) amend H.R. 7148 by substituting the waiver rules out in S. 1682 for those currently found in the House version.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]

APPENDIXES

APPENDIX 1

95TH CONGRESS
1st Session

SENATE

EXECUTIVE
D

TREATY WITH MEXICO ON THE EXECUTION OF PENAL SENTENCES

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A 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

FEBRUARY 21, 1977.—Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1977

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *February 15, 1977.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith 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.

I transmit also, for the information of the Senate, the report by the Department of State with respect to the Treaty.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two governments would be required.

This Treaty is significant because it represents an attempt to resolve a situation which has inflicted substantial hardships on a number of citizens of each country and has caused considerable concern to both governments. It received the approval of the Senate of the United Mexican States on December 30, 1976. I recommend that the Senate give favorable consideration to this Treaty at an early date.

JIMMY CARTER.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, January 17, 1977.

THE PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit a 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. I recommend that the Treaty be submitted to the Senate for its advice and consent to ratification.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two governments would be required.

The Treaty was first suggested by the Foreign Minister of Mexico at a meeting in June of this year and was then negotiated in a series of three meetings from September to November. It was approved by the Senate of the United Mexican States on December 30, 1976. It is contemplated that a similar Treaty will be negotiated with Canada in the near future.

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. The Treaty is without a direct analogy in United States practice, except for the Status of Forces Agreement with South Korea (17 UST 1677; TIAS 6127), but there are multilateral arrangements of this kind among the Nordic countries and in the Council of 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

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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 parden 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).

The Treaty will require implementing legislation to give it effect within the United States. Such legislation will be prepared in time for transmission to Congress for its consideration in conjunction with the Treaty.

Respectfully submitted.

HENRY A. KISSINGER.

Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences

The United States of America and the United Mexican States, desiring to render mutual assistance in combating crime insofar as the effects of such crime extend beyond their borders and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation, have resolved to conclude a Treaty on the execution of penal sentences and, to that end, have named their plenipotentiaries Joseph John Jova, Ambassador Extraordinary and Plenipotentiary by the President of the United States of America and Alfonso Garcia Robles, Secretary of Foreign Relations by the President of the United Mexican States,

Who, having exchanged their full powers and having found them in proper and due form, have agreed on the following Articles:

ARTICLE I

(1) Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty.

(2) Sentences imposed in the United States of America on nationals of the United Mexican States may be served in penal institutions or subject to the supervision of the authorities of the United Mexican States in accordance with the provisions of this Treaty.

ARTICLE II

This Treaty shall apply only subject to the following conditions:

(1) That the offense for which the offender was convicted and sentenced is one which would also be generally punishable as a crime in the Receiving State, provided, however, that this condition shall not be interpreted so as to require that the crimes described in the laws of the two States be identical in such matters not affecting the character of the crimes such as the quantity of property or money taken or possessed or the presence of interstate commerce.

(2) That the offender must be a national of the Receiving State.

(3) That the offender not be a domiciliary of the Transferring State.

(4) That the offense not be a political offense within the meaning of the Treaty of Extradition of 1899 between the parties, nor an offense under the immigration or the purely military laws of a party.

(5) That at least six months of the offender's sentence remains to be served at the time of petition; and

(6) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

ARTICLE III

Each State shall designate an authority to perform the functions provided in this Treaty.

ARTICLE IV

(1) Every transfer under the Treaty shall be commenced by the Authority of the Transferring State. Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.

(2) If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the Authority of the Receiving State.

(3) If the Authority of the Receiving State approves the request, it shall promptly so inform the Transferring State and shall initiate the necessary procedures to effect the transfer of the offender. If it does not approve the request, it shall so notify promptly the Authority of the Transferring State.

(4) In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State.

(5) If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required. The Federal Authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(6) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(7) The Transferring State shall furnish the Receiving State a statement showing the offense of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behavior or pretrial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Transferring State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall

also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the convict with a view to his social rehabilitation.

(8) If the Receiving State considers that the documents supplied by the Transferring State do not enable it to implement this Treaty, it may request additional information.

(9) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for the purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other Party.

ARTICLE V

(1) Delivery of the offender by the authorities of the Transferring State to those of the Receiving State shall occur at a place agreed upon by both parties. The Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(2) 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. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty release the offender.

(3) 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.

(4) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(5) The Authorities of each party shall, every six months, exchange reports indicating the status of confinement of all offenders transferred under this Treaty, including in particular the parole or release of any offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

(6) 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.

ARTICLE VI

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. The Receiving State shall, upon being advised by the Transferring State of action affect-

ing the sentence, take the appropriate action in accordance with such advice.

ARTICLE VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal or state.

ARTICLE VIII

(1) 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 Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) By special agreement between the Parties, persons accused of an offense but determined to be of unsound mental condition may be transferred for care in institutions in the country of nationality.

(3) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

ARTICLE IX

For the purposes of this Treaty—

(1) "Transferring State" means the party from which the offender is to be transferred.

(2) "Receiving State" means the party to which the offender is to be transferred; and

(3) "Offender" means a person who, in the territory of one of the parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, suspended sentence, or any other form of supervision or conditional sentence without confinement.

(4) A "domicilary" means 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 therein.

ARTICLE X

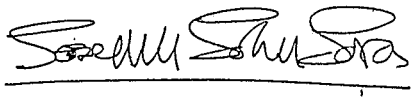
(1) This Treaty is subject to ratification. The exchange of ratifications shall take place in Washington.

(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.

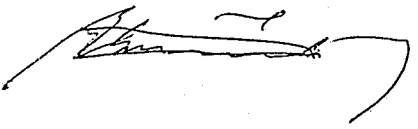
(3) Should neither contracting party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to let the Treaty terminate, the Treaty shall remain in force for another three years, and so on every three years.

DONE at Mexico City in duplicate, this twenty-fifth day of November, one thousand nine hundred seventy six, in the English and Spanish languages, each text of which shall be equally authentic.

FOR THE UNITED STATES OF AMERICA:



FOR THE UNITED MEXICAN STATES:



95TH CONGRESS
1st Session

SENATE

EXECUTIVE
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TREATY WITH CANADA ON THE EXECUTION OF PENAL SENTENCES

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA ON THE EXECUTION OF PENAL SENTENCES WHICH WAS SIGNED AT WASHINGTON ON MARCH 2, 1977

APRIL 18, 1977.—Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1977

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *April 18, 1977.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and Canada on the Execution of Penal Sentences which was signed at Washington on March 2, 1977.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the Treaty.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two Governments would be required.

This Treaty is significant because it represents an attempt to resolve a situation which has inflicted substantial hardships on a number of citizens of each country and has caused concern to both Governments. I recommend that the Senate give favorable consideration to this Treaty together with the similar treaty with the United Mexican States which I have already transmitted.

JIMMY CARTER.

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LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, D.C., April 8, 1977.

THE PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit a Treaty between the United States of America and Canada on the Execution of Penal Sentences which was signed at Washington on March 2, 1977. I recommend that the Treaty be submitted to the Senate for its advice and consent to ratification.

The Treaty is essentially similar to that with the United Mexican States which was signed on November 25, 1976 and has already been submitted by you to the Senate. It would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two Governments would be required.

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 substantial number 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. The Treaty is without a direct analogy in United States practice, except for the Status of Forces Agreement with the Republic of Korea (17 UST 1677; TIAS 6127), but there are multilateral arrangements of this kind among the Nordic countries and in the Council of 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 III). 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) military offenders; (2) those having less than six months to serve when processing of their transfer begins; and (3) 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 or province 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 pretrial 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 IV(1)). 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(3) 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 V).

The Treaty will require implementing legislation to give it effect within the United States. Such legislation will be submitted to Congress in the near future.

Respectfully submitted.

CYRUS VANCE.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA ON THE EXECUTION OF PENAL SENTENCES

The Government of the United States of America and the Government of Canada,

Desiring to enable Offenders, with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society;

Have agreed as follows:

ARTICLE I

For the purposes of this Treaty:

(a) "Sending State" means the Party from which the Offender is to be transferred;

(b) "Receiving State" means the Party to which the Offender is to be transferred;

(c) "Offender" means a person who, in the territory of either Party, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, conditional release or other form of supervision without confinement. The term shall include persons subject to confinement, custody, or supervision under the laws of the Sending State respecting juvenile offenders; and

(d) "Citizen" includes an Offender who may be a dual national of the Parties and in the case of the United States also includes nationals.

ARTICLE II

The application of this Treaty shall be subject to the following conditions:

(a) That the offense for which the Offender was convicted and sentenced is one which would also be punishable as a crime in the Receiving State. This condition shall not be interpreted so as to require that the crimes described in the laws of the two Parties be identical in such matters not affecting the character of the crimes as the quantity of property or money taken or possessed or the presence of interstate commerce.

(b) That the Offender is a citizen of the Receiving State.

(c) That the offense is not an offense under the immigration laws or solely against the military laws of a Party.

(d) That there is at least six months of the Offender's sentence remaining to be served at the time of his application.

(e) That no proceeding by way of appeal or of collateral attack upon the Offender's conviction or sentence be pending in the Sending State and that the prescribed time for appeal of the Offender's conviction or sentence has expired.

ARTICLE III

1. Each Party shall designate an authority to perform the functions provided in this Treaty.

2. Each Party shall inform an Offender, who is within the scope of the present Treaty, of the substance of the Treaty.

3. Every transfer under this Treaty shall be commenced by a written application submitted by the Offender to the authority of the Sending State. If the authority of the Sending State approves, it will transmit the application, together with its approval, through diplomatic channels to the authority of the Receiving State.

4. If the authority of the Receiving State concurs, it will so inform the Sending State and initiate procedures to effectuate the transfer of the Offender at its own expense. If it does not concur, it will promptly advise the authority of the Sending State.

5. If the Offender was sentenced by the courts pursuant to the laws of a state or province of one of the Parties, the approval of the authorities of that state or province, as well as that of the federal authority, shall be required. The federal authority of the Receiving State shall be responsible for the custody of the transferred Offender.

6. In deciding upon the transfer of an Offender, the authority of each Party shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender.

7. No Offender shall be transferred unless:

(a) he is under a sentence of imprisonment for life; or

(b) the sentence which he is serving states a definite termination date, or the authorities authorized to fix such a date have so acted; or

(c) he is subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; or

(d) he is subject to indefinite confinement as a dangerous or habitual offender.

8. The Sending State shall furnish to the Receiving State a statement showing the offense of which the Offender was convicted, the termination date of the sentence, the length of time already served by the prisoner and any credits to which the Offender is entitled on account of work done, good behavior or pretrial confinement. Where requested by the Receiving State a translation shall be provided.

9. Each Party shall establish by legislation or regulation the procedures necessary and appropriate to give legal effect within its territory to sentences pronounced by courts of the other Party and each Party agrees to cooperate in the procedures established by the other Party.

10. Delivery of the Offender by the authorities of the Sending State to those of the Receiving State shall occur at a place agreed upon by both Parties. The Sending State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the Offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

ARTICLE IV

1. 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. The Sending State shall, in addition, retain a power to pardon the Offender and the Receiving State shall, upon being advised of such pardon, release the Offender.

2. The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State.

3. 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 Sending State.

4. The Receiving State shall not be entitled to any reimbursement from the Sending State for the expenses incurred by it in the completion of the Offender's sentence.

5. The authorities of each Party shall at the request of the other Party provide reports indicating the status of all Offenders transferred under this Treaty, including in particular the parole or release of any Offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

6. 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.

ARTICLE V

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 cases of Offenders who have been transferred by it. Upon being informed by the Sending State that the conviction or sentence has been set aside or otherwise modified, the Receiving State shall take appropriate action in accordance with such information. The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State.

ARTICLE VI

An Offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by a court, Federal, State, or provincial, of the Receiving State.

ARTICLE VII

If either Party enters into an agreement for the transfer of sanctions with any other State, the other Party shall cooperate in facilitating the transit through its territory of Offenders being transferred pursuant to such agreement. The Party intending to make such a transfer will give advance notice to the other Party of such transfer.

ARTICLE VIII

1. This Treaty shall be subject to ratification and shall enter into force on the date on which instruments of ratification are exchanged. The exchange of instruments of ratification shall take place at Ottawa as soon as possible.

2. The present Treaty shall remain in force for three years from the date upon which it enters into force. Thereafter, the Treaty shall continue in force until thirty days from the date upon which either Party gives written notice to the other Party of its intention to terminate the Treaty.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed the present Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Washington this second day of March, 1977.

For the Government of the United States of America:

GRIFFIN B. BELL.

For the Government of Canada:

FRANCIS FOX.

○

STATEMENT OF HERBERT WECHSLER

My name is Herbert Wechsler. I was born in 1909 in New York City and educated at the College of the City of New York (A.B. 1928) and Columbia University School of Law (LL.B. 1931). I have been since 1933 a member of the New York bar and of the Columbia Law Faculty, holding the Harlan Fiske Stone chair of Constitutional Law since 1957. Both as a teacher and as a practitioner, I have specialized in federal jurisdiction, constitutional law and criminal law and I have written extensively in these three fields. During these many years I have devoted a substantial portion of my time to public work, including service as a special assistant to the Attorney General of the United States (1940–1944), Assistant Attorney General (1944–1946) and member of state and federal commissions. Since 1962, I have also been the executive director of the American Law Institute.

I submit this statement in response to the Chairman's letter of September 23, 1977, reporting that some members of the Subcommittee have expressed concern about the constitutionality of the treaties on exchange of prisoners and the pending implementing legislation and asking for a statement of my views.

Neither on principle nor on authority is there, in my opinion, any solid basis for doubting the constitutional validity of the treaties or of the implementing bill that passed the Senate.

My reasons, briefly stated, are as follows:

First: The purpose and effect of the two treaties and their implementing legislation are not to impose afflictive sanctions on the offenders who may be transferred with their consent from a foreign country to their home country for service of their sentences but rather to alleviate the special hardship incident to confinement or restraint away from home. The assurance of such reciprocal benefits for citizens or nationals of the contracting countries is plainly an appropriate object of the treaty power; the matter is one of "international concern" (A.L.I., Restatement of the Foreign Relations Law of the United States, section 117). And since it is a benefit, conferred with the consent of the individual involved, it is implausible upon its face to perceive a potential violation of the Bill of Rights in such an exercise of the treaty power. This common-sense view of the matter may not exhaust the legal inquiry. It does, however, seem to me the proper starting point for an appraisal of the constitutional position.

Second: The treaties envisage the use of national power and authority to imprison or restrain as criminals American citizens or nationals who have been convicted abroad of crimes committed abroad within the jurisdiction of a foreign country. Is there a constitutional impediment to such an exercise of governmental power?

It has been suggested that the due process clause of the Fifth Amendment prohibits such imprisonment if the foreign conviction was obtained by procedures lacking those safeguards of the Bill of Rights that the Fourteenth Amendment has been held to impose on state procedures. This seems to me a wholly insupportable conclusion. The Fourteenth Amendment was designed to impose limits on the states, including by interpretation limits on their criminal procedures derived by incorporation from the Bill of Rights. The Fifth Amendment was no more designed than was the Fourteenth to limit Mexican or Canadian procedures.

The due process guarantee of the Fifth Amendment must be and is interpreted to international affairs with due deference to the autonomy and jurisdiction of the members of the international community, witness the extradition cases, the act of state doctrine (unless altered by Act of Congress, the decision sustaining the power of the President as Commander-in-chief to establish U.S. Courts of the Allied High Commission for Germany (*Madsen* v. *Kinsella* (343 U.S. 341 [1952])), the surrender of service personnel for foreign trial (*Wilson* v. *Girard* (354 U.S. 524 [1957])), the subjection of enemies to the laws of war (*Ex parte Quirin*, 317 U.S. 1 [1942]), the internment and deportation of alien enemies in time of war without due process hearings (*Lucdecké* v. *Watkins* (335 U.S. 160 [1948])) and the subjection of enemy property to seizure without compensation (*Stochr* v. *Wallace* (255 U.S. 239 [1921])). The point is epitomized for me by a famous statement by Chief Justice Hughes: "Behind the words of the constitutional provisions are postulates which limit and control" (*Principality of Monaco* v. *Mississippi* (292 U.S. 313, 322 [1934])). The relevant postulate here is that Mexico and Canada had jurisdiction to apply their law to convict and sentence the offenders to whom the treaties would apply and to govern those proceedings by their own procedural conceptions.

Viewed in this way, it seems quite clear that nothing said by Mr. Justice Black in the plurality opinion in *Reid* v. *Covert* (354 U.S. 1 (1957)), as to the application of the Bill of Rights to trial abroad in American courts or the subjection of the treaty power to the limitations of the Bill of Rights has any application to this problem. The treaty takes away no right that these offenders otherwise would have. Absent the transfer, their convictions and their sentences remain in force and they must serve the sentence in a foreign land.

The question that is posed reduces simply, in my view, to this: is it a reasonable exercise of governmental power to imprison or restrain at their election individuals who otherwise would be imprisoned or restrained abroad, and to do so subject to the mitigations that the treaties articulate by making applicable our release procedures and subject also to the safeguards with respect to an informed consent that the legislation would provide. I see no room for argument upon that issue.

Third: If I am right in the analysis I have suggested, no additional complexity is introduced by the provision limiting collateral attack on the conviction or the sentence to the courts of the transferring state. This is not a suspension of the privilege of the writ of habeas corpus. The writ remains available; it simply is a good return that the offender is imprisoned in accordance with the treaty and its implementing legislation. If the treaty and the statute are valid, as I believe they are, the detention does not violate the Constitution, laws or treaties of the United States. The applictaion for the writ must, therefore, be denied (28 U.S.C. 2241(c)(3)).

We may, perhaps, regret that a judicial review of the conviction for denial of justice in the international sense (A.L.I. Restatement of Foreign Relations Law of the United States sections 178–182) is not permitted by the treaties. It is, however, wholly understandable that this may not have been attainable in the negotiations with Canada and Mexico or that we ourselves, indeed, would not be willing to subject our judgments to such an assessment by a Mexican or a Canadian tribunal. Our tradition in this area has been to rely on diplomatic intervention to protect our nationals against such injustice abroad, constituting as it does a violation of international law, and Congress has directed the President to "use such means, not amounting to acts of war, as he may think necessary and proper to effectuate the release" of any citizen wrongfully detained by or under the authority of any foreign government (R.S. § 2001, 22 U.S.C. § 1732). That system may, indeed, have more potential for success than a judicial inquiry calling on our courts to sit in judgment on the courts of other nations. In the case of Canada and Mexico it may, perhaps, be validly assumed that the presidential duty has been effectively discharged. If it has not, the examination of the case that would occur in connection with a proposed transfer may afford an opportunity for intervention of this kind that otherwise would not have been presented. Here too the treaties may produce a humane amelioriation. The transfer certainly will not exacerbate the hardship that in such a case obtains.

For the foregoing reasons, I respectfully submit that constitutional considerations should not lead the House of Representatives to hesitate to pass the implementing statute, on which the effectiveness of the two treaties is, of course, dependent.

I should add, though the matter goes beyond any special competence that I can claim, that the bill, as it passed the Senate, seems to me to go as far as feasible to assure that a prisoner's consent to transfer is truly voluntary, and, by providing eligibility for release on parole, to protect against injustice in the foreign sentence. The amendments in the Senate on these points have, in my view, improved the bill.

GEORGE WASHINGTON UNIVERSITY,
Washington, D.C., September 30, 1977.

Representative JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, Washington, D.C.

DEAR MR. EILBERG: This replies to your letter dated September 27th. As I told Mr. D'Uva on the telephone, I will be testifying on October 6th at 9:30 A.M. before another Subcommittee of the House of Representatives. Therefore, I will be unable to testify before your Subcommittee.

I have examined the materials which you sent to me with your letter. It seems to me that the critical question is this: Can a prisoner in Mexico or Canada waive his right to collaterally attack his conviction after he has been transferred to this country for serving out his sentence?

There is no question that a person may waive his constitutional rights. Accordingly, I see no problem with H.R. 7148, provided that the person who executes the waiver and is subsequently transferred to this country for serving his sentence does so knowingly and willingly.

The question of transfer of prisoners from one country to another is, as Secretary of State Kissinger said in his letter to the President dated January 17, 1977, "without a direct analogy in the United States practice, except for the Status of Forces Agreement with South Korea." The use of United States Magistrates to verify the validity of the consent would seem to me to be as far as is necessary to go. In my judgment, this is not constitutionally required, but it seems to be a desirable policy determination.

With respect to Section 4109 of H.R. 7148, I believe that for the United States Government to provide counsel to the criminals who are now in jail in Mexico and Canada goes beyond the requirements of the Constitution and beyond the necessities of good public policy. I see no reason whatsoever for this nation to provide convicted criminals with lawyers; the use of the United States Magistrate is certainly enough to insure that the consent is voluntarily given.

I know of nothing in the Constitution which would make the treaty itself or the bills passed by the Senate and H.R. 7148 invalid. As I understand it, this is the conclusion reached by the Senate's Committee on the Judiciary. I must make one caveat, however, to the statement on pages 12 and 13 of the Senate Report: There is no reason that Congress and the Executive cannot make constitutional determinations; for the Congress to say that matters should be "fully litigated" is to pass the public-policy buck to the courts. I think that Congress is unduly concerned with a group of people in Mexican and Canadian jails who, so the documents you sent me indicate, are criminals and have been validly convicted. I see no reason why we should be unduly concerned with somebody in a Mexican or Canadian jail. If that person does not want to come back to this country to serve out his sentence, he need not do so. As an original proposition, if he does not want to be in jail he should not go to a foreign country and violate its criminal laws. The treaty has been validly negotiated and approved by the Senate, however, and implementing legislation is necessary; there is nothing invalid in the implementing legislation as I read it. But I repeat that I find it verging on the incredible that the American taxpayer is to be asked to pick up the bill for lawyers to represent these criminals. I think that you should inquire into the question of whether the American taxpayer is asked to pay the costs of litigation for prisoners in American jails who wish to collaterally attack their convictions. If the answer to that is "no", then I perceive no reason for treating these people differently.

I have read the note in the *Harvard Law Review* and find nothing inconsistent with what I have said in this letter, save for the recommendation that attorneys be made available to criminals in Mexican or Canadian jails. To me that recommendation is a resounding *non sequitur*. I don't think the United States should be a welfare state for lawyers.

Sincerely,

ARTHUR S. MILLER.
Professor of Law.

AUSTIN, TEX., *July 19, 1977.*

CHAIRMAN, JUDICIARY COMMITTEE,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Rights In Mexico, an organization dedicated to the promotion of internationally protected fundamental human rights in Mexico, submits three points for consideration in the hearings on the Treaty on the Execution of Penal Sentences between Mexico and the United States. First, a consistent pattern of gross violations of fundamental human rights has been documented in Mexican penitentiaries. Second, the United States government is directly involved in the arrests of a substantial number of Americans in Mexico. Third, a prisoner must voluntarily give "express consent" before being transferred under the Treaty.

DOCUMENTED HUMAN RIGHTS VIOLATIONS

In the Congressional hearings on "U.S. Citizens Imprisoned In Mexico," U.S. State Department representatives testified that "Since January 1, 1976, incidents of physical abuse in 18 percent of new arrest cases have been substantiated," and that "there have been sixty-one [recent] cases in Mexico of confirmed or what

we feel are substantiated physical abuse." These State Department representatives also testified that one type of abuse inflicted has been electrical shocks from "cattle prods." The United States has filed at least 23 formal diplomatic protests about prisoner mistreatment with the Mexican authorities.

A commission of the Organization of American States is presently considering human rights violations in Mexico. The Inter-American Commission on Human Rights is contemplating action in case number 2133, the "Communication Concerning Violations of Fundamental Human Rights In Mexico." The case consists of approximately 500 pages of documentation of over 186 specific human rights violations of prisoners in Mexico.

Included within the allegations of the Communication before the OAS Commission are affidavits of 33 Americans incarcerated in Mexico. These statements were hand-written by these prisoners and they allege that ten were physically beaten, nineteen were physically abused when forced to perform excruciating work details, ten were electrically shocked with cattle prods, and nine were denied access to medical attention. One female prisoner made the following declaration: "I was shocked with a cattle prod, starting at my feet, going up my legs, arms, and chest area." Twenty-eight of the prisoners were coerced into signing confessions without translation, eighteen declared that their personal security was endangered, and twenty-five were extorted during imprisonment.

U.S. INVOLVEMENT

One statement made by Mr. John T. Cusak, Chief of the International Operations Division of the Drug Enforcement Agency, indicates direct involvement of the United States government in the arrest of many Americans in Mexico. In the Congressional hearings on "U.S. Citizens Imprisoned In Mexico," on April 30, 1975, Mr. Cusak testified as follows: "Should the Drug Enforcement Agency receive information which will enable the Mexican authorities to locate and intercept an American or anyone in the process of smuggling narcotics from Mexico to the United States, DEA has an obligation to provide that information to the Mexican Federal Judicial Police."

CONSENSUAL BASIS OF TREATY

The Treaty requires a prisoner to voluntarily give "express consent" before being transferred. The consensual basis of the Treaty should meet any constitutional objections.

The Chairman of Rights In Mexico has met over 100 U.S. citizens imprisoned in Mexico, and asked them their opinion of the proposed prisoner transfer treaty. These Americans overwhelmingly expressed their preferences to serve their sentences in the United States, where they are convinced they will receive more humane treatment.

Mexico's consistent violations of fundamental human rights have been widely documented, and the United States has admitted its involvement in the arrest of many Americans in Mexico. The prisoner transfer treaty provides a hunmanitarian arrangement where both Mexico and the United States might offer each prisoner the opportunity to complete prison sentences closer to the prisoner's family and home.

Respectively submitted.

PAUL D. PARSONS,
Chairman, Rights In Mexico.

DEPARTMENT OF JUSTICE,
STATE OF CALIFORNIA, OFFICE OF THE ATTORNEY GENERAL,
Sacramento, Calif., July 29, 1977.

Re Offender Transfer Treaty and Implementing Legislation (H.R. 7148).

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: The Treaty for the Transfer of Offenders between the United States and the Republic of Mexico is now pending before the Senate. Implementing legislation (H.R. 7148) is now pending before the House of Representatives. The Offender Transfer Treaty was one of the subjects considered by the Southwestern States Conference on Crime and the Border held in San Diego in April. The conference was attended by federal,

state and local law enforcement officials throughout the southwest, including the Attorney General of the United States and the Attorneys General of Texas, New Mexico, Arizona and California. A panel report on the treaty adopted by the conference is attached. I fully endorse that report and the following statement regarding the treaty and implementing legislation:

"We applaud the objectives of the Treaty between the United States and Mexico on the Execution of Penal Sentences and appreciate the diplomatic and humanitarian concerns which underlie its negotiation. As chief legal officers of our respective states we recognize the Constitutional issue which Article VII of the Treaty presents when considered in the light of the due process and habeas corpus clauses of the United States Constitution. This issue can only be resolved by the United States Supreme Court. We have carefully reviewed the language of the Treaty and of the March 14, 1977, draft of the federal implementing status. We are satisfied that the language of each safeguards the interest of our states and see no reason why each should not receive approval by the Congress of the United States."

It should be emphasized that our satisfaction with the Treaty and legislation is predicated upon resolution of our concerns that the legal and financial burdens of the Treaty be borne by the federal government rather than the state governments. This resolution takes the form of language in H.R. 7148 that the laws of the United States shall be applicable to transferred offenders, thus placing them under federal jurisdiction. And language requiring the United States Attorney General to defend against proceedings initiated by offenders in connection with a transfer or execution of a foreign sentence. Our support is therefore conditioned upon enactment of H.R. 7148 as presently drafted.

Sincerely,

EVELLE J. YOUNGER,
Attorney General.

Enclosure.

COMPARISON OF H.R. 7148—AS INTRODUCED, AND S. 1682—AS PASSED BY THE SENATE—PRISONER EXCHANGE LEGISLATION

§ 4100—Scope and limitation

(a) No change.

(b) S. 1682 specifies, as a precondition to the transfer of an offender under the act, a requirement that the offense for which the offender was sentenced in the transferring state must also constitute an offense against the receiving state. Thus, a requirement of "double criminality" as defined in the act is specifically described. This provision was added so as to conform with terms of the Treaties.

S. 1682 also details the nature of the offender's consent to be transferred. Once such consent has been given and verified by the verifying officer, it becomes irrevocable.

This was added in the hope that legal problems which might arise were the consent to be considered revocable might be avoided. Analogy is made to consents to search or to be questioned.

S. 1682 also adds that where transferee is under 18 years of age, consent can be given "by an appropriate court of the sentencing country" as well as by parent or guardian as provided in draft bill.

This provision was added to avoid the problem where, despite the willingness of a minor offender to be transferred, the parents or guardians withhold consent. In such a situation the court is authorized to make a determination on the issue.

(c) S. 1682 deletes the provision that the prescribed time for appeal of the offender's conviction in the sentencing state must have expired at the time of transfer. This deletion was made in anticipation of future treaties which might remove such a requirement where the transferee waives his or her right of appeal, and in no way affects the Mexican or Canadian Treaties as signed in this regard.

(d) No change.

(e) S. 1682 deletes this subsection entirely as the United States has adopted as a policy that it will accept all U.S. nationals seeking to finish their sentences in the U.S.

§ 4101—Definitions

(a) A new definition of "double criminality" is added by S. 1682 to conform to changes in Section 4100(b).

(b) *Imprisonment.*—No change [formerly subsection (a)]
(c) *Juvenile.*—Technical change [formerly subsection (b)]
(d) *Juvenile delinquency.*—No change [formerly subsection (c)]
(e) *Offender.*—S. 1682 deletes from definition of offender, those determined to be mentally ill. All matters relating to those mentally ill would be dealt with pursuant to § 4102(10) prescribing specific procedures to be utilized, and that such persons should not be classified as "offenders." [formerly subsection (d)]
(f) *Parole.*—No change [formerly subsection (e)]
(g) *Probation.*—No change [formerly subsection (b)]
(h) *Sentence.*—S. 1682 adds, in the definition of sentence, "judgments of acquittal" in criminal proceedings and "dismissals of allegations" in juvenile delinquency proceedings. [formerly subsection (g)]
(i) *State.*—No change [formerly subsection (h)]
(j) *Transfer.*—S. 1682 deletes references to mentally ill individuals to conform with other changes [formerly subsection (i)]
(k) *Treaty.*—No change [formerly subsection (j)]

§ *4102—Authority of Attorney General*

S. 1682 deletes the provision in this section as to procedures as to verification of consent in light of other changes made to provide that the courts and not the Attorney General designate persons to verify consent. This change is intended to avoid even the appearance of a conflict of interest.

S. 1682 adds language, "in accordance with this chapter" and also "to make regulations to implement this chapter" to the regulatory authority of the Attorney General. These additions emphasize the broad regulation authority vested in the Attorney General (within guidelines set forth in the statute).

S. 1682 deletes from the authority to provide for transportation, the limitation: "when a treaty is in force between the U.S. and the foreign country provides for such transit". Since the Mexican-American Treaty does not contain a provision regarding transfer of prisoners to third party countries through U.S. territory pursuant to treaties or agreements between Mexico and such third party countries, the inclusion of this clause could have prevented arrangements for such transfers through the U.S. to be made between the U.S. and Mexico. The expected Mexico-Canada offender transfer treaty gives this change special significance, since some or all of the transfers under such a treaty would be effected through U.S. territory. The amendment also provides for payment of expenses of such transfers by the requesting country.

S. 1682 adds provision allocating the expenses for transport of juveniles pursuant to a treaty, to the country of which the juvenile is a citizen or national.

S. 1682 deletes the provision authorizing promulgation of regulations for the return of an accused who has been determined mentally ill, to the transferring country upon his return to mental health. Neither the Mexican nor Canadian Treaty contains this provision.

§ *4103—Applicability of United States laws*

No change.

§ *4104—Transfer of offenders on probation*

(a) S. 1682 deletes words "a convicted" in line 2, and inserts word "an".
(b) No change.
(c) No change.
(d) No change.
(e) No change.
(f) No change.
(g) S. 1682 deletes this section in its entirety. This section provided that a decision of the district court 1) regarding assent to undertake supervision and 2) regarding assent to transfer . . . of an offender on probation would not be judicially reviewable.

§ *4105—Transfer of offenders serving sentence of imprisonment*

(a) No change.
(b) S. 1682 deleted this subsection which provided that where Attorney General finds, on the basis of certified documents forwarded him by Transferring State Authorities, that offender had been already credited with time spent in custody by foreign court, he shall not again allow credit for such time on the offender's remaining sentence.
(c) No change.

§ *4106—Transfer of offenders on parole; parole of offenders transferred*

(a) No change.

(b) S. 1682 deletes line 8 of this subsection in reference to 18 U.S.C. 4205(a); also, in line 9, "4206 through 4215" was changed to "4206 through 4216". 4205(a) was deleted to conform with, and for reasons expressed with respect to amendment of 4106(c). 4216, which was added, provides for, in the case of certain youthful offenders, application of Federal Youth Corrections Act (18 U.S.C. chap. 402), for purposes of sentencing.

(c) S. 1682 changes eligibility for parole criteria of an offender transferred to serve a sentence of imprisonment, providing that such prisoner shall be released, "at such time as the Parole Commission may determine", rather than referring to 4205(a), 4205(h) as does H.R. 7148. The result of this change is to confer immediate parole eligibility for these transferred prisoners.

The change was based partly on the fact as represented by the Department of Justice that the majority of these prisoners are serving time for narcotics offenses. In light of 18 U.S.C. 4205(b)(2), under which two-thirds of individuals convicted of federal narcotics offenses, receiving sentences of over one year, are sentenced in the U.S., and which provides for release on parole "at such time as the Parole Commission determines", it is maintained by the Justice Department that this change provides for a greater degree of equality of treatment for the exchanged prisoners and that the change also has a balancing or neutralizing effect on the sometimes disparate sentences imposed for similar crimes by the treaty countries.

(d) In light of the amended subsection (c), S. 1682 deletes this subsection as being superfluous.

§ *4107—Verification of consent of offenders to transfer to the United States*

(a) S. 1682 deletes, in line 4 "Federal Magistrate as defined in rule 54(c) of the Federal Rules of Criminal Procedure" and inserts "United States Magistrate or a judge defined in section 451 of Title 28, U.S. Code." These changes were made in order to remove ambiguity in the definition of "Federal Magistrate" in rule 54(c) of Federal Rules of Criminal Procedure.

(b) S. 1682 changes wording of first sentence of this subsection to emphasize and make clear that inquiries are to be made at the verification proceeding of the offender to asecertain that he or she understands and agrees to the condition under which he or she is to be transferred.

S. 1682 modifies subsection (1) deleting references to offender's waiver of rights regarding institution of proceedings in receiving country. Bases for deletion are (1) no such rights ever existed; (2) the provision would be superfluous in light of initial provision of the subsection.

Subsection 2—No change.

Subsection 3—S. 1682 adds provision that an individual can be returned to the U.S. under the conditions outlined in the subsection only *if* the U.S. requests his return.

Subsection 4—S. 1682 adds this subsection to section 4107(b) and provides that a consent to transfer, having been verified by the verifying officer, is irrevocable.

(c) S. 1682 adds this section to insure, in keeping with constitutional requirement, that offender's consent and waiver are intelligently as well as voluntarily made; the offender under this subsection must be informed of his right to consult counsel and to have counsel appointed should he or she be unable to retain counsel.

(d) S. 1682 adds this section in order to explicitly outline procedure for insuring voluntariness of the consent, including inquiries regarding any promises, threats and/or improper inducement. Also, the Attorney General is given the express authority to prescribe the form of the consent and acceptance.

(e) S. 1682 adds this section to explicitly require that the proceedings be recorded and that the Attorney General maintain custody of the records of such proceedings.

§ *4108—Verification of Consent of Offender to Transfer to the United States*

(a) S. 1682 changed this section to specifically provide that verification proceedings under this section are to take place in the sentencing country. Also, authority to designate citizen to hold consent verification proceedings under this section is given to the court, rather than the Attorney General, as is provided in H.R. 7148.

(b) S. 1682 changes wording of this section as in 4107(b) for reasons expressed therein.

Subsection (1)—Analogous to 4107(b)(1) changes.
Subsection (2)—No change.
Subsection (3)—Analogous to addition of 4107(b)(3).
Subsection (4)—Analogous to addition of 4107(b)(4).
(c) Addition of this section by S. 1682 is analogous to addition of 4107(c).
(d) Addition of this section by S. 1682 is analogous to addition of 4107(d).
(e) Addition of this section by S. 1682 is analogous to addition of 4107(e).

§ 4109—Right to Counsel, Appointment of counsel

(1) No change [formerly (a)].
(2) [Formerly (b)].

S. 1682 provides that counsel for proceedings under 4108 shall be appointed by the verifying officer, rather than the Secretary of State, pursuant regulations of the Director of Administrative Office of the U.S.; S. 1682 also provides verifying officers must approve amounts paid to such counsel by Secretary of State and further, it outlines procedure to be followed where payment to counsel in excess of the maximum amounts prescribed herein is required, i.e. certification by verifying officer and approval by chief judge of appropriate Circuit Court of Appeals; S. 1682 further provides that governmental agency attorneys may be utilized in 4108 proceedings and authorizes advance payments by Secretary of State of travel expenses to counsel.

§ 4110—Transfer of Juveniles

No change.

§ 4111—Prosecution Barred by Foreign Conviction

S. 1682, in line four (4), deletes "conviction" and inserts "sentence". This change is made in order to protect transferee from prosecution on charges of which he has been acquitted in the transferring state as well as those for which he received a conviction. See definition of "sentence" 4101(g).

S. 1682 also added provision that if the jurisdiction seeking to prosecute the offender would be barred from prosecuting him if the sentence which is the basis for the transfer had been imposed by a Federal court or a court of another state, then the offender may not be prosecuted.

§ 4112—Loss of Rights, Disqualification

No change.

§ 4113—Status of Alien Offender Transferred to a Foreign Country

No change.

§ 4114—Return of Transferred Offenders

S. 1682 altered the arrangement of this section and makes other changes as follows:

(a) In subsection (a), S. 1682 adds requirement that the Attorney General notify the appropriate authority of the sentencing country within 10 days of a final decision of a court of the U.S. ordering an offender released under this section; and, included in the notification there must be a specification of time within which the sentencing country must request the return of the offender, period not to exceed 30 days.

(b) S. 1682 sets out procedure which may be followed by the Attorney General upon receiving a request from the transferring country for the return of a prisoner who has been released as described in subsection (a). This section specifies that a complaint and supporting affidavits must be filed, and sets forth requirements as to the contents of some.

This subsection also specifies that a warrant be issued by a justice, judge, or magistrate requiring the offender to appear before the issuing authority and outlines procedures to be followed by the judge, justice or magistrate upon identification of the offender, i.e. issuance of a warrant for commitment of the offender to the custody of the Attorney General. This section also provides that a copy of the testimony and evidence introduced along with presiding officer's findings be transmitted to the Secretary of State, and a Return Warrant may issue upon the requisition of the proper authorities of the sentencing country.

(c) S. 1682 requires that the complaint referred to in (b) be filed within 60 days from the date of the order releasing the offender (similar to (3) of H.R. 7148).

(d) S. 1682 provides that an offender returned pursuant to this section is subject to the jurisdiction of the country to which he is returned for all purposes.

(e) No change [formerly (5)].

(f) S. 1682 incorporates by reference sections 3186, 3138 through 3191 and 3195 of Title 18 U.S.C., certain extradition procedures. Subsection (4) of H.R. 7148 included in this subsection S. 1682 also provides for the offender's admittance to bail or release on his own recognizance during period which his return pursuant to this section is sought.

§ 4115—Execution of Sentences imposing an obligation to make restitution or reparation

S. 1682 adds this section in its entirety, in light of provisions of law in certain foreign countries providing for restitution (monetary) to victims of certain crimes by the individual convicted of the crime. This section provides that such liabilities in the case of an offender transferred under this act will be enforceable as though they were a civil judgement for damages against the transferred offender. The section further provides for institution of proceedings by the Attorney General for collection of the amount of said restitution.

S. 1682 adds this section in anticipation of reluctance of transferring country to allow transfer of a prisoner without any assurance that monetary reparation be satisfied.

Section 2 which amends (f) of section 636 of Title 28, U.S.C.

(f) S. 1682 deletes in line 3 of this subsection, "when a treaty requires or upon request of the Attorney General".

S. 1682 also adds to this subsection authorization to perform the appointment of counsel authorized in 4109 of Title 18.

Section 3 which amends chapter 153 of Title 28, U.S.C.

Sec. 2256—Jurisdiction of proceedings relating to transferred offenders

(1) S. 1682 deletes "regardless of their form", in line 3 of the subsection.

(2) No change.

(3) No change.

(4) No change.

(5) No change.

Sec. 4, amending chap. 48, Title 10 U.S.C.

Sec. 955—Prisoners Transferred to or from foreign countries

(a) No change.

(b) No change.

Sec. 5

(a) S. 1682 authorizes appropriations of funds "as may be required to carry out the purposes of the Act".

(b) No change.

(c) No change.

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Washington, D.C., June 15, 1977.

To: House Committee on the Judiciary Attention: Arthur Endres
From: American Law Division
Subject: Legislation Implementing Prisoner Transfer Treaties With Mexico and Canada

In response to your request for an analysis of the legislation to implement prisoner transfer treaties with Mexico and Canada we are enclosing copies of two reports prepared in this Division.

CHARLES DOYLE,
Legislative Attorney.

ANALYSIS OF S. 1682/H.R. 7148 A BILL TO IMPLEMENT TREATIES FOR THE TRANSFER OF OFFENDERS TO AND FROM FOREIGN COUNTIES

BACKGROUND

Two treaties calling for the transfer of prisoners to and from the United States are currently pending in the Senate. One, a Treaty Between the United States of

America and the United Mexican States on the Execution of Penal Sentences (Mexican treaty), was signed by representatives of the United States and Mexico on (November 25, 1976) and the other, a treaty Between the United States of America and Canada on the Execution of Penal Sentences (Canadian treaty), by American and Canadian officials on (March 2, 1977). While they differ in some respects, the treaties contain the same basic provisions. They provide for the transfer of custody of foreign prisoners convicted of crimes within the territory of one of the signatories. Transferred prisoners must consent to the transfer and serve the sentences imposed but subject to the parole laws of the country to which they are transferred. Each treaty would vest exclusive jurisdiction to challenge the sentences imposed in the courts which imposed them. Transfers would be limited to prisoners who were nationals of the countries to which they were to be transferred, who had more than six months remaining to be served on their sentences, who had been convicted of crime punishable under the laws of both nations involved but not including immigration offenses, who had no pending appeals at the time of transfer, and in the case of the Mexican treaty who were not domiciles of the country in which they were convicted and were not convicted of political or military offenses.

SUMMARY OF S. 1682/H.R. 7148

S. 1682/H.R. 7148 has five sections. The first contains a new chapter 306 of title 18 of the United States Code and is the heart of the bill. The second edition would amend 28 U.S.C. 638 to authorize United States Magistrates to conduct verification proceedings. Section three would amend title 28 by adding a new section 2256 concerning the jurisdiction of United States District Courts over cases arising in connection with the treaties. A new section 955 dealing with the transfer of military prisoners would be added by section four. The final action would address the fiscal concerns arising under the treaties.

Section 1

18 U.S.C. Secs. 4100 to 4104 created by this section would provide:

Sec. 4100 (Scope and limitation of chapter).—The new chapter 306 would apply to transfers conducted pursuant to a treaty. (Sentences of those transferred to the United States would be executed in full notwithstanding the fact that treaty in question were terminated subsequent to transfer). This last provision is similar to the instance where those convicted and sentenced under subsequently repealed or amended statutes are required to serve their originally imposed sentences notwithstanding the change, see *Bradley* v. *United States*, 410 U.S. 605 (1973).

A prisoner could be transferred (only to a nation of which he was was a citizen) Mexican treaty, Art. II(2); Canadian treaty, Art. II(b), and (only with his consent) Mexican treaty, Art. IV(2); Canadian treaty, Art. II(b), and only with his consent, Mexican treaty, Art. IV(2); Canadian treaty, Art. III, § 3, (or in the case of a juvenile with the consent of his parent or guardian. A transfer could only occur after the time for appeal had past and when there were no pending appeals, Mexican treaty, Art. II(6); Canadian treaty, Art. II(e). The United States would be notified and would honor any pardon, commutation, amnesty or other reduction of sentence by the nation from which a prisoner was transferred. Mexican treaty Arts. V(2), VI; Canadian treaty, Arts. IV Sec. 1, V (The American decision to agree or refuse a transfer would not ordinarily be reviewable). However, (this should not be thought to preclude challenges to such decisions on the grounds that they were contrary to law, *i.e.* the statutes, Constitution and treaties of the United States proposed 28 U.S.C. Sec. 2256 (3), (4) which would vest jurisdiction over challenges to transfers in designated United States District Courts and *Ogler* v. [illegible]les, 368 U.S. 488(1962); *United States* v. *Smith*, 523 F.2d 771(5th Cir. 1975); *United States* v. *Bell*, 506 F.2d 207 (D.C. Cir. 1974) note that the ordinarily unreviewable exercise of prosecutorial discretion may be challenged when based on constitutionally invalid grounds.

Sec. 4101 (Definitions).—This section would define ten terms used in 18 U.S.C. Secs. 4100 to 4114—(a) "imprisonment," (b) "juveniles," (c) "juvenile delinquency," (d) "offender," (e) "parole," (f) "probation," (g) "sentence," (h)

"state," (i) "transfer" and (j) "treaty". The section appears in the footnote[1] and the definitions will be discussed, to the extent pertinent, in the context of other sections.

Sec. 4102 (*Authority of the Attorney General*) : Responsibility for implementation of prisoner exchange treaties is to be under the authority in the Attorney General of the United States. (The Attorney General would be authorized to receive custody of transferred prisoners and transfer prisoners.) He would designate individuals to verify the consent of prisoners to be transferred to the United States, and to receive custody of those transferred to the United States. He would be further authorized to promulgate necessary regulations, issue and receive documents called for by the treaty, and make arrangements for the transfer of the mentally ill, state prisoners and juveniles under the treaties and for transportation required in connection with the treaties.

Sec. 4103 (Applicability of United States Laws).—"All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees, and juvenile offenders [would] be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise."

Sec. 4104 (Transfer of offenders on probation).—Both treaties define offenders covered by their provisions to include, "a person . . . sentenced either to imprisonment or to a term of probation, parole, conditional release or other form of supervision without confinement." Mexican treaty, Art. IX (3) ; Canadian treaty, Art. I(c). Under the bill "probation" [would mean] any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed." Proposed 18 U.S.C. § 4101(f). Pursuant to section 4104 the Attorney General would determine whether the appropriate District Court were willing to accept or relinquish supervision over a probationer to be transferred. Prisoners on probation transferred to the United States would be under the supervision of the court subject to revocation under the provisions of 18 U.S.C. § 3653 and Rule 32(f) of the Federal Rules of Criminal Procedure in which case the prisoner would be treated as if he had been incarcerated or on parole at the time of transfer.

Sec. 4105 (Transferred offender serving sentence of imprisonment).—Consistent with the treaty provisions, Mexican treaty, Arts. V(2), IV(7) ; Canadian treaty, Arts. IV, § 1, III, § 8, this section would treat prisoners transferred to the United States as if they had been sentenced under the laws of the United States

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[1] Sec. 4101. Definitions :
As used in this chapter the term :
(a) "Imprisonment" means a penalty imposed by a court under which the individual is confined to an institution :
(b) "Juveniles" means :
(1) A person who is under eighteen years of age ; or
(2) For the purpose of proceedings and disposition under this chapter because of an act of juvenile delinquency, a person who is under twenty-one years of age ;
(c) "Juvenile delinquency" means :
(1) A violation of the laws of the United States or a state thereof or of a foreign country committed by a juvenile which would have been a crime if committed by an adult ; or
(2) Noncriminal acts committed by a juvenile for which supervision or treatment by juvenile authorities of the United States, a State thereof, or of the foreign country concerned is authorized.
(d) "Offender" means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency or who is accused of an offense but has been determined to be mentally ill ;
(e) "Parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision ;
(f) "Probation" means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed ;
(g) "Sentence" means not only the penalty imposed but also the judgment of conviction in a criminal case or the adjudication of delinquency in a juvenile delinquency proceeding ;
(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States ;
(i) "Transfer" means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country and also the transfer of a mentally ill person accused of an offense in one country of which he is a citizen or national for the purpose of treatment ; and
(j) "Treaty" means a treaty under which an offender sentenced in the courts of one country may be transferred to the country to which he is a citizen or national for the purpose of serving the sentence.

for purposes of good time and credit for pre-sentence confinement. (It should be noted that neither this section nor any other provisions of the bill contains language to implement Article V(3) of the Mexican treaty and that in at least some copies of the Canadian treaty the comparable provision contains an apparent misprint, see Canadian treaty, Art. IV, § 3—"The [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 Sending State.") The absence of a implementing section seems of little consequence in case of the Mexican treaty since Article V(3) would be dispositive. However, its omission might be of some importance if subsequent, similar treaties with other nations lacked such a provision and/or if there is no misprint in Article IV, § 3 of the Canadian treaty.

Sec. 4106 (Transfer of offenders on parole; parole of offenders transferred.—The treaties envision both the transfer of offenders on parole and the parole of prisoners serving terms of imprisonment at the time of transfer, Mexican treaty, Arts. IX(3), V(2); Canadian treaty, Arts. I(c), IV, § 1. The parole provisions of federal law would be generally applicable to prisoners transferred to the United States, except that offenders under twenty-two years of age would be subject to parole at any time. Presumably this exception is an attempt to place youthful offenders transferred to the United States on something of a par with those sentenced under the Federal Youth Corrections Act, see Mexican treaty, Art. VIII(3); Canadian treaty, Art. IV, § 2.

Sec. 4107 (Verification of consent of offender to transfer from the United States.—This section provides that the consent of a prisoner to be transferred from the United States would be verified by a United States magistrate and the required notification of the consequences of consent is the same as afforded those transferred to the United States.

Sec. 4108 (Verification of consent of offender to transfer to the United States).—Verification under section 4108 would be by a citizen of the United States.

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; and

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

(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.

Sec. 4109 (Right to counsel; appointment of counsel).—Prisoners would be entitled to the assistance of counsel at verification hearings and to the appointment of counsel if they are unable to secure private counsel. Within the United States, counsel would be appointed consistent with 18 U.S.C. § 3006A; outside the United States, the Secretary of State would be directed to promulgate regulations for the appointment of counsel.

Sec. 4110 (Transfer of Juveniles).—A prisoner transferred to the United States after conviction for conduct that would have constituted juvenile delinquency within the United States would be subject to the federal juvenile delinquency provisions, 18 U.S.C. §§ 5031 to 5042, except where inconsistent with the applicable treaty or agreement, see Mexican treaty, Art. VIII(3); Canadian treaty, Art. IV, §2.

Sec. 4111 (Prosecution barred by foreign conviction).—Both treaties bar prosecution in the country to which a prisoner is transferred for the same offense as that upon which the transfer is based, Mexican treaty, Art. VII; Canadian treaty, Art. VI. Section 4111 would implement this provision.

Sec. 4112 (Loss of rights, disqualification).—The loss of civil rights and disqualifications by a prisoner transferred to the United States would be limited to those which would ordinarily follow as a result of a foreign conviction under applicable federal and state law, see Mexican treaty, Art. V(c); Canadian treaty, Art. IV, § 6.

Sec. 4113 (Status of alien offender transferred to a foreign country).—An alien transferred from the United States instead of through the application of

voluntary departure, 8 U.S.C. §§ 1252(b), 1254(e), deportation, 8 U.S.C. § 1226, provisions would be treated as if those provisions had been applied.

Sec. 411. (Return of transferred offenders).—

Upon a final decision by the Courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States, the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return.

The procedures for the extradition of fugitives shall apply to the return of the offender with the following limitations:

(1) The offense for which the offender was sentenced shall be deemed to be an extraditable offense included in the treaty of extradition; and

(2) A certified copy of the sentence shall constitute evidence sufficient to sustain the charge under the provisions of the proper treaty or convention; and

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

(4) An offender returned under such proceedings shall not be deemed for any purpose to have been extradited; and

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

Section 2

Section 2 of S. 1682/H.R. 7148 would amend 28 U.S.C. § 636 by adding a new subsection (f) authorizing United States magistrates to conduct verification proceedings both within and outside the United States.

Section 3

This section would establish 28 U.S.C. § 2256 providing that "the country in which the offender was convicted shall have exclusive jurisdiction and competence over any proceedings, regardless of their form, seeking to challenge, modify or set aside convictions or sentences handed down by a court of such country." Jurisdiction over proceedings challenging the sentence or convictions of prisoners to be transferred from the United States would remain in those courts which would have jurisdiction if no transfer had occurred). The United States District Court of the district of confinement would have jurisdiction over challenges as to the method of execution of sentence of those transferred to the United States. Jurisdiction over attacks on the transfer proceedings would rest in the district of verification of consent in the case of prisoners transferred from the United States and in the district of confinement or supervision in the case of prisoners transferred to the United States.

Section 4

10 U.S.C. sec. 955 added by section 4 would permit transfer of those convicted of military offenses (10 U.S.C. ch. 47) subject to 18 U.S.C. sections 4100 to 4114 and the applicable transfer treaty. The section would also permit the transfer of military prisoners to the custody of the Secretary of Defense pursuant to and in accordance with a status of forces agreement and 18 U.S.C. sections 4100 to 4114.

Section 5

Section 5 authorizes the appropriations necessary for carrying out the purposes of the Act, requires the Attorney General to certify the reimbursible expenses involved in transferring a prisoner from the United States and to certify the expenses incurred under 18 U.S.C. sec. 3006A to the Administrative Office of the United States Courts.

ANALYSIS

Generally

S. 1682/H.R. 7148 and the treaties that it is designed to implement raise four basic questions: (1) What constitutional grounds are likely to be available to prisoners transferred to the United States to challenge their confinement or supervision within this country? (2) Are the provisions of S. 1682/H.R. 7148 likely to operate so that any such rights must be considered waived? (3) If not, may prisoners who successfully challenge confinement or supervision within the United States be returned to the country from which they were transferred?

(4) Is the only permissible forum for the resolution of such questions the judicial system from which the prisoner was transferred?

Constitutional challenges

There are several likely grounds for challenging confinement or supervision within the United States pursuant to foreign conviction through the operation of a transfer treaty and S. 1682/H.R 1748: (1) (The Foreign official conduct which led to the arrest of the transferred prisoner might have been such as to constitute a violation of the Fourth or Fifth Amendments to the United States Constitution had the arrest been made by American authorities within the United States.) (2) The foreign pre-trial, trial and post-trial procedures might have been other than (those rights of the Bill of Rights made applicable to the States through the Due Process Clause of the Fourteenth Amendment would have required had those proceedings been conducted within the United States). (3) The (punishment imposed might have been so disproportionate to the crime as to constitute cruel and unusual punishment) in violation of the Eighth Amendment had it been imposed by an American tribunal., (4) S. 1682/H.R. 7148 may operate as a bill of attainder.

(The constitutional questions associated with arrest, pre-trial, trial and post-trial procedures are binding only on the federal government and the states); they are ordinarily of no significance in the context of foreign criminal proceedings even against Americans. There are at least three exceptions. First, the (Fourth Amendment restrictions may apply in the context of foreign criminal investigations which are subsequently at issue in American courts), if there were substantial participation of federal or state authorities in the conduct which would have been violative of the Fourth Amendment if conducted by those authorities alone, *United States v. Toscanino*, 500 F. 2d 267 (2d Cir. 1974); *Stonehill* v. *United States*, 405 F. 2d 738 (9th Cir. 1969). Second, when at issue in American proceedings, (the conduct of foreign officials may be "so antipathetic to a federal court's sense of decency as to require reexamination" as to require application of otherwise inapplicable constitutional restrictions), *Gallina v. Fraser*, 278 F. 2d 77, 78 (2d Cir. 1960); *United States ex rel. Bloomfield* v. *Gengler*, 507 F. 2d 925 (2d Cir. 1974); *United States* v. *Controni*, 527 F. 2d 708 (2d Cir. 1975). Finally, although there does not appear to be any case law directly on point, it would seem that since federal authorities may not deprive anyone of his liberty without due process of law, since the due process requirements of the Fifth Amendment are at least as stringent as those of the Fourteenth, therefore (federal authorities may not deprive anyone of his liberty except pursuant to proceedings in which those rights which the states must honor are observed). For a more detailed discussion of this question see the attached memorandum entitled "Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences: Legal Issues".

Of course, the applicability of constitutional restrictions to criminal investigations and criminal prosecutions conducted by foreign officials is of little consequence unless the prisoner could establish that he has been the victim of a violation of such restrictions. Allegations with respect to foreign misconduct associated with the investigation and arrest which led to the prisoner's conviction may be extremely difficult to prove because of the limited ability of American courts to secure testimony of foreign nationals outside the United States), see "Taking Evidence Outside of the United States" 55 *Boston University Law Review* 368 (1975). On the other hand, establishing that the legal system of a particular foreign country does not feature those attributes which the Due Process Clause requires of the states in a criminal prosecution, *e.g.*, right to jury trial, right to be present at a public, speedy trial, right to call, question and confront witness, etc., should not prove particularly difficult.

Article I, sec. 9, cl. 3 of the Constitution states, "No bill of attainder . . . shall be passed." The clause prohibits Congress from inflicting punishment on an ascertainable individual or group without the benefit of a judicial trial, *United States* v. *Lovett*, 328 U.S. 303 (1946) and "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). The ratification of transfer treaties and the passage of S. 1682/H.R. 7148 are both legislative actions. The operation of such treaties and S. 1682/H.R. 7148 (would call for federal infliction of punishment not possible without such treaties and legislation.) Finally, the judicial proceedings, whose absence is prohibited by the clause, (must be those characterized by

the minimum standards of due process required of American criminal proceedings.)

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 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 final constitutional ground for challenging federal custody of transferred prisoners seems likely to be the least available. (The Eighth Amendment demands that the federal government inflict no cruel or unusual punishments.) Under its provisions, "the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976); *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958); *Weems* v. *United States*, 217 U.S. 349, 367 (1910). Although none of these cases involved a challenge to a sentence of imprisonment based solely on its length and although there is earlier case law to the effect the length of sentence alone is not covered by the Eighth Amendment, recent cases suggest that a term of imprisonment which is greatly disproportionate to the circumstances of the offender and the offense is contrary to the requirements of the Amendment, *Roberts* v. *Collins*, 544 F. 2d 168 (4th Cir. 1976); *Downey* v. *Perini*, 518 F.2d 1288 (6th Cir. 1975).

Waiver

Proposed 18 U.S.C. sec. 4108 would provide:

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified by a United States Magistrate, or by a citizen of the United States specifically designated by the Attorney General. . . .

(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; and. . . .

This provision and the Mexican and Canadian treaties raise several questions with respect to whether constitutional challenges which might otherwise be available would be waived by operation of their provisions. First, (it is not readily apparent exactly what constitutes the waiver. Does the consent to be transferred alone constitute the waiver?) Does the consent plus the warning that the consent waives the right to challenge the sentence or conviction constitute the waiver? Are additional, unspecified waiver procedures envisioned? Can the constitutional challenges in question be waived? Can they be waived at transfer? What, if any, challenges can be made if the waiver is effective?

A prisoner's consent to be transferred from one institution to another would not ordinarily be thought to include a waiver of any challenges to custody except possibly those associated with the procedures of the transfer. However, where the transfer is accomplished pursuant to treaty and statute which purport to restrict the prisoner's post-transfer access to the courts and the prisoner is aware of these provisions at the time of transfer, (it could be argued that in consenting to the transfer the prisoner agrees to abide by the provisions of the applicable treaty and statute). Alternatively it could be argued that by consenting to be transferred to the custody of American officials the prisoner waives any right to challenge the lawfulness of that custody. (On the other hand, since custody is the continuing exercise of authority it might be suggested that continuing consent is required and that the waiver could be withdrawn at any time.) This view is supported by the more recent cases holding that a search based on consent must be stopped when the consent is withdrawn, *United States* v. *Bily*, 406 F. Supp. 726 (E.D.Pa. 1975); *People* v. *Martinez*, 259 Cal. App. 2d 943, 65 Cal. Rptr. 920 (1968) and by the indication in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that questioning must cease if the individual asserts his right

to remain silent during interrogation. This support is undermined by older case law to the contrary with respect to the ability to withdraw consent to search, *Smith* v. *Commonwealth*, 197 Ky. 192, 246 S.W. 449 (1923) and by those cases which hold that once a witness has waived his protection against self-incrimination by testifying on his own behalf he may not reassert his privilege to foreclose otherwise proper cross-examination, *Brown* v. *United States*, 356 U.S. 148 (1958); *United States* v. *Higgenbotham*, 539 F. 2d 17 (9th Cir. 1976). 6

If the consent to be transferred does not by itself constitute a waiver of any right to invoke the jurisdiction of American courts to challenge the foreign conviction and sentence, there may be some question of the validity of a waiver made after the prisoner has been informed that American courts have no such jurisdiction.

However, in the final analysis, it would seem that both the treaty provisions and statute would not restrict the jurisdiction of American courts to pass on the constitutional issues raised earlier. Both the treaty and the statute purport to bar proceedings "to challenge, modify or set aside his conviction or sentence", while the constitutional attacks are against federal custody. Such proceedings would not call upon an American court to declare the foreign conviction or sentence unconstitutional; they merely ask that the constitutional impediments to federal execution of such sentences be recognized.

Return of Transferred American Prisoners

Neither the Mexican nor the Canadian treaty contains any provision for the return of transferred American prisoners ordered released from federal custody subsequent to transfer. S. 1682/H.R. 7148 suggests that return is possible under some circumstances:

Sec. 4114. Return of transferred offenders:

Upon a final decision by the Courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States, the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return.

The procedures for the extradition of fugitives shall apply to the return of the offender with the following limitations: . . .

It (might be suggested that proposed section 4114 does not apply to cases where a transferred prisoner has been ordered released because federal authorities may not constitutionally exercise custody over him.) The section seems designed merely to cover those situations where valid challenges are raised in connection with the transfer procedures but (not those which question federal custody on grounds unrelated to the transfer procedures). This interpretation is supported by the distinction which the bill would make in proposed 28 U.S.C. sec. 2256 between jurisdiction over challenges to foreign convictions and over challenges to the transfer itself. However, to the extent that the challenges attack the authority of federal officials to take custody they might be considered challenges to the transfer.

(If it should be determined that proposed section 4114 would not apply to transferred prisoners who successfully challenge federal custody on constitutional grounds, existing extradition treaties may well produce the same result.) Extradition by operation of the applicable extradition treaty would require that the offense for which the transferred prisoner was convicted was included in the treaty. Both the current Mexican and Canadian extradition (treaties call for extradition of those convicted of the offenses designated by the treaties), 31 Stat. 1818, 1819 (1899); 26 Stat. 1508, 1510 (1889). However, Article III of the Mexican Extradition Treaty provides:

Extradition shall not take place in any of the following cases:

* * * * * * *

4. When 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, or in case he or she shall have been prosecuted therein on the same charge and acquitted thereof; provided that, with the exception of the offenses included in clause 13 Article 2, of this convention, each contracting party agrees not to assume jurisdiction in the punishment of crimes committed exclusively within the territory of the other. 31 Stat. at 1820 (1899).

With respect to offenses for which extradition would otherwise be permissible under the treaty, the application in the case of transferred prisoners would bar not only extradition subsequent to transfer but would bar the transfer itself. Since for purposes of transferred prisoners the transfer treaty is rather clearly intended to amend the clause with respect to the authority of one country to punish individuals for offenses committed exclusively within the territory of the other, it seems likely that the dependent clause should also be interpreted as modified in such cases. Even without such an interpretation part 4 of Article III might accurately be described as a prohibition against dual punishment for the same offense with the dependent understanding that the party with the greatest interest, i.e., the party within whose territory the offense occurred, would have jurisdiction. Under such a view neither the transfer pursuant to treaty nor subsequent extradition to complete service of sentence would be for the execution of a single punishment not the double punishment which the extradition treaty seeks to preclude.

Since these questions have obviously never been litigated it is important to acknowledge grounds for opposing conclusions. In addition to those already suggested, the fact that S. 1682/H.R. 7148 specifically provides for the return of prisoners who successfully challenge transfer procedures but not for those who obtain their release by other means might be considered an indication that the signatories and Congress intended to restrict those who might be returned to those covered by proposed section 4114.

Jurisdiction over challenges

Is exclusive jurisdiction over challenges to federal custody of transferred American prisoners based on events occurring prior to tansfer vested in the courts of the nation where the foreign conviction was obtained? Both the Mexican and Canadian treaties contain provisions vesting exclusive jurisdiction "over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences" in the courts of the nation which imposed the sentence. Mexican treaty, Art. VI; Canadian treaty, Art. V. Under S. 1682/H.R. 7148 proposed 28 U.S.C. § 2256 would provide. "When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders: (1) The country in which the offender was convicted shall have exclusive jurisdiction and competence over any proceedings, regardless of their form, seeking to challenge, modify or set aside convictions or sentences handed down by a court of such country; . . ."

As indicated throughout, the better view would seem to be that this restriction does not apply to challenges to federal custody. However, the absence of case law directly on point, requires the consideration of other possible views. It is possible to argue that challenges to federal custody should be classified as challenges to the validity of the transfer (see proposed 28 U.S.C. § 2256 (c)) and that constitutional restrictions on federal custody are restrictions on the authority to accept of custody without which the transfer is not possible. Such an interpretation would permit proposed section 4114 to operate as authority for returning any prisoners who successfully challenged federal custody whether their offenses were extraditable or not. Yet, if strict interpretation is abandoned it is difficult to see how a challenge to federal custody based on a contention that the conviction in question was secured through procedures other than those that would be required of American criminal proceedings by due process could be any more accurately classified as a challenge to the transfer rather than a challenge to the conviction and sentence.

Alternatively, it might be argued that the treaty signatories and Congress intended all challenges based on events occurring prior to transfer to be within the exclusive jurisdiction of the country which imposed the sentence and that S. 1682/H.R. 7148 and the treaties must be interpreted accordingly.

The difficulty with such an interpretation is that it may constitute an unconstitutional suspension of the privilege of the writ of habeas corpus, it may unconstitutionally restrict the jurisdiction of United States courts, and it may unconstitutionally deny access to the courts.

"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." U.S. Const. Art. I. § 9, cl. 2. There are a number of reasons to suggest that neither the treaties nor S. 1682/H.R. 7148 constitute a suspension of the privilege of the writ in violation of this clause: Neither the treaties nor S. 1682/H.R. 7148 expressly

state that the privilege is to be suspended. The clause is directed primarily at Executive suspension and therefore has no application in instances where suspension occurs by Congressional action. The Constitution contains no express requirement that Congress vest any court with jurisdiction to issue the writ, therefore Congress might never have vested such jurisdiction and having vested it may completely or partially withdraw it. The clause requires no more than that Congress vest some court with jurisdiction as extensive as that associated with issuance of the writ at common law. Since at common law the writ could not be used to obtain the release of anyone convicted by a court of general criminal jurisdiction, any suspension occasioned by the treaties and bill would be a curtailment of statutory rather than constitutionally required jurisdiction. Finally, it might be argued that the clause has no application to imprisonment resulting from conviction in under the laws of a foreign nation for conduct committed within that country. Although each of these arguments has some appeal, none is completely persuasive.

There can be no doubt that if the provisions of the treaties and S. 1682/H.R. 7148 (must be interpreted to foreclose jurisdiction of the federal courts to order the release of those held in violation of the Constitution through habeas corpus or any other form, there is no need to expressly identify that action as a suspension of the privilege. It is also clear that neither the Executive, Congress nor the Judiciary may suspend the privilege except where required to protect public safety in cases of rebellion or invasion), *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866). While the Supreme Court has held that jurisdiction to issue the great writ must be vested by Congress, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (and that Congress may withdraw at least some of the Supreme Court's appellate jurisdiction in habeas corpus cases), *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), it also suggests that Congress has from the beginning recognized that it was under a constitutional obligation to provide for issuance of the writ by some tribunal and that a withdrawal of habeas jurisdiction from all American courts is not constitutionally permissible, see *Ex parte Bollman*, supra at 94–95; *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (holding that Supreme Court review of habeas corpus cases by writ of certiorari had not been eliminated by repeal of the appellate jurisdiction involved in *McCardle*). The Supreme Court has also observed, "Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more." *United States* v. *Hayman*, 342 U.S. 205, 211 (1952). Since the jurisdiction to issue the writ after conviction in a court of general criminal jurisdiction is solely a matter of legislative expansion and since the transferred American prisoners have presumably all been convicted by courts of general criminal jurisdiction, it might be argued that curtailment of jurisdiction to issue the writ in the case of transferred American prisoners is beyond protection secured by Article I, section 9, clause 2. The difficulty with this position is multiple.

First, (the common law reach of the writ encompasses instances where the basic complaint involves lawful restraint by the King or executive branch and the thrust of constitutional challenge in the case of transferred prisoners is directed at such custody). Second, the writ was historically utilized by the common law courts (to cancel the authority of other courts to order the incarceration of individuals within the territorial jurisdiction of the common law courts). Third, the exception denying the writ after conviction was to a large extent (a judicial expedient to insure that appellate review that could be had in the same courts by other writs, *e.g.*, writs of error, was not expanded.) Finally, since at common law the writ was available to prevent imprisonment ("across the seas" and since imprisonment in execution of a foreign sentence was unkown, it is difficult to believe that the exception should be applied to transferred American prisoners), 9 Holdsworth, *History of English Law*, 1040 25; *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). Finally, *Neely* v. *Henkel*, 180 U.S. 109 (1901) might be thought to hold that the prohibition against suspension of the writ was inapplicable when federal custody was based on crimes committed within foreign countries against the laws of those nations. 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, 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 here 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 investment. 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.

Even if the treaties and S. 1682/H.R. 7148 when interpreted to require that constitutional challenges to federal custody to pursued in foreign courts do not constitute a suspension of the privilege of the writ of habeas corpus, they might well be considered to call for an unconstitutional withdrawal of federal court jurisdiction. While there is substantial authority to support the proposition that Congress has plenary authority over the original jurisdiction of the lower federal courts and the appellate jurisdiction of all the federal courts, *Turner* v. *Bank of North America*, 4 U.S.. (4 Dall.) § 8, 10 (1799); *Ex parte Bollman, supra* at 93; *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812), there is considerable scholarly commentary to the contrary, see Radish & 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 when 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*, 395 F. Supp. 1150, 1163 n. 31 (D.Del. 1975); *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254, 257 (2d Cir. 1948). Even if the restriction on raising challenges to federal custody did not constitute a suspension of the privilege of the writ of habeas corpus or an unconstitutional restriction of federal court jurisdiction, it would probably have to be regarded as an unconstitutional denial of access to the courts. "The constitutional guarantee of due process of law 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. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier* v. *Martinez*, 416 U.S. 396 419 (1974). To interpret the treaties and S. 1682/H.R. 7148 as requiring that transferred American prisoners raise constitutional challenges to federal custody before foreign tribunals would certainly seem to constitute a denial of meaningful access to the courts. Problems associated with distance, language, acquiring the assistance of counsel, participation in preparation and presentation of the challenge, and whether the foreign tribunal would or could find that federal custody was in violation of the United States Constitution and order appropriate relief, all seem to suggest that meaningful recourse to the courts is considerably encumbered.

Summary

There are several possible constitutional challenges to federal custody over transferred American prisoners. (They may be based on allegations of misconduct of American officials in connection with a foreign conviction, contentions that foreign criminal proceedings lacked the procedural attributes which due process requires before the federal government may constitutionally deprive anyone of his liberty, arguments that federal execution of a particular sentence would constitute cruel and unusual punishment because the penalty is disproportionate to the offense and charges that the treaty in question and the provisions of S. 1682/H.R. 7148 operate as a bill of attainer.) Since these are challenges to federal custody rather than efforts to challenge, modify or set aside the foreign sentences, they are probably not among the cases which the bill and treaties reserve to the courts imposing sentence. (Moreover, neither the challenges to federal custody nor the right to seek judicial redress are among the rights waived by transferred prisoners under the treaties or the bill). Transferred prisoners who successfully

challenged federal custody might nevertheless be returned by applicable extradition procedures.

CHARLES DOYLE,
Legislative Attorney.

Memorandum: October 14, 1977

Subject: Constitutionality of H.R. 7148—providing for the transfer of offenders to and from foreign countries.

PREFATORY NOTE

The discussion that follows was originally drafted in relation to H.R. 7148, and was intended to elaborate on the legal theory underlying the constitutionality of the bill's principal provisions and its basic concepts. At its meeting Tuesday of this week the subcommittee agreed to report the Senate version, S. 1682, to the full comr ittee.

In substance, nevertheless, the basic concepts and provisions of the Senate bill are to the same effect as the House version. It differs, however, in a notable respect. The Senate bill does not in its specific terms pronounce any consequence of the offender's consent to a transfer to amount to a "waiver" of any right. The House bill does, particularly in that provision of section 4108 of the bill (at page 14) in which it is said that "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."

Although this express language of waiver is absent from the Senate bill, there appears to be no doubt that the Senate provisions amount to the same thing. By providing for the offender's voluntary consent to the tranfer, with his full knowledge of the consequences thereof, including the fact that he agrees that the transfer will be subject to the specified conditions, including "(1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence," it seems clear enough that the courts will treat this as a "waiver" situation.[1]

With this qualification, the discussion following may be applied as well to the Senate bill.

DISCUSSION

The legislation is intended to implement treaties recently concluded with Mexico and Canada, as well as to provide a base for carrying out future treaties of that sort, by which mutual benefits are conferred upon nationals of the parties. It would confer upon an American offender, who is held abroad pursuant to the judgment and sentence of a foreign court, a choice between serving the sentence abroad or of serving it at home. Perhaps the most troublesome feature of the bill, as of the treaties, is the fact that, as a precondition for making this choice available to the offender, he must "consent" to the transfer with the full knowledge that, as a consequence, "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." (Sec. 4108, page 14.)

It is assumed that the United States acceded to this precondition for the offender's transfer in the interest of comity and on demand of the foreign state. But it is important to emphasize, I believe, that the treaties to be implemented by this legislation are engagements concluded with civilized nations, possessing sophisticated and not wholly unrelated legal systems, not savage tribes practicing witchcraft. I see nothing in the Constitution that would prohibit the President and the Congress from providing nationals of the United States with such a choice of undoubted benefit to them. with the precondition which this legislation would sanction.

Duty of protection and the act of 1868

The treaties and the implementing legislation must be measured against the backdrop of what our conception is of the Nation's duties to its citizens. In exchange for the citizen's duties of fealty (allegiance), the state extends its

[1] See "Penal Treaties With Mexico and Canada," Senate Hearings, p. 163.

"protection." [2] Apart from this common law relationship, there has been imposed upon the President by the Act of 1868 a specific statutory duty to secure the release of an American citizen from imprisonment abroad.[3] The statute lays down a three-step procedure. First, if it is made known to the President that the citizen has been "unjustly" detained, the President must demand of the foreign government the reasons for such imprisonment. Second, if the citizen's detention appears to be "wrongful" and in violation of the "rights of American citizenship," the President must make demand that he be released "forthwith." Third, if the release is "unreasonably delayed or refused," the President "shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release." Finally, he makes report to the Congress of the facts relating to his action.

It is evident that, under this Act, the President's intervention is initiated and justified on the basis that some "injustice" has been visited upon a citizen by the foreign government. His demand for the release of the citizen is contingent on the determination that the citizen has been imprisoned "wrongfully" and in violation of the "rights of American citizenship." This, of course, is largely a one-sided judgment. In any event, the extent to which the judgment may be regarded as valid among other nations, as against a state that has been "recognized" and, as such, is within the family of nations, is conditioned on concepts of "sovereignty," the "equality" of states, and the "law" of nations. But it is a curious fact that there is no general or universal agreement among nations, and hence no setled "rule" of international law, on the question of what constitutes a "denial of justice," although the term is used to describe certain acts or omissions of states—including acts of a state's judiciary—directed against foreigners which are deemed to be internationally "illegal" and justifying diplomatic interposition by the aggrieved state.[4]

It does not apear that either the treaties or the bill are necessarily inconsistent with the Act and to the extent that they are not, they neither amend nor repeal it. Nevertheless, if there were anything in the treaties or the proposed legislation which would indicate that the United States government was in this respect relinquishing its responsibilities to its citizens, there would be strong policy (if not constitutional) objections toward their adoption. But there is no reason to suppose that if the President perceived any injustice in the foreign conviction or sentence of the citizen, he would not, because of the treaty or legislation, endeavor to obtain relief for the citizen from the foreign action. And we may suppose that he would continue to do so if the citizen were an offender who had been returned to the United States pursuant to the treaty, although the citizen himself had foreclosed his ability, if any he had, to contest the foreign conviction and sentence in the courts of the United States. Indeed, we take the position that by his acceptance of the no-contest condition, the citizens as much as says that he will, as a reasoned choice, confide his interests to the diplomatic arm of the United States. At best this is where he was at the beginning.

Cases denying waiver distinguished

It is true that, in exchange for the beneficial choice which is granted to the American offender, to serve his sentence in his home country, there is exacted a relinquishment of such rights as he may possess to challenge his conviction and sentence in the courts of the United States. But these are rights which, if ever he possessed them, he could not exercise or were of no avail to him during his confinement by the foreign state. Yet it is argued that we cannot, as a matter of constitutional law, condition the citizen's choice on a waiver of his constitution rights, including the rights to "due process" and the "privilege" of habeas corpus. However correct this generality may be when applied to other facts, the cases cited in support of it are of a category in which the accused's choice was limited by action of the domestic government, in situations in which the domestic government itself created the alternatives. It was in such a context that the Court had found the "chill" against the exercise of the constitutional

[2] Cf. 22 U.S.C. 1731, which provides: "All naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."

[3] 22 U.S.C. 1732.

[4] See, *The Meaning of the Term Denial of Justice in International Law*, 30 Am. J. Int. L. 632 (1936). While this uncertainty seems to persist to the present time, the United States (and other governments) have asserted the existence of "minimum standards" with which States are obliged to comply in the treatment of their nationals. See Whiteman, *Digest of International Law*, Vol. 8, Ch. XXIV, p. 697 (1967).

right to be so great that the choice of the alternative was, under the circumstances, deemed to be coerced or not in fact a choice at all.[5]

It would be inconceivable that we should stultify ourselves by seeking to apply the results in such cases to the treaty action. Such cases are obviously not authority for the proposition that the citizen may not make a choice to "waive" a constitutional right in those instances in which the validity of the choice is preserved by reason of the fact that the domestic government does not participate in the creation of the coercive condition by which the area of choice has been narrowed. The treaty (and bill) choice is precisely within the latter category. The decisive factor in adjudging the validity of the waiver is the fact that the imprisonment of the citizen is an act of the foreign jurisdiction in the exercise of its sovereign power. Thus the coercive condition is not the creation of the United States. This government endeavors only to provide the citizen with the means of extricating himself from the foreign confinement. It does so by creating the only reasonable alternative to the foreign confinement that is left to this government or to him short of war, in what must be regarded as a generous effort to "protect" the citizen, even against his own folly in most instances, and at the expense of the American taxpayer.

It is thus not so much a question whether the consent be, in some esoteric or *a priori* sense, "voluntary," as it is a question whether the alternative offered by the treaty (and implemented by the bill) is reasonable under the circumstances and whether this government gives the citizen or national an opportunity to make a *knowing* choice of the alternatives that are open to him. Doubtless, these conditions have been met in the terms of the treaties and the proposed legislation. In the absence, then, of pressures brought to bear upon him, other than the imperatives that inhere in the situation, the "voluntariness" of the choice must be presumed.[6] Assuming the voluntariness of the choice, as well as the reasonableness of the United States action in the alternative which it has provided, we may also presume the constitutionality of holding the national to his choice, that is, of holding him to what is often said to be a "waiver" of his constitutional rights or, and perhaps more precisely, to this freely elected limitation against the assertion of any right or claim that may form the basis for challenging, modifying, or setting aside the foreign conviction or sentence by action in the courts of the United States.[7]

Waiver and doctrine of estoppel

Although the bill speaks in terms of a waiver (". . . 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"[8]), it may be inartistic to speak of the consent as a "waiver." The fact is, that at the time the offender executes his consent in the foreign jurisdiction he possesses no recognizable right or privilege to make the challenge which he consents not to make. If by definition we agree that an essential element of the concept of waiver is the relinquishment of a right or privilege,[9] then the consent given under the treaties and the bill implicates the law of "estoppel" rather than the law of "waiver." I am not aware of any concept of "anticipatory waiver."

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[5] See for example *United States* v. *Jackson*, 390 U.S. 570 (1968) (no waiver of jury trial, guilty pleas held encouraged by Federal Kidnaping Act), Cf. *Brady* v. *United States*, 397 U.S. 742 (1970). Also see cases threatening loss of employment for refusal to "waive" a constitutional right, such as *Garrity* v. *New York*, 385 U.S. 493 (1967) (no waiver of 14th Amendment privilege against self-incriminatio) ; *Gardner* v. *Broderick*, 392 U.S. 273 (1968) ; and *Sanitation Men* v. *Commissioner of Sa. itation*, 392 U.S. 280 (1968).

[6] See *Brady* v. *United States*, supra n. 4, a federal kidnaping prosecution. Following entry of a guilty plea by his co-defendant, who was now to testify against him, Brady (represented by counsel) decided to plead guilty, which he did in open court, so as not to risk the death penalty by going to trial. Brady's plea was held to be "voluntary." Said the Court, "The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden. . . ." (At 751–2.)

[7] There are a number of instances in which an accused has been held to his "waiver" of constitutional rights. See, e.g., *Adams ex. rel. McCann* v. *United States*, 317 U.S. 269 (1942) (waiver of jury trial and to assistance of counsel), cited with approval in *Faretta* v. *California*, 422 U.S. 806, 814 (1975) ; *Davis* v. *United States*, 411 U.S. 233 (1973) and *Francis* v. *Henderson*, 425 U.S. 536 (1976) (respectively federal and state convictions, in which the accused was held to a waiver of claims of unconstitutional composition of grand jury) ; *Wainwright* v. *Sykes*, — U.S. — (June 23, 1977) (waiver of *Miranda* rights).

[8] H.R. 7148, at 14–15, line 22 ff.

[9] "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Subsequent quotations of this classic statement frequently omit the qualifying expression, "is ordinarily." See, e.g., *Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

It appears settled that a person may be "estopped" from asserting a constitutional right, as well as waiving it,[10] and he may be "estopped" from challenging the constitutionality of a statute under which he has sought and received a benefit.[11] Admittedly, the terms waiver and estoppel are often used synonymously and interchangeably,[12] but there are distinctions of substance between them.[13] It is the essence of an estoppel that it results from a representation which one makes to another, by which the latter is induced to change his position to his prejudice. In that event, the former is himself "estopped" from taking a position other than that which is in accord with his representation.

There are of course instances in which a loose use of the terminology may be of no consequence to the result ultimately obtained. When the events (in connection with which the act of waiver or estoppel has been made) have fully evolved, the distinction may then become one of semantics rather than substance. Does it matter, for example, whether following his trial, the accused who has failed to object prior to trial is held under Rule 12 of the Federal Rules of Criminal Procedure to have "waived" his objection or, in the alternative, is held to be "estopped" from making it?

Applied to the present situation, it is the representation implicit in the offender's act of consent that leads to an acceptance of his return. The receiving state is thus placed in the position in which the enforcement of an estoppel (or waiver, if one will) against a challenge to the foreign conviction or sentence becomes of importance to the maintenance of comity. The sensitivity of states to acts which have the effect of impugning the sovereign power is well known. The continuance of a friendly communication with the foreign power may well depend on a strict compliance with the treaty condition against challenging the judicial acts of the foreign jurisdiction. On the avoidance of such affronts hinges the continued vitality of the treaty and the ability of the Executive to secure its benefits for other of our citizens who may wish to enjoy them.

On waiving the privilege of the writ of habeas corpus

It has been suggested that an enforcement of the jurisdictional or waiver provisions of the treaties and the bill which would preclude resort to courts of the United States for the purpose of challenging the validity of the foreign conviction or sentence would have the impermissible effect of "suspending" the privilege of the writ of habeas corpus. If indeed this were the effect of any provision of the treaties or bill, the provision that did so would obviously be void as in contravention of explicit prohibitions contained in Article I, section 9, clause 2 of the Constitution.

Of course there is no express language of "suspension" in the terms of the treaties or bill, as there was in Milligan's case,[14] involving an act of Congress which authorized the President, during the "rebellion", "to suspend the privilege of the writ *habeas corpus* in any case throughout the United States, or any part thereof."[15] Moreover, there is no language in the treaties or bill that expressly and directly purports to repeal or amend federal statutes conferring jurisdiction on federal courts to grant writs of habeas corpus,[16] as occurred in McCardle's case.[17]

Article VI of the treaty with Mexico provides that the "transferring state shall have exclusive jurisdiction over any proceedings, regardless of form, intended to challenge, modify or set aside sentences handed down by its courts." Article V

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[10] ". . . [I]t is generally held that a person may, by his acts or omission to act, waive a constitutional right or provision, being unable thereafter to claim protection under it, or may be estopped to question the unconstitutionality of an act infringing such a right, at least if no public right or interests, such as matters of public policy or morals, are involved." 16 C.J.S. sec. 89, at 264–5. Also *Michel* v. *State*, 350 U.S. 91 (1955)

[11] 16 C.J.S. sec. 89, at 268–70, and cases cited. See particularly, *Galveston Wharf Co.* v. *Galveston*, 260 U.S. 469 (1923); *Douglas* v. *Beneficial Finance Co.*, 334 F. Supp. 1166, 1177 (D. Alaska 1971).

[12] 31 C.J.S. sec. 61b., at 385. See *Arnold Berstein Shipping Co.* v. *Tidewater Co.*, 34 F. Supp. 948, 952 (D.C. Md. 1938).

[13] See 31 C.J.S. sec. 61b., at 387–90, stating in part, at 389, that "A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel also involves this element. Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially. Also estoppel may carry the implication of fraud; waiver does not."

[14] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[15] 12 Stat. 755 (1863).

[16] Present statutes are codified at 28 U.S.C. 2241 et seq.

[17] *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), see also *ibid.*, 73 U.S. (6 Wall.) 318 (1868). The statute involved in this case, 15 Stat. 44 (1868), repealed an act of 1789 conferring appellate jurisdiction in habeas corpus cases.

of the Canadian treaty speaks in more positive terms. It provides that "the Receiving State shall have no jurisdiction over any proceedings, regardless of form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State." Additional related provisions are contained in both treaties which indicate that the provisions are not self-executing. Article IV(9) of the Mexican treaty provides: "Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for the purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other Party." Article III of the Canadian similarly provides: "Each Party shall establish by legislation or regulation the procedures necessary and appropriate to give legal effect within its territory to sentences pronounced by courts of the other Party and each Party agrees to cooperate in the procedures established by the other Party."

These treaty provisions are implemented in two sections of the bill. Section 4108 (at pages 14–15 of the bill) would make clear to the offender that the consequences of his consent to the transftr is that "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." Section 2256 (at pages 19–20), which follows language of the Mexican treaty, provides that "the country in which the offender was convicted shall have exclusive jurisdiction and competence over any proceedings, regardless of their form, seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country."

Thus, as to any suit to challenge the conviction or sentence, the treaties and the bill recognize the exclusivity of jurisdiction of the country in which the offender was convicted. Provisions of this type shall hereinafter be referred to as the "jurisdictional provisions." On the other hand, the bill contains not only such provisions, but also gives statutory assent to the offender's "waiver" of all rights to institute proceedings in the courts of the United States to challenge the foreign conviction or sentence. The latter, hereinafter referred to as the "waiver provisions," are peculiar to the bill. They speak to the offender's "rights of action" in United States courts, while the jurisdictional provisions of the bill, as well as of the treaties, speak to "subject-matter" jurisdiction, as well as jurisdiction over "forms of action," which would presumably include applications or petitions for writs of habeas corpus, embraced within these words of art.

If they stood alone, the jurisdictional provisions would doubtlessly raise serious constitutional issues. That a withdrawal of jurisdiction from courts of the United States to entertain all forms of action or proceedings to challenge the conviction or sentence would include an application or petition for a writ of habeas corpus, seems to be the inescapable conclusion. In a recent instance, this was the significant observation that formed a basis for the Court's refusal to give a literal construction to the terms of the Selective Service Act of 1967 which had provided that "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President. . . ." [18] Writing into this provision an exception of its own, the Court remarked, "For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." [19] But the treaty provisions on this subject, not being self-executing, and thus not to be construed as affecting existing legislation, may be of no immediate concern. The bill's provisions, however, if deemed to be amendatory of domestic law, are necessarily of concern to us, although it must be recognized that if the bill's provisions on this subject were intended to amend present statutes regulating procedures on habeas corpus, they are not drafted in conventional terms for that purpose.

Nevertheless, the constitutionality of the jurisdictional provisions contained in the Mexican or Canadian treaty, or in the bill, are not to be weighed in isolation from the totality of the provisions of either instrument. [20] The treaties and the bill reflect a consensual arrangement, both on the part of individual offenders and the States concerned. The offender's rights to resort to, or to seek or to receive relief from the courts of the receiving state, are clearly to be regulated

[18] *Oestereich* v. *Selective Service Board*, 393 U.S. 233 (1968).
[19] *Id.*, at 238.
[20] *Id.* "Examples are legion where literalness in statutory language is out of harmony either with constitutional requirements . . . or with an Act taken as an organic whole."

by the concept of "waiver." It is entirely reasonable to assume that the jurisdictional provisions are to be construed as subordinate to and in aid of this concept, and intended merely to establish an expression by one state of its acceptance of the competence of the other to enter the judgment of conviction or sentence. That the provisions are political and declaratory of intent, rather than intended to have any self-executing legal effect in restraint of the jurisdiction of the domestic courts or receiving state, is reinforced by the style in which the provisions are drafted. In thus avoiding constitutional questions, we are only following well-recognized principles of construction.[21]

We are left, then, with the question of the efficacy of the waiver provisions to bar relief by writ of habeas corpus in the courts of the receiving state. The bill's provisions by which the offender "waives all rights" to institute proceedings need not be construed as a waiver of his general right of access to the courts, or of the right to file an application or petition for a writ of habeas corpus. It need be construed as a waiver only of those rights which entitle him to relief by the courts, or to the actual issuance of the writ of habeas corpus as distinguished from an application for it. That the courts are open to all who come is a reality that need not be denied. There is no limitation against the filing of a complaint. The question of the validity of the claim or of the entitlement to relief is a different matter and requires some form of judicial determination. That in appropriate cases the Congress may constitutionally sanction an offender's waiver of constitutional or other federal rights or claims of right, with the effect of barring relief by writ of habeas corpus, is a result supported by decisions of the Court. It appears that while the Congress may not suspend the privilege of the writ of habeas corpus by withdrawing jurisdiction from the courts, it may sanction a waiver of federal rights that would bar relief by the writ to which, except for the waiver, he would otherwise be entitled.

As recently as 1973, in *Davis* v. *United States*,[22] the Court held that a federal prisoner who had failed to make a timely challenge, as required by Rule 12 of the Federal Rules of Criminal Procedure, to the allegedly unconstitutional composition of the grand jury could not, after his conviction, attack the grand jury's composition in an action for collateral relief under 28 U.S.C. 2255 (habeas corpus). It was expressly provided by Rule 12, which received congressional sanction, that a failure to raise defenses or objections within the required time "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." In denying relief to Davis, the Court said: "We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to the Rule may not be resurrected, either in criminal proceedings or in federal habeas corpus, in the absence of the showing of "cause which that Rule requires."

Three years later, in *Francis* v. *Henderson*,[23] the Court applied the rule in *Davis* to the case of a state prisoner who failed to make a timely challenge to the composition of the grand jury that had indicted him. Louisiana law then in force and at issue required that the objection was to be raised pre-trial or otherwise was to "be considered as waived and shall not afterwards be urged or heard." In denying relief to Francis, the Court said:

"There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. 28 U.S.C. §§ 2241, 2254. The issue, as in the *Davis* case, goes rather to the appropriate exercise of power. This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo its habeas corpus power. See *Fay* v. *Noia*, 372 U.S. 391, 425–426. The question to be decided is whether the circumstances of this case are such as to invoke the application of those considerations and concerns." [24]

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[21] *Id.*; and see *Johnson* v. *Robison*, 415 U.S. 361, 366–7 (1974) (". . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] questions may be avoided.")

[22] 411 U.S. 233 (1973).

[23] 425 U.S. 536 (1976).

[24] Most recently, in *Wainwright* v. *Sykes*, decided June 23, 1977, the Court applied the rule in *Francis* to a waived objection to the admission of a confession, allegedly obtained in violation of the state prisoner's *Miranda* rights, at trial. At the same time the Court narrowed the "sweep" of *Fay* v. *Noia*, stating, "We leave open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard, and note here only that it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, *supra*, which would make federal habeas corpus review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay* v. *Noia*, *supra*, going far beyond the facts of the case eliciting it, which we today reject."

It is precisely such considerations of comity, as well as a concern for the protection of the country's nationals, that one may reasonably suppose would invite and assure the Court's ultimate sanction of the waiver procedures of the bill. It may be presumed that the Court would take no action to threaten a treaty relationship reflecting a reasoned policy determination in which the Executive and the Congress concur, even though in the judgment of others the judiciary of the foreign state is claimed to have acted, or is likely to act, "unfairly" or contrary to our perception of the offender's constitutional rights in judging or sentencing the offender.[25] While it cannot be doubted that the Constitution follows the citizen in his peregrinations abroad, it does so only to shield him against his own government's exercise of power.[26] Its safeguards cannot be asserted against the foreign sovereign.

There are constitutional "experts" who have suggested that United States courts may or will grant relief by writ of habeas corpus to offenders transferred here, on the basis of allegations and proof that there was American "involvement" in their foreign arrest, trial, or conviction. Presumably this involvement is thought to be adequate when consisting of participation by American agents abroad in some violation of privacy, fourth amendment, or due process rights, in the variety in which they come, as adjudged by United States courts. I do not share this view. It reflects, it seems, the more limited vision of experts who appear to be wholly or largely preoccupied with concepts of domestic law, rather than evidencing familiarity with concepts governing the Court's decisions in matters involving the law of nations. I think it would be wrong to establish any record in the Committee's proceedings on the bill that would indicate the Committee's acceptance of this view. To do so may at some point tend to prompt a court to endanger the treaty relationship.

That the law of nations is a part of the federal common law is a fact frequently reiterated in decisions of the Court.[27] And it is a fact that in the law of nations an overwhelming respect is paid to the concept of "sovereignty." It seems obvious to me that the Court has not retreated one step from such conventional concepts, commencing with its earlier expressions on the subject, as in *The Schooner Exchange* v. *McFaddon*,[28] to its latest in *First National City Bank* v. *Banco Nacional de Cuba*[29] and *Alfred Dunhill of London* v. *Republic of Cuba*[30].

Of course highly imaginative, exceptional, and most unlikely cases may be hypothesized in which the American involvement may be of such nature as to invite relief by habeas corpus, but such relief may be justified on principle only when the assumption of jurisdiction to grant such relief by the American courts does not run counter to age-old concepts of comity and sovereignty. This might be the case when, for example, the United States agents conspire with the agents of the foreign power to effect an offender's arrest and conviction abroad in violation not only of the law of the United States, but also of the law of the foreign jurisdiction under circumstances of which the foreign court would take notice and would act to void the conviction or sentence. In that event, the representatives of this and the foreign sovereignty are literally *particeps criminis*, and could not complain of the release of the offender by an intervening judiciary acting independently of the executive. Comity not being imperiled, a court of the United States might then, consistently with concepts announced in *Davis* v. *United States* and *Francis* v. *Henderson*, well assume jurisdiction and grant the writ. It is not likely, however, that the case would ever reach the courts. It is more likely that the foreign court would grant relief on application to it.

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[25] See *Holmes* v. *Laird*, 459 F. 2d 1211 (D.C. Cir. 1972), citing *Neely* v. *Henkel*, 180 U.S. 109 (1901), and stating, at 1219, "What we learn from *Neely* is that a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials." The sensitivity of states to acts which have the effect of impugning the sovereign power is well known. See *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972) (act of state doctrine). Also *United States* v. *Belmont*, 301 U.S. 324 (1937), emphasizing what is said to be "the exclusive competence of the executive branch in the field of foreign affairs."

[26] *Reid* v. *Covert*, 354 U.S. 1, 33 (1957).

[27] Mr. Justice White put it this way: "The doctrine that the law of nations is a part of the law of the land, originally formulated in England and brought to America as part of our legal heritage, is reflected in the debates during the convention and in the Constitution itself." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 451 (1954), and cases there cited.

[28] 7 Cranch 116 (1812).

[29] 406 U.S. 759 (1972).

[30] 425 U.S. 682 (1976).

Enforcement of a foreign penal sentence

Finally, it does not seem that much attention need be paid to such generalities as that the United States "cannot" enforce the penal sentence of a foreign state. This suggestion rests on early dicta in the case of *The Antepole*,[31] in which Chief Justice Marshall had said, "The courts of no country execute the penal laws of another country." The dicta, of course, rests plainly on the doctrine of sovereignty and was obviously intended only to reiterate a universally accepted proposition of international law to the effect that a state is under no compulsion to undertake the enforcement of the penal laws of a foreign state, at least in the absence of an agreement to do so. Cited in argument in *Dallemagne* v. *Moisan*,[32] the dicta was wholly ignored by the Court which in that case upheld the arrest and confinement in the United States of a foreign seaman at the request of the French consul under a treaty with France. Thus, equally consistent with the doctrine of sovereignty is the proposition that a state may execute or enforce the penal sentence of a foreign power if it chooses to do so as a matter of agreement.[33] But the question remains whether the United States, in particular, may do so consistently with its own constitutional system.

Of course there is no express constitutional prohibition to which one may point that would generally deny this power to the government of the United States. Assuming the validity of the treaty as an exercise by the President of a power expressly commited to him, by and with the advice and consent of the Senate, to make treaties,[34] it must be acknowledged that the proposed legislation, H.R. 7148, which is appropriately designed to implement and give effect to the treaty with Mexico and Canada, is presumably within the congressional power, if not as an act of "sovereignty," [35] then by virtue of the authority of the "necessary and proper" clause.[36] But it may be urged that we assume too much. The treaty power is not without limitation. In response we say that we perceive no restraint against the treaty power in question and view it as being, in principle, wholly consistent with concepts of domestic law as elaborated by the Court, and clearly within the classic and most restrictive statement of the Executive and Congressional power as enunciated by Mr. Justice Field in *Geofroy* v. *Riggs*,[37] who said:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

That the matters adjusted by the treaties with Mexico and Canada are properly the subject of negotiation with a foreign country, and that the issues may be properly resolved as by the terms of these treaties they are sought to be, is strengthened by the practice of nations. Within recent years, and increasingly, the practice of transferring prisoners has gained the adherence and approval of states as been previously indicated, the law of nations is a "part" of the federal law.[39] While the practice is not yet universal, certainly in the face of this developing practice we need not isolate ourselves by any premature and restrictive, as well as unnecessary, construction of the Constitution in its application to either the treaties with Mexico and Canada or the implementing legislation.

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[31] 23 U.S. (10 Wheat.) 66, 123 (1825).
[32] 197 U.S. 169, 172 (1905).
[33] We have not only engaged in the practice of temporarily arresting and, through our courts, detaining persons subject to the jurisdiction of foreign consular officers, a practice upheld in *Dallemagne* v. *Moisan*, supra, but we have in our status of forces agreements confided our own citizens to the vagaries of foreign courts, a practice upheld in *Wilson* v. *Girard*, 354 U.S. 524 (1957). By the act of 1944 we have also undertaken the confinement of persons sentenced to imprisonment by a service court of a friendly foreign force. 22 U.S.C. 705.
[34] Article 2, section 2, clause 2.
[35] See *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–18 (1936).
[36] Article I, section 8, clause 18.
[37] 133 U.S. 258, 267 (1890).
[38] See Letter of Transmittal, Message from The President of the United States (Treaty With Mexico on the Execution of Penal Sentences), Senate, 95th Congress, 1st Session, Executive D, 1977.
[39] Supra n. 26.

DEPARTMENT OF STATE—INCOMING TELEGRAM

JULY, 1977.

To: Secretary of State, Washington, D.C.
From: American Embassy, Mexico
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 fiingerprints.

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 AMTNAD * 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% involve 20 kilos or more(76.4% involved one kilo or more, and only 0.9% lesst than 25 grams (approximately one ounce). Cocaine accounted for 48 of the 168 drug cases. Of the cocaine cases, 47.9% involved one kilo or more, 64.6% involved 500 grams or more, and 83.4% involved 100 grams or more.

DEPARTMENT OF STATE—INCOMING TELEGRAM

From: American Embassy Mexico JULY 1977.

To: Secretary of State, Washington, D.C.

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.

SPECIAL CONSULAR SERVICES

HANDBOOK

Protection of American Nationals Arrested, on Trial, or Imprisoned

Department of State

July 1976

CONTENTS

PREFACE

One of the basic functions of a consul has traditionally been to provide a "cultural bridge" between the host community and the consul's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual arrested in a foreign place or imprisoned in a foreign jail.

Neither arrest nor conviction deprives a United States national of the right to the consul's best efforts in facilitating the citizen's welfare and defense or in protecting the citizen's legal and human rights. Like attorneys and social workers, consular officers are obliged to serve their clients with dedicated professional enthusiasm regardless of their own opinions of the client's innocence or personal merit.

The guidelines in this handbook should not be taken as defining the limits of the consular officer's responsibility, but rather as furnishing a frame of reference for each officer's own creative approach to arrestee and prisoner services.

CONTINUED

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CHAPTER 1

ARRESTS

NOTIFICATION

In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that he or she obtain prompt notification whenever an American citizen is arrested.

Vienna Consular Convention

Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of his or her right to communicate with the American consul. The officer should be familiar with the Vienna Convention and the provisions thereof as they relate to arrest cases. Excerpts of appropriate sections may be found in the Appendix, along with a current list of signatories.

Bilateral Consular Treaties

Many of our current bilateral consular treaties also require that the arresting authorities directly and promptly notify the consular officer of the sending state of the arrest of a national of that state. The consular officer must be familiar with the details of bilateral consular treaties which may exist between the host government and the United States.

Relations with Local Authorities

Practical considerations make it imperative that the consular officer be notified immediately whenever an American citizen is arrested. In order to provide effective protection and assistance to arrested Americans, consular officers are expected to maintain relationships with local authorities and other sources which will secure their cooperation in providing immediate notification, no matter what the language of applicable treaties legally requires. Without such prompt notification of arrest, it is impossible to achieve the essential, timely access to a detained U.S. citizen.

ACCESS

Experience has demonstrated that prompt personal access to the detained citizen assures the arrestee and the host authorities of the serious interest of the Government in the case. Further, it enables the consular officer to provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan. Moreover, it provides an opportunity for the consular officer to explain the legal procedure of the host government and the detainee's rights thereunder at a time when such information is most useful. Prompt personal access to the detainee by the consular officer is necessary to forestall physical abuse of the prisoner by the arresting and/or investigating authorities or to ascertain whether such abuse has occurred.

Upon receiving notification that an American citizen is being detained, it is absolutely essential that the consular officer achieve timely access to the detainee through one of the following methods:

Personal Visit

The consular officer should personally visit each arrestee as soon as possible It is recognized, however, that problems of distance may render an immediate personal visit impossible.

Telephone Contact

If an immediate personal visit by the consular officer is not possible, efforts should be made to contact and interview the detainee by telephone. Such conversation does not obviate the consular officer's responsibility to follow up with a personal visit at the earliest possible oppor unity, normally within a few days.

Visit by Volunteers

If an immediate personal visit by the consular officer is not possible, the post may wish to consider enlisting the cooperation of American citizens resident in the area of the place of arrest to personally visit the detained American. Again, this does not obviate the consular officer's responsibility to follow up with a personal visit as soon as possible, normally within a few days.

INITIAL VISIT

In the course of the initial visit to a United States citizen arrested abroad, the consular officer must endeavor to give the arrestee a realistic and positive understanding of the Government's interest in and responsibility for a citizen in this situation. While it is only fair to curb the prisoner's expectations of extraordinary intervention or other miraculous remedies for this plight, the consular officer must emphasize the actions that can be taken on the arrestee's behalf. Consular protection is the inherent right of every citizen. This right is in no way abridged either by evidence of guilt, by the nature of the alleged crime, or by the personal merit of the individual. Thus the consular officer must avoid any display of disdain, self-righteousness, or moral disapproval.

The officer should accomplish several objectives during or as a result of the initial visit.

Verification of Citizenship and Identity

Before rendering any substantial service to an arrestee, the consular officer must ascertain that the individual is entitled to the protection of the United States Government by virtue of one of the following:

A. A U.S. citizen.

B. A national not a citizen of the United States, which includes natives of American Samoa and native inhabitants of the Trust Territory of the Pacific Islands. (See 8 FAM 200 for further clarification).

C. A "Third Country" national for whom the United States has formally accepted responsibilities as Protecting Power. In these cases, representation should initially be limited to providing emergency services and the Department should be consulted for long-term services which the post may be expected to provide.

D. Dual nationals are fully entitled to consular protection EXCEPT for those traveling or residing in a third country on documentation of the second (non-U.S.) country of nationality.

In the majority of cases, possession of a passport satisfactorily establishes both the identity and the citizenship of the individual. In countries where citizens customarily travel without passports, however, or where the individual claims a passport has been lost or stolen, the consular officer will have to rely upon secondary documentary evidence, judgment, or just the results of conversation with the prisoner.

Determining Potentially Fraudulent or Dubious Claims

Consular officers should be alert to possible passport fraud, and where the prisoner is in possession of a passport or card of identity but there remains doubt as to identity and/or citizenship, the consular officer should report the circumstances in full to the Department. A brief summary should be included in the Remarks section of the report, in addition to the verification of passport and identity procedures required under 8 FAM Section 243. In these or any case of dubious or unresolved citizenship, the consular officer may furnish provisional consular services pending resolution of the question. Such provisional services could certainly include what is normally provided and might also include informal representation to preclude or terminate mistreatment, but would not ordinarily extend to formal representation to the host government.

List of Attorneys

The post's list of attorneys, maintained as required under 7 FAM 873, may be abridged in accordance with each post's experience concerning the types of arrest cases involving American citizens. Many of the lists prepared by posts are commendably extensive and comprehensive. In arrest cases, however, it is of little use to a prisoner to have a long list of attorneys and law firms handling only civil cases. Posts with extensive lists should extract those attorneys and firms handling criminal cases and print an abbreviated list for arrestee use. Lawyers found to be dishonest, incompetent, or inattentive to their American clients' interests should be excluded from the list whenever such a determination is made by the consular officer. Care should be exercised so that the final choice of legal counsel is made by the arrestee. This is important not only for the prisoner's benefit, but also to avoid claims that the consul is soliciting for a particular lawyer.

Providing Instructional Material on Judicial Procedures

Legal systems vary greatly, particularly outside Common Law areas. An American citizen arrested abroad often has an imperfect understanding of American criminal procedure and may have absolutely no understanding of the legal procedures of the country in which he finds himself detained. Thus it is essential that each mission (or where variations in local conditions warrant, each constituent

post) prepare informational material for distribution to each arrested American regarding the judicial process the arrestee is likely to face. Posts should prepare an information packet covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules. The purpose of this material is not to usurp the function of legal counsel or encourage a "do it yourself" approach. Rather it serves the purpose of helping arrestees understand what is happening to them and to provide a yardstick against which they can measure attorney performance. Such informational material should be updated regularly, and copies forwarded to the Department for SCS' files.

CONDITION OF PRISONER AND ENVIRONMENT

Abuse of Prisoners

In the first contact with a prisoner, whether in prison or by phone, the consular officer should, if possible, determine from the prisoner if there has been any physical abuse or rights violated. Whenever a prisoner alleges physical abuse, it is imperative that the prisoner be seen by the consular officer at the earliest possible opportunity.

A. Examination by Consular Officer

The consular officer should verify during the initial visit whether there are any marks or signs of such abuse as bruises, etc., bearing in mind, however, that many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence. Torture by electric shock and various forms of "water treatment" are but two of the more common forms of torture which normally do not leave marks. Where such methods are alleged to have been used, the personal interview of the prisoner is equally imperative. In all cases of allegation of abuse, it is essential that the consular officer exercise judgment on the basis of all evidence at hand, including assessment of the prisoner's credibility, in determining the probable veracity of the allegation.

B. Examination by Independent Physician

In cases of abuse, the consular officer should arrange, if possible, to have the prisoner examined by an independent medical doctor to determine the extent and probable cause of any injury. Funds for this purpose, however, are not available through regularly appropriated funds.

C. Written Statements from Prisoners

Consular officers should not, as a general rule, require the prisoner to make a formal declaration under oath or present a written statement regarding abuse, though the consular officer should be willing to accept either course of action should the prisoner so request. Though such statements are contraindicated, since they can create an unnecessary barrier between the consular officer and the prisoner, detailed notes should be kept in the event the veracity of the original report is questioned.

D. Protests to Host Government

Although the prerogative of deciding whether or not to protest the abuse of a citizen belongs to the sovereign state of the citizen's nationality, and not to the citizen himself, practical and humanitarian

considerations usually require that a protest to the host government be made only if the citizen desires it. Posts should not usually make protests contrary to the subject's wishes because of the possibility of host government retaliation. In all cases, however, where the citizen wishes a protest made, and the consular officer is reasonably convinced that the abuse did in fact occur, a protest to the appropriate authorities should be made. The fact that a formal protest is to be made to the host government at the national level should not preclude the consular officer's prompt and vigorous protest at a local or working level.

Conditions of Detention

Prison conditions vary widely, particularly from country to country, but also often within an individual country. At the time of the initial visit to an arrested American, the consular officer should observe the physical conditions under which the prisoner is being held. If it is determined that the conditions do not meet generally accepted international standards, the consular officer should attempt to obtain an improvement through direct intervention with the responsible authorities on a local level. If this does not achieve results formal protests at the local or national level should be made. For a further discussion of prison conditions, see "Prolonged Imprisonment" below.

Personal Property Rip-offs

The consular officer visiting an arrestee for the first time should ask whether any of the arrestee's personal property has been lost or stolen in the arrest and detention process. If the prisoner claims that items have been lost or stolen, the consular officer should inquire after the missing property and attempt to have it returned to the prisoner, held in properly receipted custody by the appropriate authorities, or, if confiscated in accordance with law, fully documented.

REPORT OF ARREST

It is imperative that posts submit prompt and comprehensive reports telegraphically on the arrest and detention of any American citizen which involves any one of the following: (1) detention over 24 hours, (2) physical abuse or denial of human rights, or (3) circumstances which in the judgment of the post possesses special public relations consideration. Prompt reports to the Department are absolutely necessary inasmuch as families and friends of the arrestee, and members of Congress, usually call upon the Department for advice and assistance as soon as they receive word of a particular arrest. It is clearly preferable for the family to learn of an arrest from the consular office rather than from the news media.

Report Format

The following format for reporting arrests should be followed to the fullest extent possible. In view of the Privacy Act and other considerations, separate reports must be submitted on each person arrested. The items set forth serve (1) to facilitate the entry of the arrest data into the Department's computer system; (2) to enable the Department to more accurately and comprehensively respond to questions posed by families and friends of the arrestee, and (3) to aid the Department as it monitors the case in the future. The consular officer should carry copies of the format when access is first obtained to assist not only in developing the information required for the initial and/or subsequent report, but also as a guideline in conducting the initial interview.

SAMPLE CABLE FORMAT

E. O. 11652:

TAGS: CASC:

SUBJECT: W/W -- ARRESTS: _____ (Name) _____

Following American Arrested:

1. Name: (LAST, First, Middle)

   Maiden Name:

   Aliases:

2. Date and Place (State) of birth:

3. Passport Number:

   Date/Place Issued:

4. Last known U.S. Address: (Include ZIP code.)

5. Date and Place of Arrest:

6. Charges: (If narcotics, specify type and amount involved. If exact charge unknown, state the general reason for the arrest.)

7. Place of Detention: (Include name of city.)

8. Brief Status of Case:

9. Trial Date and/or Hearing Date:

10. Possible sentence: (Maximum/Minimum)

11. Attorney: (Include name, mailing address, and telephone number.)

12. Next-of-kin: (Name, mailing address, and relationship.)

13. Notification: (Indicate if arrestee authorizes notification of next-of-kin or other designee. If yes, indicate if Department is requested to make notification or if notification was accomplished by post. If by post, state method (phone, letter, etc.) and date. In cases of minors, or arrestees not capable of making sound mental judgments, post should seek opinion and assistance of Department.)

14. Has consular access been obtained? If yes, clearly state date and method (phone, personal visit, letter, etc.). If no, state reason and give date when access anticipated:

15. Names of other Americans arrested in same case: (Give names for cross reference purposes only. Separate arrest reports must be submitted on each individual cited.)

16. Any evidence or claim of mistreatment or denial of human rights: (Give YES or NO answer in each case. If YES, indicate evidence to support claim and what remedial action post is taking.)

17. Remarks: (Provide whatever additional information and comments post thinks warranted and useful concerning the circumstances of the arrest and welfare of the arrestee, etc. Post can also include in this section names of persons to which the arrestee authorizes release of information under the provisions of the Privacy Act.)

Follow-up Reporting

Posts should keep the Department abreast of any new developments in a case and should report telegraphically any change in any item of the initial arrest report. When the post learns that an individual has been sentenced or released, the information should be immediately sent to the Department. Reports of fines should be given in both local currency and U.S. dollars. Reports of release should include date of release and conditions (provisional, unconditional, completion of sentence, etc.).

In submitting follow-up reports, posts can use an abbreviated format of the initial arrest report by referring to item number and report change.

NOTES

CHAPTER 2

PRE-TRIAL CONFINEMENT

REGULAR VISITATION

It is essential that a citizen in pre-trial confinement be visited regularly by the consular officer. Each post should formalize a regular visitation schedule to each prisoner in accordance with conditions prevailing in the consular district.

Monthly Visits

It is expected that in most cases visits will be on a monthly basis unless otherwise justified. Posts should be alert, however, to the necessity for more frequent visitation where conditions of incarceration require it. In any case where a post believes that visits less frequent than once a month are justified by local conditions, the consular officer must obtain Department concurrence.

Report

All posts should submit a brief report to the Department on each visit. Visiting consular officers should make adequate notes of prisoner interviews for inclusion in the post's file on each individual case.

Purpose

The purposes of regular visitation are primarily:

A. To check on the treatment which the prisoner is receiving and to monitor the state of health and well-being.

B. To follow the progress of the case in the judicial process and, where necessary and requested, act as liaison between the prisoner and his lawyer, the court, and the prosecutor.

C. To enable the consular officer to determine what minor services may be provided to the citizen to enable him to maintain reasonable morale. This may include, but is not necessarily limited to, such minor everyday items as buying postage stamps, soap, etc., which can become major problems for the citizen who is incarcerated.

D. By being familiar with the current status of the citizen's case and well-being, the consular officer is in a position to provide, on a timely basis, responsive replies to inquiries received from the Department, the prisoner's family and friends, and Members of the Congress.

FUNDS

Where local conditions make it necessary, the consular officer should be prepared to receive money on behalf of the prisoner under SCS/TRUST procedure as set forth in 7 FAM 370. See Appendix for sample cable.

Amounts

The amounts transmitted will ordinarily be small, i.e. amounts suitable for prisoners supplemental living expenses. From time to time, however, it may be necessary for the prisoner to receive relatively larger amounts for legal fees, etc.

Illegal Use

Under no circumstances should the consular officer allow himself to be drawn into any scheme involving bribery or other illegal use of funds.

THE CASE WORKER CONCEPT

If possible, the same consular officer should visit the same prisoner regularly. There are several advantages to such a "case worker" approach. The consular officer thus becomes thoroughly familiar with the specific facts and special problems of the prisoner's situation. This should enable the officer to become responsive in the maximum degree to the prisoner's need not only for small services, but, more importantly, in liaison with attorneys, court officials, and prosecutors. Furthermore, the officer will be able to respond promptly and competently to requests for information from the Department, etc. Few things are more discouraging to a prisoner than to detail an urgent need to the visiting consular officer only to have a different consular officer on the next visit disclaim all knowledge of the matter. The "case worker" principle will also assist each post to estimate the number of man-hours necessary to conduct its regular prisoner visiting schedule.

NOTES

CHAPTER 3

TRIAL

ATTENDANCE

Each post should determine, on the basis of local judicial procedures and other influencing factors, whether it is necessary or desirable for a consular officer to attend the trial of a citizen prisoner. The main purpose of such attendance is to insure that the U.S. citizen is not discriminated against, either in procedure or sentence, on the basis of U.S. nationality. Whenever a post believes that such discrimination might occur, it is essential that a consular officer attend the trial.

Attendance by Local Employee

While it may be helpful in some cases to have a FSL employee attend the trial along with the consular officer to translate or explain local procedure, the local employee's attendance cannot substitute for the consular officer.

Discrimination Protests

Whenever it is determined that an American citizen has been discriminated against, it should be brought to the immediate attention of the highest levels of the Mission and reported promptly to the Department indicating what action is proposed or has been taken to protest the discrimination.

Requests by Defendant or Family

Even though the post determines that discrimination is unlikely, every reasonable effort should be made to comply with requests by defendants and their families for trial attendance by a consular officer.

REPORTING

The post should promptly report the sentence received by a convicted U.S. national to the Department. If incarceration after sentencing will be in a different institution, the change should be reported to the Department. If, in this or any other circumstance, a prisoner is moved to a different consular district, the post's file should be transferred and the Department notified.

APPEALS

Whenever a convicted U.S. national has an appeal pending before the courts, the consular officer should continue to be available to perform the liaison services with the prisoner's lawyer, judicial authorities, etc.

FUNDS

Where local conditions make it necessary, the consular officer should be prepared to receive money on behalf of the prisoner under SCS/TRUST procedure as set forth in 7 FAM 370. See Appendix for sample cable.

Amounts

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APPEALS

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NOTES

CHAPTER 4

PROLONGED IMPRISONMENT

VISITATION

The principles of regular visitation and the "case worker" organization of workload described in Chapter 2 become more important as the prisoner serves the imposed sentence. Posts should maintain a monthly schedule of visits as set forth in Chapter 2.

REPORTING

The post should also maintain the same record of visits as described earlier, and continue to report such visits to the Department.

CONCEPTS OF REHABILITATION

It must be borne in mind that most U.S. citizen prisoners will return, in time, to a free society, most often to the United States. Their adjustment to society, hence their subsequent social or anti-social behavior, will depend in large measure on the concepts they carry with them from their relationships with society and authority during their period of imprisonment.

Many foreign penal systems are well equipped to return U.S. nationals to their own society as rehabilitated individuals. Others, while having the capacity to rehabilitate members of their own society, are inadequate, due to different cultural mores and needs, to rehabilitate the U.S. national. Still others, unfortunately, are not essentially geared to rehabilitation at all. Such conditions may be countrywide or they may vary radically from one penal institution to another within a country. Moreover, rehabilitation may not be the issue at all in some cases. Persons who do not suffer from any form of social maladjustment are often subject to imprisonment, either as a result of error on the part of authorities or because of the commission of such offenses as destructive automobile accidents, etc. The same may well be true of Americans convicted abroad of "political offenses," real or imagined, which would not be considered criminal in the United States.

CONSULAR OFFICER RESPONSIBILITIES

The consular officer obviously cannot carry the primary responsibility for a prisoner's rehabilitation or a healthy social attitude. Nonetheless, a consular officer, as a symbolic and functional representative of an organized society, and particularly of the U.S. Government, can have some significant impact on the prisoner's attitudes toward these entities. The consular officer's friendly, compassionate attitude and willingness to perform services on behalf of the prisoner's morale, comfort, and health can contribute greatly to the prisoner's continued or regained social adaptation.

HEALTH

There are a number of things the consular officer can do to help a prisoner maintain adequate health during the period of incarceration.

Nutrition

Many penal systems do not, for various reasons, provide an adequate nutritional diet to maintain a prisoner in a reasonable state of health. In these circumstances, the consular officer should pay careful attention to the state of the prisoner's health. It may be possible to persuade the responsible local authorities to improve prisoner diet.

A. Outside Sources. Dietary supplements can often be arranged through the solicitation of contributions of vitamins and minerals from locally represented American pharmaceutical companies, donations of food by the local American community, or other contributions.

B. Financial Resources. The handling of trust funds consisting of money sent by prisoner's families may be a vital factor in maintaining adequate nutrition. The consular officer may also be able to arrange for employment within the prison which would enable the U.S. national to purchase supplemental food items.

Medical and Dental Care

The provision of adequate medical and dental care is a recognized and essential responsibility of the imprisoning authority. However, national standards of medical and dental care vary greatly from country to country. A level of medical care which is high by local standards may be woefully inadequate by the standards of our society. Furthermore, the prison system may not enjoy a standard of medical and dental facilities commensurate with the normal standards available within the host country.

A. Outside Resources. While the consular officer must make every effort to persuade the imprisoning authorities to fulfill their medical responsibilities, it must be recognized that in many cases other resources must be utilized. Needless to say, the first outside resource to be tapped, if available, will be the prisoner's family and friends, who may be able to provide funds for employment of private practitioners if such are allowed by the local authorities. The local American community, if any, may also be a source of help.

B. Unavailability of Funds. Since there are no U.S. Government funds obligated, posts may have to be extremely resourceful and imaginative in solving this serious problem. Unfortunately, in some cases, it cannot be solved. Such failure should not, however, be the result of inattention to the problem on the part of any post.

MORALE

Since many of the U.S. nationals imprisoned abroad are first-time offenders, and others may be serving their first time in prison, the consular officer will often find that prisoners suffer severe emotional reactions to incarceration. Even those with previous U.S. prison experience may well exhibit severe morale problems as a result of the alien cultural environment in which they find themselves. While it is obviously well beyond the ability of the consular officer to eliminate or even moderate the basic causes of this reaction, there are a number of actions which may be taken to reduce their adverse effect on the prisoner.

Reading Materials

The availability of English language reading material (especially of American origin) such as books, magazines, newspapers, etc., can often go a long way to easing the problems of confinement in an alien society. The local American community, if any, may be persuaded to supply prisoners such reading material, as well as athletic equipment, games, etc.

Holiday Meals

The local American community may also be willing to provide typical American holiday meals on appropriate occasions if local prison authorities permit.

Special Family Visits

The consular officer may often arrange for special permission for visits to prisoners by family members who have either arrived on other than normal visiting days or whose ability to visit the place of confinement is limited.

Providing Personal Amenities

As with prisoners in pre-trial confinement, everyday items such as postage stamps, toiletries, stationery, etc., where permitted by prison authorities, may be purchased out of prisoners' funds by the consular officer.

Prisoner Employment

In many penal systems, remunerative work is available to some or all prisoners. Such work may also count for reduction of sentence. Consular officers should take an active interest in prisoners' attempts to obtain such work; in prisons where the opportunities exist but are limited, the consular officer's expression of interest may make the difference in having such work made available.

Correspondence Courses

Correspondence courses can do much to alleviate the boredom and depression common to a prison experience. Consular officers should be ready to assist prisoners in arranging for correspondence courses, proctoring examinations, and other such facilitating services.

Personal Conversation

While considering the various specific and individual services that a consular officer can perform, the post must not overlook the psychological lift a prisoner can derive just from the consular officer's visit. The expression of interest of another human being and the opportunity for conversation from someone from "outside the walls" can be an important morale-building event in a prisoner's otherwise dull existence.

CONTACTS WITH FAMILY AND OTHER INTERESTED PARTIES

The consular officer should answer promptly and as responsively as possible all inquiries received from a prisoner's next-of-kin, Members of Congress, the Department, etc. At the request of the prisoner, the consular officer may write directly to NOK to advise them of a prisoner's need or to assure them of the prisoner's well-being.

PRISONERS WHO DO NOT WISH TO BE VISITED

Prisoners who do not wish to see a consular officer should generally have their wishes respected. However, before noting in the records of the case that a prisoner has expressed such a desire, the consular officer should get that information directly from the prisoner, if possible. After ascertaining to the officer's satisfaction that a prisoner really does not wish to be visited, the consular officer should report that fact to the Department. If subsequent events indicate that the prisoner has changed this decision, or that overriding considerations may make an interview necessary, the consular officer should not hesitate to ask to see the prisoner. When visiting a prison in which one or more American prisoners have requested that they not be visited, the consular officer should, nevertheless, inquire about those prisoners' well-being, and annotate the files and report to the Department accordingly.

NOTES

CHAPTER 5

THE DEATH OF A PRISONER

Whenever a U.S. national prisoner dies, the post should notify NOK, etc., by telegram and follow the normal procedures as set forth in 7 FAM 440. (Also see Airgram A–1597 dated 3/19/76.) Additionally, the death of any American while in custody abroad must be promptly reported to the Department by separate cable giving as many of the pertinent details as are available. Unless it is clear that the medically determined cause of death obviates the possibility that death resulted from mistreatment or negligence on the part of the local authorities, the post should comment in its report to the Department whether or not this factor appears to exist. If there is reasonable suspicion that death may have resulted from mistreatment or negligence, the post should immediately request the host government to undertake a full investigation of the cause of death, including proper post mortem if such is not routine. It must be noted, however, that there are no USG funds to pay for such post mortem examination. Posts facing this problem should not hesitate to seek the Department's advice and guidance.

NOTES

CHAPTER 6

RELEASE

It is essential that the release of a U.S. national who has been imprisoned be promptly reported to the Department by telegram. This requirement applies even though an earlier interim report may have provided the exact date of scheduled release.

NOTES

EXTRACT

VIENNA CONSULAR CONVENTION

April 24, 1963

ARTICLE 36

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

CONSULAR TREATIES PARTICIPANTS

Country	Vienna Convention Ratifications or Accessions Deposited	Bilateral Consular Convention in Force	Treaties Containing Consular Provisions
Afghanistan			Yes
Algeria	Yes		
Argentina	Yes		Yes
Australia	Yes		Yes
Austria	Yes		Yes
Bahamas		Yes	
Bahrain			
Bangladesh			
Barbados		Yes	
Belgium	Yes	Yes	Yes
Benin			
Bolivia	Yes		Yes
Botswana			
Brazil	Yes		
Bulgaria		Yes	
Burma			Yes
Burundi			
Cameroon	Yes		
Canada	Yes		Yes
Central African Republic			
Chad			
Chile	Yes		
China, Republic of			Yes
Colombia	Yes	Yes	Yes
Costa Rica	Yes	Yes	Yes
Cyprus	Yes	Yes	
Czechoslovakia	Yes		
Denmark	Yes		Yes
Dominican Republic	Yes		
Ecuador	Yes		
Egypt	Yes		
El Salvador	Yes		
Equatorial Guinea			
Ethiopia			Yes
Finland			Yes
Fiji	Yes	Yes	
France	Yes	Yes	

CONSULAR TREATIES PARTICIPANTS (Continued)

Country	Vienna Convention Ratifications or Accessions Deposited	Bilateral Consular Convention in Force	Treaties Containing Consular Provisions
Gabon	Yes		
Gambia		Yes	
German Democratic Republic			
Germany, Federal Republic of	Yes		Yes
Ghana	Yes	Yes	
Greece	Yes	Yes	
Grenada		Yes	
Guatemala	Yes		
Guinea			
Guyana	Yes	Yes	
Haiti			Yes
Honduras	Yes		Yes
Hungary		Yes	
Iceland			
India			Yes
Indonesia			
Iran	Yes		Yes
Iraq	Yes		
Ireland	Yes	Yes	
Israel			Yes
Italy	Yes	Yes	
Ivory Coast			
Jamaica	Yes	Yes	
Japan		Yes	
Jordan	Yes		
Kenya	Yes		
Korea		Yes	
Kuwait	Yes	Yes	
Laos	Yes		
Lebanon	Yes		
Lesotho	Yes		
Liberia		Yes	
Libya			
Liechtenstein	Yes		
Luxembourg	Yes		Yes
Madagascar	Yes		
Malawi			

CONSULAR TREATIES PARTICIPANTS (Continued)

Country	Vienna Convention Ratifications or Accessions Deposited	Bilateral Consular Convention in Force	Treaties Containing Consular Provisions
Malaysia		Yes	
Maldives			
Mali	Yes		
Malta		Yes	
Mauritania			
Mauritius	Yes	Yes	
Mexico	Yes	Yes	
Morocco			
Mozambique			
Nauru			
Nepal	Yes		Yes
Netherlands			Yes
New Zealand	Yes		Yes
Nicaragua	Yes		Yes
Niger	Yes		
Nigeria	Yes	Yes	
Norway			Yes
Oman	Yes		Yes
Pakistan	Yes		Yes
Panama	Yes		
Papua New Guinea	Yes		
Paraguay	Yes		Yes
Peru			Yes
Philippines	Yes	Yes	Yes
Poland		Yes	
Portugal	Yes		
Qatar			
Romania	Yes	Yes	
Rwanda	Yes		
Saudi Arabia		Yes	
Senegal	Yes		
Sierra Leone		Yes	
Singapore		Yes	
Somalia	Yes		
South Africa			Yes

CONSULAR TREATIES PARTICIPANTS (Continued)

Country	Vienna Convention Ratifications or Accessions Deposited	Bilateral Consular Convention in Force	Treaties Containing Consular Provisions
Spain	Yes		Yes
Sri Lanka			Yes
Sudan			
Swaziland		Yes	
Sweden	Yes	Yes	
Switzerland	Yes		Yes
Syria	Yes		
Tanzania		Yes	
Thailand			Yes
Togo			Yes
Tonga	Yes	Yes	
Trinidad/Tobago	Yes	Yes	
Tunisia	Yes		
Turkey	Yes		
U.S.S.R.		Yes	
United Arab Emirates			
United Kingdom	Yes	Yes	
Upper Volta	Yes		
Uruguay	Yes		
Venezuela	Yes		
Western Samoa			
Yemen -- Sana			Yes
Yugoslavia	Yes	Yes	
Zaire			
Zambia		Yes	

SAMPLE CABLE

RE

RECEIPT OF FUNDS

FM SECSTATE WASHDC

TO AMCONSUL

UNCLAS STATE 123456

EO 11652: N/A

TAGS: CASC(Smith, JOHN W.)

SUBJECT: W/W FUNDS ARREST JOHN W. SMITH

1. SCS/TRUST DOLS 500 (FIVE HUNDRED) FOR JOHN W. SMITH SYMBOL 19X6875 ACCOUNT NO. S-321.

2. DEPOSITOR: R.J. SMITH 1405 BENSON WAY, NEW HOPE, PENNA.

3. RECEIVED BY DEPARTMENT VIA WESTERN UNION MONEY ORDER.

4. FOR POST INFORMATION: IF SUFFICIENT CASH NOT ON HAND FOR PAYMENT CASHIER SHOULD USE EMERGENCY REPLENISHMENT PROCEDURE TO OBTAIN FUNDS IMMEDIATELY THROUGH USDO.

5. NOTIFY DEPARTMENT BF/FS/AD/RR WHEN FINAL PAYMENT MADE.

6. FOLLOWING MESSAGE WITH MONEY ORDER QUOTE**********.

END